

## WESTERN ELECTRIC CO. LTD

v.

## COMPTROLLER OF CUSTOMS

[COURT OF APPEAL\*, 1964 (Mills-Owens P., Marsack J.A., Briggs J. A.), 10th, 14th July]

## Criminal Jurisdiction

*Criminal law—evidence—markings on goods—invoices and certificates of origin—hearsay—not within recognised exceptions—Court of Appeal Ordinance (Cap. 3) s.30A—Customs Ordinance (Cap. 166) s.116—Customs Duties Ordinance (Cap. 167)—East African Customs Management Act 1952, s.167(a)—Customs Consolidation Act 1876 (39 & 40 Vict., c.36) s.168.*

*Criminal law—mens rea—false customs entry—whether mens rea essential ingredient of the offence—Customs Ordinance (Cap. 166) s.116—Customs Duties Ordinance (Cap. 167)—East African Customs Management Act 1952, s.167(a)—Customs Consolidation Act 1876 (39 & 40 Vict., c.36) (Imperial) s.168—Sale of Food and Drugs Act 1875 (38 & 39 Vict., c.63) (Imperial)—Fertilisers and Feeding Stuffs Act 1893 (56 & 57 Vict., c.56) (Imperial).*

The appellant company was convicted in a Magistrate's Court of making a false declaration in a Customs Entry Form A produced to an officer of customs contrary to section 116 of the Customs Ordinance. On appeal to the Supreme Court material issues were argued concerning the admissibility and effect of evidence

- (a) That the goods in question or their containers bore markings indicative of their country of origin and

\* The appeal from this judgment to the Privy Council is reported in [1965] 3 All E.R. 599. Their Lordships held that the markings on the goods were hearsay and must be excluded from consideration, but that the offence of making a false entry is complete on proof of the inaccuracy of the entry without proof of *mens rea*. The appeal was dismissed for other reasons.

Customs Ordinance, s.116: Should any person make any false entry in any form, declaration, entry, bond, return, receipt or in any document whatever required by or produced to any officer of customs under this Ordinance, or should any person counterfeit, falsify or wilfully use when counterfeited or falsified, any document required by or produced to any officer of Customs or should any person falsely produce to any such officer of customs under any of the provisions of this Ordinance in respect of any goods or of any vessel any document of any kind or description whatever that does not truly refer to such goods or to such vessel, or should any person make a false declaration to any officer of customs under any of the provisions of this Ordinance, whether such declaration be an oral one or a declaration subscribed by the person making it or a declaration on oath or otherwise, or should any person not truly answer any reasonable question put to such person by any officer of customs under any of the provisions of this Ordinance, or should any person alter or tamper with any document or instrument after the same has been officially issued or counterfeit the seal, signature or initials of or used by any officer of customs for the identification of any such document or instrument or for the security of any goods or for any other purpose under this Ordinance, such person shall on conviction for every such offence, except where a specific penalty is herein provided, be liable to a fine not exceeding two hundred pounds nor less than fifty pounds and in default of payment to imprisonment not exceeding six nor less than two months.

- (b) That certain invoices and Certificates of Origin also indicated countries of origin of the goods.

A A further issue was whether *mens rea* was an essential ingredient of the offence with which the appellant company was charged.

In the Supreme Court the learned judge, pursuant to section 30A of the Court of Appeal Ordinance reserved these issues as questions of law for the decision of the Court of Appeal.

B *Held*: 1. The marks on the goods and their containers were hearsay and not within any of the recognised exceptions to the hearsay rule. They were therefore inadmissible as evidence of the country of origin.

*Myers v. Director of Public Prosecutions* [1965] A.C. 1001; [1964] 3 W.L.R.145, followed.

C 2. Subject to the exception that the documents may be receivable against a person if he has in any way recognised, adopted or acted upon them, the invoices and certificates of origin were not evidence in themselves that the goods originated from the countries specified therein.

D 3. Upon the proper construction of section 116 of the Customs Ordinance *mens rea* is an essential ingredient of the offences created by the section.

E Cases referred to: *R. v. Rice* [1963] 1 Q.B.857; [1963] 1 All E.R.832; *Chamberlain v. Fenn* (1907) 26 N.Z.L.R. 152; *Davies v. Harvey* (1874) L.R.9 Q.B.433; 30 L.T. 629; *R. v. Ewart* (1905) 25 N.Z.L.R.709; *Sheras v. De Rutzen* [1895] 1 Q.B.918; 72 L.T.839; *Nicholas v. Hall* (1873) L.R.8 C.P.322; 28 L.T.473; *Lim Chin Aik v. R.* [1963] A.C.160; [1963] 1 All E.R.223; *Attorney-General v. Lockwood* (1842) 9 M. & W.378, aff'd. 10 M. & W.464; 152 E.R.160; *Hobbs v. Winchester Corporation* [1910] 2 K.B.471; 102 L.T.841; *R. v. St. Margaret's Trust Ltd.* [1958] 2 All E.R.289; 42 Cr. App.R.183; *Srinivas Mall Bairolia v. King Emperor* [1947] I.L.R.460; *Brend v. Wood* (1946) 62 T.L.R.462; 175 L.T.306; *Fraser v. Beckett & Sterling Ltd.* [1963] N.Z.L.R.480; *Proudmann v. Dayman* (1943) 67 C.L.R.536; *Ecclesfield v. Chilman* (1893) 11 N.Z.L.R. 719; *D'Audney v. Marketing Services (N.Z.) Ltd* [1962] N.Z.L.R. 51; *Irving v. Gallagher*, *Queensland Law Journal* 1903, p.21; *R. v. Prince* (1875) L.R.2 C.C.R.154; 32 L.T.700; *R. v. Hunt* (1820) 3 B. & Ald.566; 106 E.R.768; *R. v. Hinley* 1 Cox C.C. 12; 174 E.R.370; *Derbyshire v. Houlston* [1897] 1 Q.B.772; 76 L.T.624; *Korten v. West Sussex County Council* (1903) 72 L.J.K.B.514; 88 L.T.466; *Laird v. Dobell* [1906] 1 K.B.131; 93 L.T. 842; *Chajutin v. Whitehead* [1938] 1 K.B.506; [1938] 1 All E.R.159; *R. v. Cohen* [1951] 1 K.B.505; [1951] 1 All E.R.203; *Sambasivam v. P. P. Malaya* [1950] A.C.458; *English and Scottish Co-operative etc. Society Ltd. v. Odhams Press Ltd.* [1940] 1 K.B.440; [1940] 1 All E.R.1.

Questions of law reserved for the Court of Appeal pursuant to Section 30A of the Court of Appeal Ordinance.

H S. M. Koya for the appellant.

D. McLoughlin, Solicitor-General for the respondent.

The facts sufficiently appear from the judgment of Marsack J. A.

The following judgments were read :

MARSACK J.A. : [4th September, 1964]—

The appellant company was convicted by the Senior Magistrate sitting at Lautoka of the offence of making a false declaration in a Customs Import Entry Form, the declaration being false with respect to the countries of origin of certain imported goods. The company appealed to a judge of the Supreme Court and the judge, pursuant to Section 30A of the Court of Appeal Ordinance (Cap. 3), reserved certain questions of law for the decision of this Court, expressing the opinion, subject to the determination of such questions, that the appeal should be dismissed. The points of law reserved are as follows :

- "1. To what extent, if any, is the evidence of the markings on goods or on containers of goods or containers admissible as *prima facie* evidence of the country of origin of such goods for the purposes of the Customs Ordinance (Cap. 166) and the Customs Duties Ordinance (Cap. 167)?
2. Is *mens rea* an essential ingredient of the offences created by Section 116 of the Customs Ordinance (Cap. 166)?
3. Did the onus of proof rest on the Comptroller of Customs in this case to prove that the countries of origin declared by the Appellant Company's Agent were not in fact the true countries of origin of the goods concerned, notwithstanding the provisions of Section 152 of the Customs Ordinance?
4. Are the Invoices and Certificates of Origin in the form prescribed by the Customs Duties Ordinance admissible in evidence on the issue of what in fact are the countries of origin of goods referred to therein?
5. In the circumstances am I correct in my opinion that this appeal should be dismissed."

The first question, whether the markings on goods imported into Fiji or their containers, are admissible in evidence as *prima facie* proof of their country of origin, is one of considerable importance. There is no express provision in the Customs Ordinance on the subject, so that the matter falls to be determined in accordance with the general principles of law.

There can be no doubt that the evidence furnished by these marks is hearsay. The person who attached the marks cannot be called in evidence to identify them and to give direct evidence as to the country of origin of the articles so marked. The evidence would, therefore, be admissible only as an exception to what is known as the hearsay rule.

A It is certainly true that in many cases, of which *R. v. Rice* [1963] 1 All E.R. 832 is an example, this type of hearsay evidence has been admitted on the basis of its inherent probability. As far as containers are concerned the degree of inherent probability that the particulars written on them are correct is less than in the case of a name indelibly embossed on the article itself, as is the case with one of the articles concerned in the present prosecution. This, however, would affect only the weight of the evidence and not its admissibility. The question asked in the Case Stated is concerned with admissibility only and not with weight. The Judge in the Court below held that indelible marks were admissible in evidence but that those which were not indelible were not.

B In my opinion, the question has been finally settled by the judgment of the House of Lords in *Myers v. D.P.P.* [1964] 3 W.L.R. 145. In that case the Court of Criminal Appeal had held that records of chassis numbers and engine numbers of motor cars entered, in log books kept by the manufacturers, at the time of manufacture were not admissible in evidence to prove that a motor car which bore an irremovable block number had, when it left the works, borne the chassis and engine numbers shown in the records. In the Court of Criminal Appeal it was held that the probative value of these records depended on the circumstances in which the record was maintained and the inherent probability that it would be correct rather than incorrect. This, in the opinion of Their Lordships, was undeniable as a matter of commonsense; but it could not be reconciled with the existing law. (Ibid p.158).

At page 154 Lord Reid says :

E "The reason why this evidence is maintained to have been inadmissible is that its cogency depends on hearsay. The witness could only say that a record made by someone else showed that, if the record was correctly made, a car had left the works bearing three particular numbers. He could not prove that the record was correct or that the numbers which it contained were in fact the numbers on the car when it was made. This is a highly technical point, but the law regarding hearsay evidence is technical, and I would say absurdly technical. So I must consider whether in the existing state of the law that objection to the admissibility of this evidence must prevail."

F In the result it was held that that objection to the admissibility of the evidence must prevail. The principle is stated in the headnote at page 146 :

G "It was established law that as a general rule hearsay evidence was not admissible, and that authority must be found to justify its reception within some established and existing exceptions to the rule, for to countenance new exceptions thereto would amount to judicial legislation."

H The evidence in *Myers'* case did not, in the judgment of Their Lordships, come within any established and existing exception to the hearsay rule and was accordingly held to be inadmissible.

The reasoning adopted in that judgment is, in my opinion, directly applicable to the question before this Court. The marks on the

articles and the containers, whether indelible or otherwise, are definitely hearsay. The person producing the articles or the containers cannot prove that the statements incorporated in the markings are correct. No direct evidence is available to prove that the articles were in fact produced or manufactured in the country indicated by the markings on the containers or on the article itself. The person who actually made the marks was not — and as a matter of practical possibility could not be — called to give evidence as to their being made and as to the truth of what they represented.

At the hearing the Solicitor-General referred to certain East Africa cases in which markings on containers were held to be *prima facie* evidence of the country of origin of the contents. It is, however, doubtful if those decisions can stand in view of the judgment of the House of Lords in Myers' case. It was further contended for the Crown that the marks in question in this case amounted to public documents and as such were admissible as one of the recognised exceptions to the hearsay rule. In my opinion this argument is not tenable. A similar point was raised in Myers' case but was rejected on the ground that no record can be classed as a public record within the exception unless it is open to inspection by at least a section of the public.

To make these marks admissible in evidence to show the country of origin, they would have to come within one of the established exceptions to the hearsay rule. In my opinion they do not fall within any of the recognised exceptions, though undoubtedly the Courts have from time to time admitted a good deal of such evidence on the ground of its inherent probability. Since the decision of the House of Lords in Myers v. D.P.P. further extensions to the hearsay rule, however well they may accord with commonsense and practical usefulness, will, it appears, no longer be permitted.

In my opinion, therefore, the answer to question 1 in the Case Stated should be: the evidence of the markings on goods or on containers of goods, or labels attached to them, is inadmissible as evidence of the country of origin.

The practical inconvenience that may be caused by such a ruling can easily be overcome by an express provision in an amendment to the Customs Ordinance. That, however, is a matter for the Legislature and not for this Court.

The second question is whether *mens rea* is an essential ingredient of the offences created by Section 116 of the Customs Ordinance. This is a matter of considerable difficulty. The Solicitor-General relies principally on the decision of Cooper J. in *Chamberlain v. Fenn* (1907) 26 N.Z.L.R. 152. In the course of his judgment at p.157 the learned judge says:

"Where in laws relating to the revenue, acts are prohibited under a penalty, the mere commission of those acts subjects the offender to the penalty although no guilty mind existed: *Davies v. Harvey* L.R. 9 Q.B. 433."

The case of *Davies v. Harvey* cited as authority for that proposition does not fully support the dictum of Cooper J. However, there is a



most forthright declaration as to the law on this subject by Williams J. in the earlier New Zealand case of *R. v. Ewart* (C.A.) 25 N.Z.L.R. 709 at p.726. The learned judge is there discussing exceptions to the general rule that *mens rea* is an essential component of every criminal offence. He proceeds:

"Revenue cases are a recognised exception. Revenue statutes are for the protection of the revenue. If the effect of a prohibited act is injurious to the revenue the fact that it was done by a mistake or accident is immaterial."

It is, however, to be noted that the judgment in *R. v. Ewart*, which was a majority decision, was concerned only with a prosecution under the Offensive Publications Act and no statement of the law regarding revenue cases was necessary for the determination of the question before the court.

With respect I am of opinion that the statement of the law quoted from the judgment of Williams J. is strictly *obiter* and is not fully warranted by the reported decisions. I have been unable to find any authority, whether binding on this Court or of persuasive force, which lays down that in no case of offences under revenue statutes is *mens rea* an essential ingredient.

What is usually regarded as *locus classicus* on this subject is the dictum of Wright J. in *Sherras v. De Rutzen* [1895] 1 Q.B. at p.921:

"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 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."

Although this goes further than the authority quoted by Wright J. in support of it, namely *Nichols v. Hall*, 8 C.P.322, yet it has been approved and followed in a great many cases, notably by the Privy Council in *Lim Chin Aik v. R.* [1963] 1 All E.R. 223. A little further on in his judgment Wright J. says that the class of acts which form exceptions to the *mens rea* rule are those which are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty. He then proceeds at p.922:

"Several such instances are to be found in the decisions on the revenue statutes, e.g. *Attorney-General v. Lockwood*, 9 M. & W. 378."

The judgment in *Attorney-General v. Lockwood* contains no specific ruling such as that of Williams J. in *R. v. Ewart* (*supra*) to the effect that *mens rea* is not necessary in respect of offences under the revenue statutes. There is, however, a general statement as to the construction of statutes by Alderson B. at p.168:

"The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which

they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act, or to some palpable and evident absurdity. Now, that being the rule upon which we are to construe statutes, let us apply that rule to the statute before us."

A

There is no doubt that the old doctrine that *mens rea* was a necessary ingredient in all criminal offences has become greatly modified in modern times, though possibly not to the extent indicated by Kennedy L. J. in *Hobbs v. Winchester Corporation* [1910] 2 K.B. 471. At p.483 that learned judge says :

B

"I think there is a clear balance of authorities that in construing a modern statute this presumption as to *mens rea* does not exist. It is impossible now, as illustrated by the cases of *R. v. Prince* and *R. v. Bishop*, to apply the maxim generally to all statutes and the substance of all the recorded cases is that it is necessary to look at the object of each Act that is under consideration to see where and how far knowledge is of the essence of the offence created."

C

This judgment was considered by the Court of Criminal Appeal in *R. v. St. Margaret's Trust Ltd.* [1958] 2 All E.R. 289 where at page 293 it was stated :

"What Kennedy L.J. is here saying, we think, is that modern statutes create offences where knowledge on the part of the offender is not essential, and that accordingly there is no universal prior presumption of *mens rea*. Each statute must be construed according to its terms and its objects. If, so construed, *mens rea* is not expressly or by necessary implication excluded, it is then that it will be regarded as essential."

D

In *Lim Chin Aik v. R.* (supra) at p.228 Lord Evershed quoted with approval the judgment of Lord Du Parc in *Srinivas Mall Bairolia v. King Emperor* [1947] I.L.R. 460 in which he accepts as correct the statement of the law in the passage cited from the judgment of Wright J. in *Sherras v. De Rutzen* (supra), and also the dictum of Lord Goddard in *Brend v. Wood* (1946) 62 T.L.R. 462 at p.463 :

E

"It is in my opinion of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind."

F

There is, in my respectful opinion, an admirable statement of the present position of the law in the judgment of McCarthy J. in *Fraser v. Beckett & Sterling Ltd.* (C.A.) [1963] N.Z.L.R. 480 at p.496:

G

"For myself, I doubt whether the last phase of the battle between the two schools of thought has yet been fought, and it may well be that it is more in conformity with the spirit of the common law to insist upon proof of *mens rea* unless there is a clear indication that proof is to be dispensed with."

H

A similar view is taken by Gresson P. in the same case at p.485 :

A "The effect of the authorities is that where the statute imposes what is apparently an absolute prohibition an absence of guilty knowledge may or may not be a defence. It must in every case depend on the wording and purpose of the particular statute. There are many cases which exemplify that principle and which exemplify also the difference of judicial opinion there has been in applying the principle."

B Further in the course of his judgment Gresson P. states that he proposed to be guided by what was said by Dixon J. in *Proudman v. Dayman* (1943) 67 C.L.R. 536 :

C "Indeed there has been a marked and growing tendency to treat the *prima facie* rule as excluded or rebutted in the case of summary offences created by modern statutes, particularly those dealing with social and industrial regulation. But although it has been said that in construing a modern statute a presumption as to *mens rea* does not exist . . . it is probably still true that, unless from the words, context, subject-matter or general nature of the enactment, some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation even from a summary offence."

D I have been at some pains to examine the authorities on this difficult question in view of the differences of judicial opinion which have been manifest in the cases cited and many others. In the result I reach the conclusion that though there are in modern times classes of statutes in which offences are created with absolute liability, so that the prosecution has not to prove *mens rea*, it is still essential to look at the statute itself to decide whether or not the Legislature intended to impose absolute liability and, if such were the intention, whether or not it was made clear in the statute itself. I do not think it possible to say that all statutes affecting the revenue belong automatically to the class in which *mens rea* is excluded as an essential ingredient of the offences specified thereunder.

F It, therefore, becomes necessary to examine carefully the wording of Section 116 of the Customs Ordinance, under which this prosecution was brought, to see if it leads to the necessary inference that the person charged is under an absolute liability even if he acted innocently and with full belief on reasonable grounds that his declaration was true.

G There is one factor which, though not decisive, is, in my opinion, relevant and requiring to be taken into account. That is the provision for a minimum penalty of £50 which, at the time the Ordinance was first passed in 1881, represented a very heavy penalty indeed. In the New Zealand case of *Ecclesfield v. Chilman* (1893) 11 N.Z.L.R. 719, Denniston J. in considering a section of a statute under which there was a similar minimum penalty said at p. 721 :

H "It would require very clear language to justify the conclusion that the Legislature intended to create a liability to such a punishment in a case where there might be no guilty mind, or even no negligence or carelessness."



In *D'Audney v. Marketing Services (N.Z.) Ltd.* [1962] N.Z.L.R. 51, Turner J. attached great weight to the principle enunciated by Denniston J. in *Ecclesfield v. Chilman*. In *Fraser v. Beckett & Sterling Ltd.* (supra) the New Zealand Court of Appeal, however, held that Turner J. had been in error in placing so much reliance upon it. McCarthy J., in the course of his judgment in that case, expressed the view that the existence of a minimum monetary penalty is an important matter to be taken into consideration but did not in Fraser's case outweigh the other factors involved in that particular case. With respect I agree that the fact that a minimum monetary penalty has been fixed under a statute is not conclusive, but it is none the less a matter to be taken into account in construing the section under which the prosecution is brought.

Lord Evershed in *Lim Chin Aik v. R.* (supra) draws a distinction between those statutes which regulate particular activities for the public welfare, such as those concerning the sale of food and drink, in which it has frequently been inferred that the Legislature had intended that such activities should be carried out under conditions of strict liability, and other statutes in respect of which different considerations apply. At page 228 he says :

"But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

Applying that principle to the present case it is relevant to ask what the importer could have done, directly or indirectly, to promote the observance of the regulations. He had acted in strict *bona fides* on a declaration sent to him by the exporter from whom he had ordered the goods. There was no reason for him even to suspect that full reliance could not be placed on the truth of that declaration. It was suggested by the Solicitor-General, in the course of his argument, that the importer could have satisfied himself as to the contents of the case by opening it before he made the declaration. In my opinion, there was no obligation on his part to do anything of the sort; and from a practical point of view the taking of such precautions by all importers in respect of all packages arriving in the port of Suva would lead to such delays that the clearing of the wharves in reasonable time would become impossible.

The question for determination is then whether Section 116 is so worded as to impose an absolute liability on the importer in conditions such as those outlined above. I do not think it is. To impose such a liability would, in my view, need words establishing beyond doubt the fact that the liability of the person charged was absolute

and that the Ordinance was intended to punish those who acted innocently as well as the guilty. If such had been the intention of the Legislature it would have been easy to say so. It would have needed only a few words added to the section to provide that belief on the part of the person charged on reasonable grounds in the truth of his declaration would be no defence to the charge if the declaration were in fact erroneous. Such words appear, for example, in the East African Customs Management Act 1952, Section 167(a) which reads :

"In any proceedings under this Act, it shall not, unless it is expressly so provided, be necessary to prove guilty knowledge."

One of the cases cited during the argument was *Irving v. Gallagher* reported in Queensland Law Journal 1903, p. 21. In this case it was held that in a prosecution under a somewhat similar section to that concerned in the present case proof of *mens rea* was not necessary. In the course of his judgment Power J. at p. 125 said :

"If entries are made at the Custom House whereby the consignee pays a lower rate of duty than that for which he is properly liable, it is evident that the revenue may suffer to exactly the same degree whether the error be made with intent to evade payment of duties or through carelessness, or possibly inadvertence. The means of supplying accurate information is peculiarly within the knowledge of the consignee, and the burden of furnishing a correct statement is, therefore, not unreasonably placed upon him. If he fails to do so, he cannot escape liability by alleging or proving that he had no fraudulent intention. His action speaks for itself whether designed or undesigned."

In the present case, however, it would not be correct to say that the means of supplying accurate information is peculiarly within the knowledge of the consignee. Until the container was opened — and possibly not even then — his only source of information was the declaration supplied by the New Zealand exporter, and no action on his part short of an examination of the contents of the container would have enabled him to ascertain that the declaration of the exporter was in fact erroneous.

It is true that in that portion of Section 116 under which the charge was brought the offence is that of making a false declaration and the word "wilfully", which is used elsewhere in this section, does not apply in this part of it. It has been argued in many cases that the use of the word "wilfully" or "knowingly" in one place in a statute and its omission in another indicates that in the latter case the state of mind of the person charged is immaterial. I do not think that the omission of the word in this part of Section 116 can have that effect. This has been recognised in a number of cases: see *Ecclesfield v. Chilman* (supra) and *Lim Chin Aik v. R.* at p. 230. I therefore conclude that the answer to question 2 should be that *mens rea* is an essential ingredient of the offences created by Section 116 of the Customs Ordinance (Cap. 166).

It is perhaps not enough to say merely that *mens rea* is an essential ingredient of an offence under Section 116. There is also the question whether the onus lies on the prosecution to prove *mens rea*,

or whether this is the type of case in which there is a presumption of *mens rea*, but one which can be negated by evidence on the part of the defendant. In *R. v. Prince* L.R. 2 C.C.R. 154, Lord Esher (then Brett J.) refers to cases such as this where the absence of the word "knowingly" does not prevent the accused person from proving that the *mens rea* to be *prima facie* inferred from his doing the prohibited acts, did not in fact exist. In Ewart's case it was held that an act might very well, upon the true construction of the statute, be made in itself *prima facie* to import a guilty mind, but as to which the presumption arising from the doing of the act might be rebutted by evidence adduced by the person charged. The principle was stated in a somewhat more direct manner by Day J. in *Sherras v. De Rutzen* (supra) where he held that the omission of the word "knowingly" in a penal statute merely shifted the onus of proof from the prosecution to the defence so that it lay upon the defence to prove the absence of *mens rea*. It may, however, be doubtful whether the class of case referred to in Ewart and the judgment of Day J., can still be considered good law, in view of the express statement by Lord Evershed in *Lim Chin Aik v. R.* (supra) when referring to *Sherras v. De Rutzen*, at p. 227 :

"The question of onus does not, as already stated, arise in the present case. Their Lordships think it right, however, to say that they should not be thought to assent to the proposition of Day J."

This would seem to be essentially a case in which the mere performance of the act alleged, that is the making of a false declaration, might be held *prima facie* to import *mens rea* but that the presumption of it could properly be rebutted by evidence on behalf of the defendant.

This, however, does not, in my view, affect the answer which should be given to the second question in the Case Stated. That question concerns merely the point as to whether *mens rea* is an essential ingredient of the offence. It does not relate to the burden of proof of *mens rea* or whether there can be any *prima facie* presumption of it from the nature of the act alleged.

For reasons which I have already given, I am of opinion that *mens rea* is an essential ingredient of offences under Section 116.

The third question asked in the Case Stated refers to the onus of proof with regard to the countries of origin. The answer to this question, in my opinion, is not necessary for the determination of the case before the Court, and this was conceded by both counsel appearing before us. In these circumstances this Court, in my view, should not be called upon to answer it.

Turning now to the fourth question, namely whether invoices and certificates of origin in the prescribed form are admissible as evidence as to the true countries of origin of the goods concerned. Here again, the strict application of the hearsay rule would prevent the documents being used to establish the truth of the statements therein contained. This would, however, be subject to a recognised exception to the rule against hearsay, in that the documents would be admissible against

the party producing them to show his knowledge of their contents, his connection with or complicity in the transactions to which they relate, or his state of mind with reference thereto. As is stated in Phipson on Evidence, 10th Edition, para. 768:

A "They will further be receivable against him as admissions (i.e. exceptions to the hearsay rule) to prove the truth of their contents if he has in any way recognised, adopted or acted upon them."

B That, in my view, represents the only way in which the invoices and certificates of origin are admissible in evidence on the issue of what in fact are the countries of origin of the goods referred to. In other words, they are not evidence in themselves that the goods originated from the countries specified in the certificates. They may, in certain circumstances, be admissible as against the party producing them. The Customs officers as an administrative matter may, and no doubt frequently do, accept the invoices and certificates of origin as a basis upon which customs duties may be calculated. This does not, however, mean that if a dispute arises as to the country of origin of any particular article the invoices and certificates of origin are admissible, even as *prima facie* evidence of the truth of the statements contained therein.

C As to the fifth question, the answer should, in my opinion, be in the negative. The learned Judge of the Court below states:

D "It is clear that the Appellant Company in this case has acted perfectly innocently."

That being so, in view of the opinion expressed in this judgment that *mens rea* is an essential ingredient in the offence with which the company was charged, the company should not, in my view, have been convicted.

E MILLS-OWENS P. :

Having had the advantage of reading the judgment of Marsack, J.A., I agree with his conclusions on all five questions. With respect to question 1 and 2, however, I would wish to state how the matters of admissibility and *mens rea*, respectively, present themselves to me.

F There would appear to be a point of distinction between the present case and Myer's case in that Myer's case was concerned with the admissibility of records made at second-hand; the records produced in court were in fact compiled by clerks from information, record cards, supplied by workmen who were not called to give evidence to substantiate that the cards truly represented the relevant identification marks on the motor car engines. On that ground alone the records produced in court were inadmissible as hearsay. In the present case the original articles, the goods and their containers, were produced in court and, undoubtedly, they were admissible as 'real' evidence.

G The question is to what extent did they afford proof, as a matter of admissibility. No doubt some articles produced as real evidence prove themselves, for what they obviously are, or appear to be. In other cases a court would have to be assisted by expert evidence to understand the nature or purpose of a particular object. The articles

we are concerned with proved themselves, by their mere production, as objects bearing particular marks or words. But, and here as it appears to me is the crux of the matter, it does not follow that the truth of the marks or words was thereby established, even on a *prima facie* basis. That would be so only if the marks or words were writings or documents which proved themselves, a position which would arise only if they fell within one of the recognised exceptions to the hearsay rule, as, for example, public documents. The distinction is between proving the existence of the marks or words and proving their veracity as statements of origin.

The distinction may appear artificial, and it is tempting to regard the marks or words which, in the case of one article, are indelibly embossed, as forming part of the real evidence. But I do not think this is permissible — it remains a case where the marks or words constitute 'documents' sought to be adduced to prove themselves, in breach of the hearsay rule.

I have been unable to discover any modern authority precisely in point. The subject of real evidence seems to be disregarded by many writers on the subject of evidence. The well-known case of *R. v. Hunt* (1820) 3 B. & Ald. 566 is not of direct assistance. There the main question was whether banners carried by a mob should have been produced in court to prove that they bore certain words of sedition or incitement to violence, and it was held that the *viva voce* evidence of an eye-witness to recount the words was admissible, without notice to produce, and sufficient proof except in so far as the jury might think that his memory or perception was at fault. So here, it would appear, the marks or words on the goods and containers might have been proved by the evidence of a witness. The case of *Hunt* has, however, been criticised in more than one respect (*vide R. v. Hinley* 1 Cox 12). In any event it does not deal precisely with the point now in issue. In my view the marks or words are clearly hearsay.

On the point of *mens rea* also we are without direct authority on the construction to be placed on section 116 of the Customs Ordinance. The exception made by Wright J. in *Sherras v. De Rutzen* (*supra*) with respect of 'revenue offences' is not, and no doubt was never intended to be, definitive. *Prima facie*, 'revenue cases' would cover a large field, but it could very well be that the learned judge had in mind cases such as possession of uncustomed goods, or of forged stamp dies, or forged stamps, and similar cases. His reference to the case of *Attorney-General v. Lockwood* would suggest so, as that was a case of possession of an article prohibited to a brewer. In such cases *mens rea* would have lain in the intention to possess, which was what was prohibited, not an intention to make thereof a particular fraudulent use.

Section 116 is obviously based on section 168 of the Customs Consolidation Act, 1876. A comparison may usefully be made with decisions on the Food and Drugs Act, 1875, in which the language of one of the sections is close to that in the case before us. Thus in *Derbyshire v. Houlston* [1897] 1 Q.B. 772, the defendant was charged under



a section which provided that: "Every person who shall give a false warranty in writing to any purchaser in respect of an article of food or a drug sold by him" was to be guilty of an offence. It was argued that 'false' meant no more than untrue, but the court rejected it. Wright J., one of the judges, referred to his own decision in *Sherras v. De Rutzen* and concluded that a charge of giving a false warranty implied the existence of a guilty mind.

A comparison may also be made with the cases under the Fertilisers and Feeding Stuffs Act, 1893: *Korten v. W. Sussex C. C.* (1903) 72 L.J.K.B. 514, and *Laird v. Dobell* [1906] 1 K.B. 131, where, in each case, on a charge of causing or permitting to be given, to a purchaser of fertiliser, an invoice which was false in a material particular, it was held, although not without judicial doubts, that absence of personal knowledge of the falsity on the part of the defendant was no defence. In my view, a distinction may be drawn between those cases and *Derbyshire v. Houlston* in that, on the language of the Act of 1873 and having regard to the nature of the subject-matter and surrounding circumstances, strict liability was almost certainly intended.

*Derbyshire v. Houlston* has also been compared with cases such as *Chajutin v. Whitehead* [1938] 1 K.B. 506 (possession of an altered passport) where the defence did not even submit that it was necessary to prove a criminal intent. But it would appear that *mens rea* in the particular context of the Aliens Order would have meant an intention to use the passport as altered, which, as Hewart L.C.J. said, would mean re-writing the Order. The conviction rested on the conscious possession of an altered passport, which was all that the Order required. The same may be said, in my view, of cases such as *R. v. Cohen* [1951] 1 K.B. 505, and *Sambasivam v. P. P. Malaya* [1950] A.C. 458, where the required *mens rea* lay in the conscious possession of prohibited articles.

In *English and Scottish Co-operative etc. Society Ltd. v. Odhams Press Ltd.* [1940] 1 K.B. 440, the issue was whether the trial judge was correct, in a claim for defamation, in leaving to the jury the question whether a headline appearing in a newspaper was defamatory. The headline read: "False Profit Return Charge". All three members of the Court of Appeal expressed the view that this implied fraudulent conduct on the part of the plaintiff company. Although a decision on a civil matter it is valuable as indicating the attitude of the court to a charge involving falsity.

As it appears to me, in cases such as the present case, it is not enough to say that the revenue may suffer to the same degree whether the false declaration be made fraudulently, negligently, or inadvertently. That may be a sound reason for legislating to include innocent misstatements, but it does not in itself warrant a construction of strict liability. If the doctrine of *mens rea* remains, as it undoubtedly does, a canon of the law (*Lim Chin Aik v. R.* (supra)), it is not possible to say, a priori, that a particular offence falls into a particular category of subject-matter in respect of which *mens rea* is not required. The first approach must surely be to the terms of the enactment.

I do not find section 116 of the Customs Ordinance couched in terms of strict liability. The relevant words are: "makes a false declaration", not, for example, "fails to make a true declaration". If one were to say of a person that he had made a false declaration on oath could it be said that there was no imputation of dishonesty? Any less than if one had said that he had told a lie? The section appears to me to envisage a conscious misrepresentation or suppression, and thus to require the mental intention not merely to make a declaration (which happens or turns out to be untrue) but to make it as a false declaration. I would, therefore, respectfully adopt the view expressed by Wright J. in *Derbyshire v. Houlston* (supra), where he said that the charge of giving a false warranty implied the existence of a guilty mind.

The addition of the words: "fraudulently", or "with intent to defraud", would not I think have supplied anything which is not already implicit in the section. The use of the word "wilfully" in one part of the section was, I think, deliberate, and consistent with an intention on the part of the Legislature throughout to punish dishonest conduct, rather than to make a distinction between one form of offence under the section and others thereunder.

For these reasons I agree with the conclusion of Marsack J.A. on questions 1 and 2 submitted to us. I would not wish to add anything to what he has said on the remaining questions.

BRIGGS J.A. :

I have had the advantage of reading the judgments of the President and Marsack J. A. in this case. I agree with the conclusions on all the five questions submitted to the Court reached in those judgments.