MILICEVIC v. CAMPBELL AND THE COMMONWEALTH[1]

Constitutional Law — Validity of legislation — Trade and commerce power — Incidental powers — Importation of and the prohibition of importation of goods — Reasonable connexion with a subject matter within Commonwealth power — Constitution s. 51(i) — Judiciary Act 1903-1969 (Cth) s. 18 — High Court Rules 0.35 r. 2 — Customs Act 1901-1971 (Cth) ss. 233B(1)(ca), 233B(1B).

The case concerned a question referred to the Full High Court of Australia by way of a stated case under section 18 of the Judiciary Act 1903-1969 (Cth) and Order 35 rule 2 of the High Court Rules. The plaintiff claimed to be entitled to a declaration that the provisions of section 233B(1)(ca) of the Customs Act 1901-1971 (Cth) were invalid. He had been committed for trial for an offence against that section.

The section which was challenged provides that:

> (1) Any person who . . .
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> (ca) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act . . .
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> shall be guilty of an offence.

A defence to the above section is contained in section 233B(1B) which provides that:

> (1B) On the prosecution of a person for an offence against sub-section (1) of this section, being an offence to which paragraph (ca) of that sub-section applies, it is a defence if the person proves that the goods were not imported into Australia or were not imported into Australia in contravention of this Act.

The plaintiff's argument was to the effect that section 233B(1)(ca) fell outside the legislative power of the Commonwealth under section 51(i) of the Constitution (the trade and commerce power) because the wording used could apply to cover goods which had not in truth been imported. Importation was not made an element of the offence, the vital words around which the offence centred being "which are reasonably suspected of having been imported".

The Court, which in this case was constituted by McTiernan A-C.J., Gibbs, Mason and Jacobs JJ., decided the issue against the plaintiff without dissent, holding the section to be a valid law of the Commonwealth. However, their Honours differed in their reasons for so doing, and it is this which merits some consideration.

McTiernan A-C.J. decided the question on the ground that the words "which are reasonably suspected of having been imported into Australia" could not be supposed to be intended to apply to goods which had not

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[1] (1975) 6 A.L.R. 1; (1975) 49 A.L.J.R. 195. High Court of Australia; McTiernan A-C.J., Gibbs, Mason and Jacobs JJ. Menzies J. participated in the hearing, but died before judgment.

in fact been imported into Australia in contravention of the Act.[2] He considered there to be a reasonable connexion between the section impugned and the trade and commerce power, while not proceeding to explain the basis of such connexion.

Gibbs J. found that the section, if read alone and unqualified, would not be a law with respect to trade and commerce with other countries, or within the incidental area of the power, and would thus be beyond power.[3] However, he was of the opinion that the effect of section 233B(1B) of the Customs Act was to place the burden of proof on the accused person to establish that the goods were not imported, this being a permissible legislative technique. He held that in this way section 233B(1B) rendered section 233B(1)(ca) valid, on the basis that it then no longer purported to apply to goods which in fact were proved not to have been imported.[4]

Mason J. considered that in the result there was no relevant difference between the two provisions in issue (sections 233B(1)(ca) and 233B(1B)) and a provision which made it an offence for a person to have in his possession narcotics imported into Australia, and then cast onto the defendant the onus of proving that the goods were not so imported.[5] Further, he felt, without needing to decide the issue, that section 233B(1)(ca) might without the support of section 233B(1B) be ancillary and incidental to importation of goods, that is, to part of the trade and commerce power, having regard to "the importance of enforcing prohibitions prescribed against the importation of narcotic goods and the notorious difficulty of establishing the origin of particular goods".[6]

Jacobs J. held section 233B(1)(ca) on its own to be recognisably ancillary to the matter of importation, since in his view it gave practical effect to the purpose of preventing the presence of goods of the prohibited kind in Australia in view of the fact that reasonableness of the suspicion was a justiciable question, and that there was power to legislate, not only in respect of the act of importation but also in respect of its consequence, the presence of imports in the Australian community.[7]

A preliminary issue in the interpretation of section 233B(1)(ca) arose in relation to the meaning of the term "prohibited imports". Section 51 of the Customs Act defines them as "goods, the importation of which is prohibited under the last preceding section", namely, by regulation of the Governor-General. Apart from this fairly explicit provision, the recent case of *R.* v. *Bull*[8] supports the contention that there is no requirement that in order to come within the term the goods be actually imported. In that decision a majority held that goods could be "prohibited imports" within sections 231(1)(c) and 233B(1)(a) of the Customs Act without having been imported.

Had the words required actual importation to have occurred, the need

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[2] (1975) 6 A.L.R. 1, 4.
[3] *Id.* 8.
[4] *Id.* 9.
[5] *Id.* 11.
[6] *Id.* 12.
[7] *Id.* 13-14.
[8] (1974) 131 C.L.R. 203.

for proof thereof would have been implied, and the plaintiff's sole objection to the section would have been removed. But, as Gibbs J. pointed out,[9] such a requirement would render the offending words "reasonably suspected of having been imported" quite contradictory, and would remove the distinction between this section and section 233B(1)(c). In addition, section 233B(1B) would be unnecessary.

It was suggested by Gibbs J. that some other sections of the Act would be beyond power if the definition not requiring actual importation was applied to them.[10] Section 233(1)(d) for example provides that: "No person shall . . . (d) unlawfully convey or have in his possession any smuggled goods or prohibited imports or prohibited exports." Applying the definition under section 51, indigenous goods would not be excluded, yet the power over imports could not extend to them. As regards exports, the problem would appear even greater, since the corresponding requirement of actual exportation would, if fulfilled, put the possession of such goods out of Australia, and so is clearly inappropriate. Some element of *intention* to export would seem to be a necessary addition, in order to bring such a provision within power.

This view appears to be in conflict with that of McTiernan A-C.J., who stated without qualification that:

> It is a valid exercise of the legislative power incidental to the power granted by s 51(i) to make the possession in Australia, without reasonable excuse, of narcotic goods an offence punishable under the Customs Act 1901-1971. That clearly is an appropriate means of excluding narcotic substances . . . from the channels of trade and commerce with other countries.[11]

With respect, it is submitted that such an exercise of the legislative power could not be valid, for if it were, then all necessity for proof of importation or matters relating to exportation would be removed, wherever the onus might otherwise be cast. Accordingly, this suggestion seems quite opposed to the acknowledged substance at the root of the plaintiff's argument. A provision such as that proposed by McTiernan A-C.J. does not go to the centre of the power under section 51(i), for it operates on an act of possession, and not on an act of interstate or overseas trade directly. It could therefore only be justified if it were shown that that conduct was so relevant to the subject matter of the power that a law forbidding it was a law with respect to that subject matter: because a substantial connexion must be shown when the law is only to be held valid by virtue of its falling within the incidental area.[12] In *O'Sullivan* v. *Noarlunga Meat Ltd*[13] Fullagar J. held, in a decision which can still be considered to be the leading authority on this aspect, that:

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[9] (1975) 6 A.L.R. 1, 8. The point is also discussed by Mason J. *id.* 10.
[10] *E.g.* ss. 229(b), 233(1)(d) and 233(2).
[11] (1975) 6 A.L.R. 1, 3.
[12] *Herald & Weekly Times Ltd* v. *The Commonwealth* (1966) 115 C.L.R. 418.
[13] (1954) 92 C.L.R. 565.

> By virtue of [the trade and commerce] power all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth. . . . I would think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export.[14]

Although Fullagar J.'s statement there was made within the frame of reference of a positive export trade, its applicability need not be so limited. However, simple possession, unqualified by either intention to export, or proof or even reasonable suspicion of importation, is not one of the "acts or processes which can be identified as being done or carried out for export". The very element of identification is absent. There is nothing in the act of possession which inherently connects it with the acts of import or of export. A phrase such as "possession for export" would surely be a minimal requirement for the necessary indication as to the connexion with power.

At this point the ground for decision taken by Jacobs J. becomes relevant, since he held that a reasonable suspicion was sufficient to support the challenged provision under the trade and commerce power as a law relating to the consequence of importation, namely, the presence of imports in the Australian community, and as such, an aspect within the incidental area of the power. It is not to be denied that a law which relates to the possession of goods which have been imported or provides for their forfeiture is valid.[15] But the connexion with the power through the origin of the goods is basic to the validity of such a law. Jacobs J.'s view was that if a reasonable suspicion of importation was all that could be established, the provision could still be seen as a "control in aid of the power to prohibit imports and effectively to forbid the presence or use in this country of imported goods, the importation of which is prohibited".[16]

Mason J. was clearly in favour of this view also, although he did not base his judgment upon it. He said:

> The effective enforcement of prohibitions against the importation of narcotic goods may well be assisted by such a measure and if it so appears then it may well be that Parliament in the exercise of the power conferred by s 51(i) can select it as an appropriate means of enforcing those prohibitions.[17]

The argument against this view is that the mere desirability of a measure as a supplement to the effectiveness of provisions which the Commonwealth has power to enact does not of itself bring such a measure within power under the incidental area, if its effect is to extend

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[14] *Id.* 598.

[15] So held in *Irving* v. *Nishimura* (1907) 5 C.L.R. 233; *Hill* v. *Donohoe* (1911) 13 C.L.R. 224 and *Burton* v. *Honan* (1952) 86 C.L.R. 169, referred to by Gibbs J. in the case under discussion: (1975) 6 A.L.R. 1, 6.

[16] (1975) 6 A.L.R. 1, 13.

[17] *Id.* 12.

the area of power beyond that given in the Constitution by replacing proof of the existence of jurisdictional facts with the lesser requirement of reasonable suspicion as to their existence. To do so is not simply to widen the incidental power, it is to exceed the primary power itself.

McTiernan A-C.J. would apparently disagree with this argument also, as he saw the insertion of the section as "consequential upon the wide extension of the category of narcotic substances to which s 233B would apply after the commencement of the Customs Act (No. 2) 1971".[18] Gibbs J. was the sole judge who acceded to the validity of the plaintiff's argument in part. He put that argument at its best in stating it to be: "that the power of the Parliament to enact legislation similar to s 233B(1)(ca) is attracted only if the goods have in fact been imported: 'Nothing can be prohibited but what are in truth imports and imports are necessarily a subject of the power given by s 51(i)' (*Australian Communist Party* v *Commonwealth* (1951) 83 C.L.R.1 at 189 per Dixon J.)".[19] He agreed that it is possible that a suspicion, although based on reasonable grounds, may in truth be mistaken. The rule formulated by Dixon J., relating to a law within the centre of the power, could scarcely be less relevant when applied to a law in the incidental area.

The legislation in issue here does not depend for its connexion with constitutional power upon the opinion of the Governor-General or other law maker. Reference to executive discretion will normally render Commonwealth legislation invalid, if it is applied to connect the purported law with the head of power. However, the issue involved here is suggestive of a form of possibly related invalidity, since proof of reasonable suspicion is similarly not proof of the truth, whether it be required to exist in the mind of some person at the time when the possession charged is alleged to have occurred or to exist in the mind of the Court, and whether or not the reasonableness of the suspicion be a justiciable question.[20] It remains no more than a suspicion.

Gibbs J. decided against the plaintiff on the ground that the limitation of section 233B(1)(ca) by section 233B(1B) was sufficient to render the former valid. He discussed the position in relation to Parliament enacting laws prescribing rules of evidence as to the onus of proof in certain subject matters, and referred in particular to the case of *Williamson* v. *Ah On*,[21] which held valid a provision of the Immigration Act 1901-1925 (Cth) which placed on a person charged with being a prohibited immigrant the burden of proof, by specified means only, that he was not an immigrant. That case had received criticism from Dr Wynes,[22] whose primary objection to the decision was quoted by Gibbs J.:

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[18] *Id.* 3.

[19] *Id.* 7.

[20] As found by Jacobs J., (1975) 6 A.L.R. 1, 13, and also discussed by Mason J. *id.* 12.

[21] (1926) 39 C.L.R. 95.

[22] Wynes, *Legislative, Executive and Judicial Powers in Australia* (4th ed. 1970) 124-125.

> It is true that Parliament may regulate the burden of proof; but it is another thing to say that proof of facts which go to the root of the existence of federal power shall be given only in a certain way and that, no matter how strong the evidence may be, no matter how unmistakably and clearly it may be shown that the person charged does not come within the area of legitimate Commonwealth power, yet he shall be treated as coming within it.[23]

In section 223B, no express limitation on proof is applied, and Gibbs J. saw the decision in *Williamson* v. *Ah On* as "authority for the proposition that, speaking generally, the Parliament may validly place upon an accused person the burden of proving any fact in issue, even a fact that, when established, shows not only that the law does not apply to the case but that it could not validly have been applied".[24] Dr Wynes went on to say however that "Parliament cannot, by enacting away any portion of the proof of the existence of the necessary act of immigration, give itself legislative power over something which is not immigration".[25] He saw no valid distinction between a legislative assertion of a power *simpliciter*, as in the *Communist Party Case*[26] and a provision asserting a power in the absence of evidence of a specified character upon the very fact on whose existence the power depends.[27]

While it may be conceded that no express restrictions on the form of proof are imposed in the present legislation in issue, it may perhaps be argued that, in relation to constitutional facts, a reversal of the onus of proof ought not to be possible, for the reason that established rules of evidence may well prevent a defendant from proving in court that the goods were not in fact imported, or alternatively, he may have no knowledge whatsoever as to their origin. In either event the legislation would have the result of deeming the goods to have been imported and could in fact be operating upon indigenous goods; that is to say, positive proof of applicability cannot be dispensed with. However, it does not appear that this argument was accorded consideration by any of the justices in the present case.

Mason J. also saw no objection to a provision casting the onus of proof onto the party who seeks to deny the existence of a certain fact beyond which the scope of the legislative power does not extend. He found support for his view in the judgment of Dixon J. in *Orient Steam Navigation Co. Ltd* v. *Gleeson*,[28] and in rather unsubstantiated dicta of Evatt J. made in *R.* v. *Hush; ex parte Devanny*.[29] Dixon J. in the former case had held that the onus of proof was a mere matter of procedure "[u]pon such matters, falling as they do within the subject over which the Commonwealth has power . . .",[30] but it could be protested that

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[23] (1975) 6 A.L.R. 1, 9-10.
[24] *Id.* 10.
[25] Wynes, *op. cit.* 125.
[26] (1951) 83 C.L.R. 1.
[27] Wynes, *op. cit.* 125-126, fn. 43.
[28] (1931) 44 C.L.R. 254, 262-263.
[29] (1932) 48 C.L.R. 487, 512 to the effect that the very nature of the subject matter might warrant a reversal of onus of proof.
[30] (1931) 44 C.L.R. 254, 262-263.

this appears to beg the question, and to dispense with the need for proof at all if the issue over which proof is required, as to whether the matters do fall within power, can be so predetermined. McTiernan A-C.J. took in effect a similar view in relation to section 233B(1B) to those of Gibbs and Mason JJ., but denied any necessity for reliance on *Williamson* v. *Ah On*. Jacobs J. commented that this defence would presumably be available even in the absence of its express enactment. This seems somewhat of a contradiction in the judgment of Jacobs J., in view of his previous finding that section 233B(1)(ca) would be a valid enactment without the support of section 233B(1B) since on that basis an offence would arise upon the prosecution showing the existence of a reasonable suspicion in relation to the goods. The only defences to such an offence would appear to have been that either such a suspicion was not in fact reasonable, or that it was not in fact held. The fact of importation would not seem to be an issue in relation to such an offence, and thus the offence could involve non-imported goods.

While the consequences of this decision in relation to the particular legislation involved are possibly not great, its precedent value may be significant if it is seen to approve legislation which may encompass matters beyond the scope of constitutional powers. There are serious objections to the Commonwealth assuming power over such matters (with or without a reversal of the onus of proof), and then requiring a subject to either submit thereto or to prove that he is in fact outside the valid scope of the legislation. It is submitted that the maxim *ei incumbit probatio qui dicit, non qui negat* cannot be discarded for the convenience of the Commonwealth, and that the Commonwealth should be constrained within the limits of its constitutional powers, notwithstanding that those powers may extend over a wide incidental area.

JOANNA FEATHERSTON*

ATTORNEY-GENERAL FOR AUSTRALIA (AT THE RELATION OF McKINLAY) AND OTHERS v. THE COMMONWEALTH AND OTHERS[1]

Constitutional law — Electoral distributions — Constitution ss. 24-30 — Commonwealth Electoral Act 1918-1975 (Cth) — Representation Act 1905-1973 (Cth) — Relevance of U.S. Supreme Court interpretation of Article 1 Section 2 of the U.S. Constitution.

In *McKinlay's* case three actions were consolidated into one. In the first of these, the Attorney-General for Australia (at the relation of McKinlay) sought against the Commonwealth and the Chief Electoral

* B.A./LL.B. (A.N.U.).

[1] (1975) 7 A.L.R. 593. High Court of Australia; Barwick C.J., McTiernan, Gibbs, Stephen, Mason, Jacobs and Murphy JJ.