COMPTROLLER OF CUSTOMS v. BASMA

Supreme Court (Webber, C.J.): August 4th, 1936

[1] **Criminal Law — absolute liability — Folded Woven Goods Ordinance, 1933, s.2 creates offence of absolute liability — proof of intention to comply with Ordinance mitigates sentence:** The prohibition against importing folded woven goods unless folded and stamped according to the provisions of the Folded Woven Goods Ordinance, 1933, s.2 is absolute; but evidence that, when ordering the goods, the accused warned the firm supplying the goods from overseas of the relevant terms of the Ordinance may be used in mitigation of sentence (page 434, line 39—page 435, line 11).

[2] **Criminal Law — mens rea — statutory offences — mens rea presumed essential ingredient of offence — principal exceptions:** The three principal exceptions to the presumption that *mens rea* is an essential ingredient in every offence are (a) acts not criminal in any real sense but prohibited under a penality in the public interest; (b) acts constituting public nuisances; (c) cases criminal in form but really only a summary mode of enforcing a civil right (page 434, lines 14—23).

[3] **Criminal Law — mens rea — statutory offences — object and words of statute to be examined to determine whether mens rea required — use of "knowingly" indicates mens rea required:** In determining whether *mens rea* is an ingredient of an offence or whether the prohibited act is absolute, it is necessary (a) to look at the object of each statute to see whether and how far the accused's knowledge is of the essence of the offence, and (b) to see whether the operative verb of a prescribed offence in a case not covered by authority is controlled by such a word as "knowingly": if it is, *mens rea* is required (page 432, lines 31—35; page 433, lines 10—15; lines 28—33).

[4] **Customs and Excise Duties — offences — unlawful importation of folded woven goods — Folded Woven Goods Ordinance, 1933, s.2 creates offence of absolute liability — proof of intention to comply with Ordinance mitigates sentence:** See [1] above.

[5] **Customs and Excise Duties — offences — unlawful importation of folded woven goods — importer not liable for offence unless commits overt act of ordering them:** Where an importer has received bales of fabric from abroad without having committed the overt act of ordering them, he cannot be regarded as having committed the offence of importing improperly folded and unstamped bales of fabric contrary to the Folded Woven Goods Ordinance, 1933, s.2 (page 436, lines 21—23).

[6] **Statutes — interpretation — criminal and penal statutes — mens rea in statutory offences — object and words of statute to be examined to determine whether mens rea required — use of "knowingly" indicates mens rea required:** See [3] above.

The respondent was charged in the Police Magistrate's Court

with importing a bale of fabric that had not been stamped as required under s.2 of the Folded Woven Goods Ordinance, 1933.

The respondent, an agent for a firm of importers, alleged that the bale imported had not been specifically ordered by him, but had been included without his knowledge in a consignment of other goods, and that he did not know that it had not been properly marked: these facts were not disputed. The respondent contended that the offence under the Folded Woven Goods Ordinance, 1933 required proof of *mens rea* and the magistrate held that the respondent could not lawfully be convicted of the charge without definite proof of knowledge and acquitted him.

The appellant, the Comptroller of Customs, appealed on the ground that (a) the acquittal was wrong in law; (b) the Folded Woven Goods Ordinance, 1933 was definitely prohibitive and did not require proof of knowledge on the part of the accused; and (c) the magistrate, having found that the goods had not been stamped as required, was bound to convict the respondent. The respondent contended that the evidence must show an intention to do an unlawful act and that there was no evidence of any overt act regarding the goods in question.

The court considered further exceptions to the presumption that *mens rea* is an essential ingredient in every offence; and it also considered whether the respondent could on the evidence be regarded as the importer of the goods.

The appeal was dismissed.

Cases referred to:

(1) *Allen v. Whitehead*, [1930] 1 K.B. 211; (1929), 142 L.T. 141.

(2) *Att.-Gen. v. Lockwood* (1842), 9 M. & W. 378; 152 E.R. 160.

(3) *Betts v. Armstead* (1888), 20 Q.B.D. 771; 58 L.T. 811.

(4) *Buckingham v. Duck*, [1918] W.N. 359; (1918), 120 L.T. 84.

(5) *Cotterill v. Penn*, [1936] 1 K.B. 53; (1935), 153 L.T. 377.

(6) *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207; [1881—5] All E.R. Rep. 412.

(7) *Hobbs v. Winchester Corp.*, [1910] 2 K.B. 471; (1910), 102 L.T. 841.

(8) *Horton v. Gwynne*, [1921] 2 K.B. 661; (1921), 125 L.T. 309.

(9) *London C.C. v. Royal Arsenal Co-op Socy. Ltd.*, [1936] 1 K.B. 154; (1935), 154 L.T. 214.

(10) *In re Mahmoud*, [1921] 2 K.B. 716; (1921), 125 L.T. 161.

(11) *R. v. Denyer*, [1926] 2 K.B. 258; (1926), 134 L.T. 637.

(12) *R. v. Maughan* (1934), 24 Cr. App. R. 130.

(13) *R. v. Prince* (1875), L.R. 2 C.C.R. 154; [1874—80] All E.R. Rep. 881.

(14) *R. v. Russell*, [1910] A.C. 446; (1910), 85 L.T. 253.

(15) *R. v. Tolson* (1889), 23 Q.B.D. 168; [1886—90] All E.R. Rep. 26.

(16) *R. v. Wheat*, [1921] 2 K.B. 119; (1921), 124 L.T. 830.

(17) *R. v. Woodrow* (1846), 15 M. & W. 404; 153 E.R. 168.

(18) *Sherras v. De Rutzen*, [1895] 1 Q.B. 918; [1895—9] All E.R. Rep. 1167.

(19) *Stott v. Green*, [1936] 2 All E.R. 354; *sub nom. Stott v. Harry Green Ltd.* (1936), 80 Sol. Jo. 426.

Legislation construed:

Customs Ordinance (Laws of Sierra Leone, 1925, *cap.* 49), s.2:
The relevant terms of this section are set out at page 435, lines 24—30.

Folded Woven Goods Ordinance, 1933 (No. 13 of 1933), s.2:
"No folded woven goods . . . shall be imported into Sierra Leone for any purpose . . . unless the same shall be folded in folds of not less than thirty-six inches in length and each piece shall be marked with the number of yards and inches (if any) contained. Such mark shall be stamped upon the fabric of each piece."

Cromie, *Ag. Sol.-Gen.*, for the appellant;
Beoku-Betts for the respondent.

WEBBER, C.J.:

This is an appeal from the magistrate who acquitted the respondent on a charge under s.2 of the Folded Woven Goods Ordinance, 1933. The charge was that he was concerned in importing certain folded woven goods, to wit one bale of dyed tussore, the pieces contained therein not being stamped with the number of yards and inches contrary to the above section, whereby the said H.K. Basma, the agent of Messrs. Basma Bros. & Co., forfeited the goods and was liable to a penalty of £100 as provided by s.4 of the above quoted Ordinance.

In his judgment the magistrate said the facts were not disputed, namely, that this bale had not been specifically ordered by the respondent, but was included in a consignment of other things ordered by him and that he did not know they were not properly marked. The magistrate said: "It cannot reasonably be expected that he knew that they had not been properly marked."

The respondent through his counsel argued before the magistrate that this Ordinance must be subject to the fundamental rule of criminal law which is summed up in the maxim *actus non facit reum, nisi mens sit rea.* After dealing exhaustively with the decisions quoted, the magistrate held that the respondent could not be lawfully convicted of the charge unless there was definite proof of knowledge or of some *malus animus* and acquitted him.

Being dissatisfied with the decision, the Acting Solicitor-General, Mr. A.A. Cromie, filed a petition of appeal under the Appeals from Magistrates Ordinance, 1935. Argument was heard as to the competency of this appeal and I decided that the appeal was properly before me.

The grounds of the petition of appeal are as follows:

(a) That the acquittal was wrong in law;

(b) That the Folded Woven Goods Ordinance, 1933 does not require knowledge or *malus animus* on the part of the accused in respect of any matter under the Ordinance to be proved by the prosecutor;

(c) That the magistrate, having found as a fact that the goods had not been stamped in accordance with the Ordinance, was bound to convict the respondent.

I was much impressed with the able argument of the learned Acting Solicitor-General on the doctrine of *mens rea* and its application in criminal causes. He quoted several cases to show that where the legislature had passed Acts definitely prohibitive, the maxim of *mens rea* had no application.

He quoted *Cundy* v. *Le Cocq* (6), a case in which a person selling liquor to a drunken person was convicted although he did not know that the person was drunk. It was held that the prohibition was absolute and knowledge of a state of drunkenness was immaterial.

In *Allen* v. *Whitehead* (1) a manager knowingly suffered prostitutes to meet in the refreshment house of the owner. The owner, although he did not know of the incident, was convicted. It was held that the knowledge of the manager must be imputed to the employer.

In *Hobbs* v. *Winchester Corp.* (7), the accused was convicted of exposing for sale unsound meat and it was held that knowledge of its unsoundness was immaterial.

In *R.* v. *Maughan* (12), and *R.* v. *Prince* (13), the accused were convicted of indecent assault and abduction; the defences that the

accused had reasonable beliefs that the girls were above 16 years were held to be untenable.

And in the bigamy cases, *R.* v. *Russell* (14) and *R.* v. *Wheat* (16), the fact of the second marriage was sufficient to convict even though, as in the latter case, the accused had the honest belief that the former marriage was dissolved.

Other cases bearing on the question of *scienter* and *mens rea* were cited to me, namely: *Horton* v. *Gwynne* (8); *Cotterill* v. *Penn*, (5); *R.* v. *Denyer* (11); *London C.C.* v. *Royal Arsenal Co-op. Socy, Ltd.* (9); *Buckingham* v. *Duck* (4); *Stott* v. *Green* (19).

The trend of these cases seems to show that where the legislature has forbidden certain acts the offender is not excused by a plea of the absence of *mens rea;* and where the legislature has made the omission to do certain acts an offence here also the innocence of the omission is no excuse.

In *Cundy* v. *Le Cocq* (6) there was the act of selling liquor to a drunken person. In *Allen* v. *Whitehead* (1) there was the act of permitting prostitutes to meet in a refreshment house. In *Hobbs* v. *Winchester Corp.* (7) the act of exposing unsound meat was proved. The acts of indecent assault and abduction respectively were proved in *R.* v. *Maughan* (12) and *R.* v. *Prince* (13). The killing of tame pigeons in *Horton* v. *Gwynne* (8) and *Cotterill* v. *Penn* (5) was also proved.

These cases quoted by the learned Acting Solicitor-General point out that there are exceptions to the general rule of law that *mens rea* is an essential element of criminal law and that a statute, however comprehensive and unqualified it be in its language, is usually understood as silently requiring that this element of *mens rea* should be imported into it unless a contrary intention be expressed or implied.

These exceptions, as pointed out by the learned Acting Solicitor-General in the cases quoted go to show that in deciding when *mens rea* is not an ingredient and the prohibited act is absolute it is necessary to look at the object of each Act to see whether and how far knowledge is of the essence of the offence created (*Cundy* v. *Le Cocq* (6), *per* Stephen, J., 13 Q.B.D. at 210; [1881—5] All E.R. Rep. at 413; *R.* v. *Tolson* (15) 13 Q.B.D. at 168; [1886—90] All E.R. Rep. at 26). For instance in *R.* v. *Prince* (13) where a girl under 16 was abducted, the object of the legislature being to prevent an invasion of parental rights it must be supposed that they intended that the wrongdoer should act at his peril.

S.C.

Modern legislation dealing with municipal law and public health has been framed in such terms as to make an act criminal without any *mens rea.* By-laws which impose regulations in the interest of health and convenience of the public are generally so conceived and the mere breach is sufficient to constitute an offence (*Hobbs* v. *Winchester Corp.* (7); *Betts* v. *Armstead* (3); *Cundy* v. *Le Cocq* (6) and the quotation from *Maxwell on the Interpretation of Statutes*, 7th ed., at 98 (1929), as referred to by the learned Acting Solicitor-General is apt. It reads as follows:

> "Probably, it may now be said that, in construing the operative verb of a prescribed offence in a case not covered by authority, it is not unusual to see whether that verb is controlled by such a word as 'knowingly.' If it is, the doctrine of *mens rea* applies, but if it is not, the better opinion is the exclusion of that doctrine."

Now I come to the arguments of Mr. Betts, counsel for the respondent. In his reference to 2 *Stroud's Judicial Dictionary*, 2nd ed., at 1046 (1903), he argued that the evidence must show an intention to do an unlawful act, and that where the word "knowingly" was used it merely shifted the onus of showing knowledge on to the prosecution and where the word was omitted the onus was shifted on to the defence to show absence of knowledge as *mens rea.*

He quoted many cases. In some cases the underlying principle supports the contention of the learned Acting Solicitor-General. He referred to *Sherras* v. *De Rutzen* (18). In that case Wright, J. said ([1895] 1 Q.B. at 921; [1865—9] All E.R. Rep. at 1169):

> "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but [the learned judge continued] that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered."

In the above case the accused was charged with supplying liquor to a police constable while on duty contrary to s.16(2) of the Licensing Act, 1872 and it was held that this section does not apply where there was a *bona fide* belief that the police constable was off duty. Again, in *In re Mahmoud* (10) referred to by Mr. Betts, Scrutton, L.J. in his judgment says as follows ([1921] 2 K.B. at 728; 125 L.T. at 163):

"Where the prohibition is for public purposes as a general rule, unless there is the word 'knowingly' or something to show that the offence can only be committed by a person who knows he is committing an offence the person must take the risk."

The Lord Justice referred to the case of *R.* v. *Woodrow* (17), a very old case which nevertheless is of some assistance to the Acting Solicitor-General. It was considered an offence for a tobacco dealer to have in his possession adulterated tobacco although he honestly believed when he purchased it that it was genuine.

Mr. Betts quoted several other cases which I have considered and here I will sum up in a few words the general effect of all the cases quoted by both counsel. I admit that it is difficult to reconcile them. Apart from isolated cases there are three principal exceptions to the presumption that *mens rea* is an essential ingredient in every offence.

One is a class of acts not criminal in any real sense but which in the public interest are prohibited under a penalty. See *Att.-Gen.* v. *Lockwood* (2) where the innocent possession of liquorice by a beer retailer was held an offence. Another class comprehends some and perhaps all nuisances, and the last class relates to cases criminal in form but really only a summary mode of enforcing a civil right.

Except in classes such as these or in any isolated cases Wright, J. says in *Sherras* v. *De Rutzen* (18) ([1895] 1 Q.B. at 922; [1895—9] All E.R. Rep. at 1170):

"Except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him generally or in the particular matter, in order to constitute an offence."

Now I ask myself can any one of these exceptions be applied in the case now before me on appeal? It can hardly be to the public interest that imported folded woven goods should be stamped showing the number of yards and inches in the folds, though it does facilitate the work of the customs officers when fixing the duties payable. Nor can this case apply to the other classes. I therefore can only enquire as to whether it is an isolated case to which the exception may be applied. I have come to the conclusion that in cases of this kind if it is proved that the accused ordered these goods which were unstamped, he commits an

offence under s.2 of the Ordinance but he can plead in mitigation of sentence, if he can show that in ordering the goods, he warned the firm with whom he was dealing of the existence of the material sections of the Ordinance. A trader who deals in cotton and other goods is expected to know the customs laws and regulations dealing with the importing of such goods and the duties payable, so when he imports folded woven goods he takes the risk and must suffer the consequences of a consignment arriving contrary to customs law.

The prohibition under s.2 of the Ordinance is absolute in my opinion and the doctrine of *mens rea* is not an ingredient. I do not think the doctrine "*lex non cogit ad impossibilia*" can apply. It is true that the importer has no control over the dealings with the goods prior to shipment; if the firm with which he is dealing omits or neglects to stamp the goods, the importer will no doubt have a civil remedy.

I now come to the question as to whether the respondent on the evidence can be regarded as the importer of these particular goods. These goods were never ordered by him. They were included in a large consignment. He received the invoice and it was sent to the customs. He cannot read or write English and has never read the invoice. Now the definition of an importer given in s.2 of the Customs Ordinance (*cap.* 49), is as follows:

> "'Importer' shall include any owner or other person, for the time being possessed of, or beneficially interested in, any goods imported within the limits to which this Ordinance extends, from the time of importation thereof until they shall, on payment of the duties thereon, or otherwise, be delivered or discharged from the custody, or control of the customs."

This is a very wide definition and includes a person beneficially interested in the goods consigned to him. The respondent said in his evidence that if he had got the goods he would have sold them. Therefore when the goods arrived and he received the invoice he became beneficially interested in what he thought was the consignment of goods he actually ordered. He may or may not have had the invoice read to him but it may be argued that he was beneficially interested in each item of the goods detailed in the invoice. He never received the goods owing to the firm's omission to stamp the same in accordance with the law.

Now comes the most important phase of this case. Mr. Betts contended that, even if the respondent could be regarded as an importer under the definition, there was no evidence of any overt act dealing with the goods and he quoted 1 *Stroud's Judicial Dictionary*, 2nd ed., at 23—24 (1903) and 9 *Halsbury's Laws of England*, 1st ed., at 238, para. 507. The law is clear, namely that a person cannot be guilty of an offence unless he has committed an overt act, that is to say, an act capable of being observed by someone else, or he has made default in doing some act. The Acting Solicitor-General argued that the receipt of the invoice and the sending of a clerk to clear the goods must be regarded as an overt act. This would be so if the magistrate had found on the facts that the accused ordered these goods. The receiving of the invoice and the sending of a clerk to clear the goods were the necessary results which followed the ordering.

The ordering of the goods was the main overt act, the other acts were subsidiary. In all the cases quoted there was the intention to commit the act; in some cases the act was prohibited and in other cases in doing the act which in itself was lawful the party ran or took the risk of the consequences of his act.

In this case there was no overt act as the accused never ordered the goods and could in no sense be regarded as committing the offence under s.2 of the Folded Woven Goods Ordinance, 1933. To convict and punish an innocent consignee who never ordered these goods would be under all the circumstances of this case a travesty of justice. The magistrate on his finding of the facts was correct in acquitting the accused.

This appeal is accordingly dismissed.

Appeal dismissed.