IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 006 of 2014

BETWEEN

STANLEY TERUPO

Appellant

AND

STATE

Respondent

Ms. V. Ravono for the Appellant

Ms. A. Vavadakua for the State

Date of Hearing : 28 February 2014

11, 16 April 2014

Date of Judgment: 5 May 2014

JUDGMENT

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1. In the Magistrates Court at Nausori on the 8th November 2013 the Appellant was convicted after trial of Failing to Declare Currency at The Border contrary to section 32(1) of the Financial Transactions Reporting Act No. 22

of 2004 ("the Act"). It was ordered that no conviction be recorded against him on condition that he pay a fine of $800.

2. The Appellant appeals both the conviction and sentence on the basis that the learned Magistrate erred in finding that the offence was one of strict liability and she as a consequence failed to consider that he was unaware that he was carrying the currency notes with him and could not therefore have been expected to declare it.

Section 32(1) of the Act reads:

32(1) *"Any person who leaves or arrives in the Fiji Islands with more than $10,000 or such other amount as may be prescribed, in currency or negotiable bearer instruments oh his or her person or in his luggage without first having reported the fact to the Fiji Islands Revenue and Customs Authority commits an offence and is liable on conviction to fine not exceeding $60,000 or imprisonment for a term not exceeding 10 years or both"*

3. The learned Magistrate after reviewing the authorities concluded that the offence was one of strict liability and therefore that there was no need to find ***mens rea*** on the part of the offender.

Facts

4. On the 10th October 2013, the appellant arrived at Nausori Airport on a flight from Funafuti, Tuvalu. He was carrying a parcel. On examination, the parcel was found to contain $22,000 in Fijian currency notes. The appellant had not declared to FRCA that he was carrying currency in excess of $10,000.

5. At trial the accused (as he then was) gave evidence that he was an Australian Naval Officer and had been based in Tuvalu for about ten months. When he was about to leave Funafuti Airport he was in a rush. A friend of his who was

a Tuvalu Customs Officer at the Airport there gave him the package as he was about to board and asked him to carry it to Nausori where his son would meet him and collect the package from him. He agreed and there was no time to discuss what was in the package which was securely wrapped and taped.

6. In all innocence he said he carried the package without trying to conceal it and was asked at the Nausori Airport by a FRCA agent to open it. The package was opened and the money discovered.

7. The accused co-operated with the authorities: he admitted to being in possession of the parcel and to bringing it in to Fiji but said that he was totally unaware of its contents.

The Magistrate's Findings

8. The learned Magistrate first analysed the law of possession and it's necessary element of intention, then she analysed case law on mens rea without stating a conclusion, however she must have decided that it was unnecessary for her to consider mens rea because in the light of the accused's stated ignorance of what was in the package she went on to convict him. She did refer to the Queensland case of **R v Tahib; exparte C'wlth D.P.P.** [1998] QCA 307, a case which provides for a limited application of mens rea in this very offence.

9. The maximum penalty for breach of the section is a fine not exceeding $60,000 and/or a term of imprisonment of 10 years.

10. In finding that the Prosecution had proved the case against the accused she convicted him and then proceeded to sentence. In the circumstances where the accused had no idea of what he was carrying, she fined him $800 and ordered that no conviction be recorded against him.

The Appeal

11. The appellant prays that in the absence of words in the section denoting intention, the Court must read in words denoting intention or mens rea, relying on the principles laid down by **Sweet v Parsley** (1969) 1 All ER 347. He submits by his Counsel that "there was not a single shred of evidence that the Appellant was aware or had the knowledge that the parcel he was carrying contained cash that was in excess of $10,000".

12. Counsel also submits that the **Tahib** case established that it should be proved that the accused knew that he was in possession of more than $10,000 and that he knew that he had brought such excess currency into Fiji.

13. Counsel in addition submits that the learned Magistrate erred when she found that **Tahib** lays down the principle that where there is knowledge of a duty to report a financial transaction, mens rea does not apply.

The State Responds

14. In seeking to uphold the conviction and sentence, Counsel for the State relies on the Fiji High Court decision of **Hong Kuo Hui** HAC 40.2004 in which Winter J. discussed different categories of intention with regard to offences and in which he followed the Australian High Court in **He Kaw Te** [1985] 157 CLR 523 and the New Zealand Court of Appeal in **Millar v Ministry of Transport** [1986] 1 NZLR 660.

15. Counsel supports the apparent view of the Magistrate that the offence is one of strict liability with the onus on the defence to prove that there was an honest and reasonable mistake. The State submits that the Defence failed to satisfy that burden. The Magistrate had clearly said that she could not accept that the Appellant did not know what was in the package.

Discussion

16. There can be no doubt that the accused at trial was in possession of the package, that he had entered Fiji, that he had more than $10,000 on his person, and that he had not declared the excess funds to an officer of FRCA.

17. The only issue outstanding and the issue on which this Appeal is launched is for any requirement as to mens rea, in which case this accused may well have been able to satisfy the Court that he was totally unaware of the contents of the package and therefore he had absolutely no intention to defeat the terms of the section in the Act.

18. The decision of Winter J. in **Hong Kuo Hui** (supra) is of great assistance in this appeal. In his analysis of the Australian High Court decision in **He Kaw Te** (supra) and the NZ CA in **Millar** (supra), he finds four categories of intention in offending:

    - Implied mens rea
    - The "Strawbridge" approach (requiring an honest belief on the part of the accused that would make his actus reus lawful
    - Strict liability
    - Absolute liability.

19. In strict liability offences only the actus reus is relevant and there is no mens rea to prove, however an accused can prove an entire absence of fault to exculpate himself

20. In absolute liability (which must be very rare) the offence is complete on proof of the actus reus and there is no defence of lack of fault that an accused can show to defeat the offence.

21. The legislation must be examined for its purpose in deciding whether the legislature intended that any provision(s) in the Act was meant to be absolutely applied in respect of any purported breach of the offences.

22. In revenue offences, such as laws governing taxation and the provision of information to enable assessment of income tax to be made, it has been held that breaches are offences of strict liability to prevent a plethora of excuses that would defeat the proper assessment of those liable to taxation. See **IRD v Thomas** [1989] 13 TRNZ 697.

23. In legislation that is not exactly criminal but is more regulatory, it is more likely that offending will be held to be absolute, in order to protect the public interest or to protect the sovereign state either socially or financially.

24. The purpose of the Act is to impose regulate and control financial transactions, set up a Financial Intelligence Unit and to regulate money laundering within the borders of the jurisdiction. One of the easiest ways for money generated illegally to be brought into the national revenue is to smuggle it in through airports or sea ports and it is in the interests of anti money laundering that the provisions of Section 32(1) were enacted. The legislature would not have wanted any flexibility or to allow any excuse in the import of undeclared large sums of money and it is obvious that to this end the offence must be held to be one of **absolute liability** which would allow no defence whatsoever.

The Effect of the Decision on the Present Appeal

25. The decision of the learned Magistrate was heading in the right direction (she saw the need for strict enforcement of the financial regulation) but unfortunately she got a little lost on the way. She had decided that a defence of honest mistake was available but found also that it had not been made out to defeat the prosecution. She realized that the accused's situation did deserve much sympathy and for that reason convicted him but ordered that

the conviction not be recorded. The fine of $800 was lenient in the circumstances.

26. The Learned Magistrate has arrived at a correct result in this case but for the wrong reasons. She should have found that the offence is one of absolute liability and then made the lenient orders that she did.

27. The appeal is dismissed.

28. The appellant may appeal to the Court of Appeal within 42 days.

P.K. Madigan
Judge

At Suva
5 May 2014