IN THE HIGH COURT OF AUSTRALIA

CHIPP

v.

CAMPBELL BEAUMONT TRADING PTY. LIMITED AND OTHERS

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on MONDAY, 22nd DECEMBER 1969

CHIPP

v.

CAMPBELL BEAUMONT TRADING PTY. LTD. & ORS.

ORDER

1) Declare that the defendants and each of them have and has been guilty of an offence under s. 234 (a) with respect to the duty properly payable in respect of each entry ex warehouse for home consumption of the goods comprised in the entries ex warehouse for home consumption mentioned in paragraphs 8 to 32 of the Statement of Claim.

2) Declare that the defendants and each of them have and has been guilty of an offence under s. 234 (d) with respect to the entries referred to in the declaration already made.

3) The defendants, and each of them, to pay to the plaintiff by way of penalty under ss. 234 (d) and 240 of the Customs Act, 1901-1968 in respect of all the entries of goods ex warehouse for home consumption as set forth in paragraphs 8 to 32 of the Statement of Claim the total sum of One million dollars ($1,000,000).

4) The defendants and each of them to pay to the plaintiff by way of penalty under ss. 234 (a) and 240 of the said Act for the offence in respect of all the said entries of goods for home consumption the total sum of Two hundred dollars ($200).

5) Exhibits to be handed out in accordance with usual order.

6) By consent, no order for costs.

CHIPP

v.

CAMPBELL BEAUMONT TRADING PTY. LTD. & ORS.

JUDGMENT BARWICK C.J.

CHIPP

v.

CAMPBELL BEAUMONT TRADING PTY. LTD. & ORS.

The plaintiff who is the Minister of State for Customs and Excise for the Commonwealth of Australia sues Campbell Beaumont Trading Pty. Ltd., a company incorporated in New South Wales under the Company legislation of that State, carrying on in Sydney at all material times the business of an importer; William Patrick Bond, who during those times was that company's managing director; Godfrey Phillips International Pty. Ltd., a company incorporated in the State of Victoria under the Company legislation of that State, at all material times carrying on in Melbourne the business of manufacturing and dealing in tobacco; and Cedric Malcolm Paynter and Derek Landon Smith during those times the managing and the financial director respectively of the last mentioned company for penalties under the Customs Act, 1901-1968 of the Commonwealth (the Act).

The plaintiff's statement of claim which at the hearing of this matter was amended by consent and pursuant to my order in that behalf made on 28th November last, alleged that in respect of 1,360 entries of cigars ex warehouse for home consumption, and 60 entries of cigarettes ex warehouse for home consumption, the defendants had made, or had each been party to the making of, an entry which was false in the particulars furnished therein of the weight of the cigars or cigarettes as the case may be the subject of the entry; that the defendants had thereby evaded, or been party to the

evasion in each instance of, a substantial amount of duty payable in respect of such entry for consumption. The plaintiff alleged that in respect of each such entry and evasion, the defendants had an intent to defraud the revenue. The plaintiff also alleged that the defendants had committed in relation to those cigars and cigarettes the offence of smuggling under s. 233 (1)(a). The plaintiff claims in respect of each entry or evasion and in respect of such smuggling the penalties for which s. 234 and 240 of the Act provide. The suit is thus a customs prosecution within Part XIV of the Act: consequently the provisions of s. 255 are available to the plaintiff and by an appropriate paragraph of the statement of claim he has averred the facts which he relates in the statement.

The defendants by their statements of defence admit the matters of fact relating to each of the 1,420 entries for home consumption but deny that they or any of them had an intent to defraud the revenue or that they or any of them smuggled any of the goods. The plaintiff joined issue upon these statements of defence except in so far as they contained admissions of fact.

Upon the proceedings being called on before me for hearing, I was informed by counsel for the Crown that the defendants proposed with his concurrence to tender statements setting out the facts relating to the entries referred to in the statement of claim, which statements would include transcripts of interviews between Customs officers investigating the making of such entries and the personal defendants. I was asked by both parties to accept these statements as recording the evidence which the defendants on the one hand and the investigating officers on the other hand could give on oath. Counsel for the plaintiff said that the plaintiff, whilst having no actual

knowledge of all the matters stated in these statements of fact, could agree that the statements were substantially correct except as to the existence in Sydney of a list of conventional weights and as to the communications said to have passed between the defendants. He informed me that full enquiry had not found in the possession of the Customs in Sydney or in that of any of the officers there any such list of weights as is mentioned in the statements of fact and that upon departmental enquiries no Customs officer connected with the passing of any of the above entries had been found guilty of any offence other than negligence in the performance of duty as such an officer. Counsel for the plaintiff also informed me that the plaintiff had no further material on which to base the allegation in his statement of claim of an intent to defraud than what appeared in the statements of fact and the transcript of the interrogation of the defendants annexed to those statements of fact. He tendered two series of documents, one relating to the allegations in paragraph 10 of the statement of claim and the other relating to the allegations in paragraph 11 of the statement of claim. Each series of documents include the commercial invoice of the manufacturers, the entry for warehousing, the genuine invoice and the entry ex warehouse for home consumption.

It would appear from these statements of fact that the first defendant for some years during which some person other than the third defendant was the agent in Australia for the sale and distribution of cigars manufactured by Ritmeester Sigarenfabrieken N.V. of Holland had arranged for shipments of such cigars on arrival in Australia to be warehoused and for their entry ex warehouse for home consumption upon the directions of the then agent for their sale and distribution in Australia. According to

the statement of the first and second defendants, during this time a practice existed in Sydney for the Customs to accept an entry of cigars and cigarettes ex warehouse for home consumption according to a conventional weight of the cigars without actually weighing them, or a sample of them at the time of passing that entry. When in 1948 the third defendant succeeded to the agency for the sale and distribution in Australia of Ritmeester cigars, the first defendant by the second defendant informed the third defendant through the fourth defendant and fifth defendants that because cigars were not weighed in Sydney by Customs officers when entered for home consumption whilst they were weighed in Melbourne on such entry, it was advisable and would be profitable to import and enter Ritmeester cigars through Sydney rather than through Melbourne. The third, fourth and fifth defendants agree that they were so informed, that they realised that there could be a considerable saving in import duty, which on cigars and cigarettes is levied according to weight, that the saving meant a significant reduction in their costs; that with this knowledge they authorised the first defendant to clear goods through Sydney and that there was an arrangement by which the first defendant was paid a commission which reflected some part of the import duty thus saved.

From the documents tendered in evidence which the parties agreed were symptomatic of all the entries referred to in the statement of claim, the course of events and the practice adopted in connection with the importation of cigars is quite apparent.

The cigars were invoiced by the manufacturers in Holland to the third defendant by what is referred to in the documents as a commercial invoice. An invoice

for the purposes of Customs, called a Genuine Invoice (see s. 4 and 40B of the Act), was also furnished with the goods. Each of these invoices specified a weight per thousand of the cigars referred to in the invoice, such weight being expressed in kilogrammes. There is no challenge in this case to the propriety of those invoices or to any of the particulars set out in them. The specified weight was the same in each. On arrival of the ship in Sydney the first defendant usually, though not always, through the second defendant entered the goods for warehousing in the Argyle Bond. In this entry for warehousing the weight of the cigars as particularised in the genuine invoice was disclosed, the necessary conversion from kilogrammes to pounds being accurately calculated. Indeed, the genuine invoice setting out the manufacturer's weight was produced. The shipments remained in warehouse for various, and on occasions lengthy, periods of time. I was given to understand by counsel during the hearing of this case that the weight of cigars and cigarettes could be expected to vary due to climatic influences and that their weight at the point of entry ex warehouse for home consumption would not necessarily be the same as the weight particularised in the genuine invoice. In Melbourne, according to what I was told, check weighing is done when the cigars are so entered and the actual, or at least the approximate actual, weight of the cigars at that time is ascertained.

However, when the third defendant directed the first defendant to enter a quantity of cigars for home consumption and to arrange for their delivery to the customer of the third defendant who was purchasing them, the first defendant frequently, though not always, through the second defendant prepared and submitted an entry of the

required quantity of cigars ex warehouse for home consumption. This entry contained a reference to the entry for warehousing, identifying the subject matter of the later entry with that of the former. But, the weight of the cigars entered for home consumption was in every instance less than that particularised in the entry for warehousing. The first and second defendants say that the weight set out in the entries for home consumption accorded with a schedule of weights in their possession which they derived from the Customs in Sydney many years ago. They do not know how the schedule originated but they say that the weights it sets out were always accepted by Customs officers in Sydney over many years, including the years during which they entered for home consumption cigars and cigarettes imported by the third defendant. As I have said the plaintiff's counsel says that the plaintiff knows nothing of such a list and that extensive search and enquiry by officers in Sydney has not revealed any such list.

However, in the case of every entry for home consumption the appropriate Customs officer endorsed the entries submitted by the first defendant with the legend "Particulars Correct" and passed the entry. Different officers followed this course over the years with which this case is concerned. Each officer had in his possession or readily available to him at the time of passing the entry ex warehouse for home consumption the appropriate entry for warehousing to which the entry for home consumption expressly made reference. Thus the discrepancy, which was in every instance considerable in the weight of the cigars as between the two entries was patent to him because he had need to verify the identity of the goods whether in whole

or in part in each entry. I ought at this point to mention that the entries for home consumption were passed in the name of the first defendant as owner, though in truth it was not. This is said by the second defendant to have resulted from an arrangement with the Customs as a matter of convenience. However, no significance is presently said to attach to this irregularity.

Upon the goods being thus entered for home consumption, the first defendant would pass to the third defendant an account for the amount of duty paid and for the amount of commission payable for the first defendant's services. The third defendant had no other knowledge of the details of the clearance of the goods for home consumption.

It is quite apparent from this brief recital that nobody now knows the actual weight of the cigars or cigarettes at the point of entry ex warehouse for home consumption. The exporters' weight according to its invoice is known and duty for the difference between that weight and the weight set out in the entries for home consumption has been calculated. In respect of all the entries to which the amended statement of claim relates, the total amount of duty short levied on this basis is $343,326. The whole of this sum along with a further sum of $230,235. representing duty short paid on entries made outside the period covered by this action has been paid to the Collector of Customs for New South Wales by the third defendant "under protest". I was informed by counsel for that defendant that the protest was to cover particularly that part of the amount claimed to have been short levied, the recovery of which was statute barred according to the provisions of the Act. But, though the actual weight of the cigars and

cigarettes to which the offending entries relate is not known, the admission by the defendants in their statements of defence of the weights averred by the plaintiff as the true weight of such cigars and cigarettes at the time of entry for home consumption renders the third defendant liable for duty on the basis averred by the plaintiff. In any case it is agreed by the parties that for present purposes I am entitled to assume and will assume that the whole of the duty upon the importation of all the cigars and cigarettes to which the statement of claim refers is secured to the plaintiff.

The acceptance over a period of years of the weights shown in the entries ex warehouse for home consumption, in the face of the particulars in the entry for warehousing, indicates either that the Customs officers certifying the correctness of the particulars in the entries for home consumption were knowingly participating in a fraud on the revenue or that they had the view that, because of the likelihood of a variation due to climatic influences of the goods the subject of the entries, acceptance of a conventional weight would in general give a fair result taken over a period of time. Or there may possibly be other explanations of this irregular course of conduct on the part of the different Customs officers who certified and passed the entries. However, I would not be warranted upon the material before me in finding the Customs officers guilty of fraud in the acceptance of the entries ex warehouse for home consumption. They were clearly negligent in accepting conventional weights, if that is what they did; at least they ought to have spot-checked such weights with some frequency and the defendants cannot escape culpability for taking advantage of this dereliction of duty on the part of the various Customs officers. But I do not take the view

that this conduct necessarily involved an intent to defraud the revenue. No information was withheld from the Customs and no act proved to have been done to persuade the Customs officers to accept the weights in the entries for home consumption.

In this situation I am disposed to accept the statement of the first and second defendant that there was a list of conventional rates of which both those defendants and the Customs in Sydney were aware and by reference to which the entries for home consumption were made, certified and passed. But it is unnecessary to come to any final conclusion on that matter. I find that the third, fourth and fifth defendants were aware of the practice in Sydney in relation to the passing of entries for home consumption of cigars and cigarettes; that they preferred to clear cigars and cigarettes imported on their account through Sydney rather than through Melbourne as a means of involving the third defendant in the payment of less duty than it might otherwise be required to pay. But I am unable on the material before me to conclude that in employing the first defendant with the knowledge of the practice that defendant followed in entering the cigars and cigarettes for home consumption to arrange for the warehousing and subsequent entry for home consumption of cigars and cigarettes it or the third and fourth defendant had an intent to defraud the revenue. No other act by those defendants in this respect is established.

The case then is one in which on the admissions in the pleadings there has been a systematic underpayment of duty achieved by means of the making of entries ex warehouse for home consumption which contained false particulars as to the weight of the goods the subject of the entry. But no intent to defraud the revenue is positively established. Therefore

I am not concerned in this case as was my brother Kitto in Anderson v. Vogel and Son Pty. Ltd. 41 A.L.J.R. 264 with a case of smuggling. Smuggling is defined by s. 4 of the Act as "any importation, introduction or exportation or attempted importation, introduction or exportation of goods with intent to defraud the revenue." I have been unable to make a finding as to intent which would satisfy this definition. Further, the question whether the passing of an entry for home consumption of goods already in the country under bond in a warehouse would satisfy other parts of the definition of smuggling would need close consideration.

The plaintiff seeks "convictions" of the defendants both under s. 234 (a) - evasion of duty - and s. 234 (d) - making a false entry. But the evasion was, as I have said, achieved by the false entries. Thus, though there may be a conviction under both subsections, it is not proper, in my opinion, to treat the matter as involving two separate and unrelated offences for which substantial separate penalties should be imposed, though of course in assessing a penalty for making the false entry if that be taken as the principal offence the fact that thereby duty was evaded must be a most important factor.

The value of the goods to which the 1,420 entries related was $1,872,000. The amount of duty evaded $343,326.

I find all the defendants guilty of making entries which were false in the particulars of the weight of the goods to which the entries related and of evading payment of duty which was payable thereon. The third, fourth and fifth defendants are guilty of the offence under s. 234 (d) by reason of the provision of s. 236 of the Act and the first and second defendants are guilty of the offence under s. 234 (a) by reason of s. 236. The maximum

penalty for the offence under s. 234 (a) is by virtue of s. 240 three times the value of the goods the subject of the entries, i.e. $5,616,000.

Though an intent to defraud has not been made out by the plaintiff, there has been a systematic course of conduct on the part of the defendants by which payment of the large sum of duty to which I have referred has been evaded and advantage taken to the profit of the first and third defendants of the negligence of Customs officers in the passing of entries for home consumption of goods warehoused under bond. I should mention at this point that since these offences were committed there has been a substantial change in the ownership of the shares in the third defendant and in its management. Since that time the third defendant has not only co-operated with the plaintiff and his officers but has paid, though for the moment under protest, the whole amount of the duty claimed by the plaintiff in respect of the great number of entries for home consumption listed in or referred to in the statement of claim.

Counsel for each party addressed me on the question of penalty. All were agreed that there was no need to discriminate as between the defendants as to degrees of culpability and that whatever penalty I decided to impose should be imposed on each and all the defendants. Counsel for the defendants, and particularly counsel for the third defendant, did not seek to minimise the seriousness of the offences committed over the substantial number of years to which the plaintiff's claim relates; but counsel for the third defendant took the course of suggesting to me a figure for penalty which he submitted I ought to find adequate in all the circumstances. It was a most substantial figure, namely, $1,000,000, which though far short of the maximum penalty possible is about thrice the amount of duty evaded

in the transactions under challenge. Counsel for the other defendants concurred in the submission. Counsel for the plaintiff informed me that he had considered this figure, counsel for the third defendant having given him foreknowledge of the intention to propose it for my consideration. Having given the matter some thought counsel for the plaintiff informed me that it was the plaintiff's view that such a penalty was adequate in all the circumstances. Indeed, counsel with some candour informed me that, had he had need to make a submission in that case, he for his own part doubted whether he would have pressed for any greater penalty if I had been able to find an intent to defraud the revenue.

Without endorsing this view of counsel for the plaintiff - and there is no present need to consider it one way or another - and after a good deal of consideration, I have come to the conclusion that a total penalty of $1,000,200 imposed on each and all the defendants is an adequate penalty both to mark disapproval of the defendants' course of conduct and to protect the revenue against the evasion of duty and the making of false entries.

Accordingly, I make declarations :

1) That the defendants and each of them have and has been guilty of an offence under s. 234 (a) with respect to the duty properly payable in respect of each entry ex warehouse for home consumption of the goods comprised in the entries ex warehouse for home consumption mentioned in paragraphs 8 to 32 of the Statement of Claim.

2) That the defendants and each of them have and has been guilty of an offence under s. 234 (d) with respect to the entries referred to in the declaration already made.

I impose a total penalty of $1,000,000 in respect of the offences under s. 234 (d) and a total penalty of $200 in respect of the offence under s. 234 (a).

I make the usual order for the handing out of exhibits.

By consent I make no order for costs.