

IN THE COMMONWEALTH INDUSTRIAL COURT

In the matter of the *Stevedoring Industry Act* 1956-1966

and of

THE AUSTRALIAN STEVEDORING INDUSTRY AUTHORITY

Informant

v.

PATRICK STEVEDORING COMPANY PTY LIMITED

Defendant

(B Nos 209 and 210 of 1970)

Breach of Act—Failure of registered employer to ensure that stevedoring operations for which it had engaged waterside workers were expeditiously, safely and efficiently performed—Failure to ensure that the performance of stevedoring operations was at all times properly supervised—Imposition of more than one conviction on charges arising out of the same set of circumstances—Stevedoring operations performed on goods in the course of trade with another country—Judicial notice—Penalty—Costs—Stevedoring Industry Act 1956-1966 ss. 7 (3) (a), 33 (1) (b), (c) (i).

On 7 April 1970 summonses were filed on behalf of the Australian Stevedoring Industry Authority calling up Patrick Stevedoring Company Pty Limited, being a registered employer within the meaning of the *Stevedoring Industry Act* 1956-1966, to answer charges that on or about 25 September 1969 at the port of Port Kembla it did not ensure that as far as practicable stevedoring operations on the ship *Good Faith*, for which it had engaged waterside workers were expeditiously, safely and efficiently performed and that the performance of stevedoring operations was at all times properly supervised, contrary to the provisions of section 33 (1) (b) and (c) (i) of the said Act.

The matters came on for hearing before the Court (Joske J.) in Sydney on 28 April 1970.

J. F. Dey, of counsel, for the informant.

W. E. Reddy and J. Blackman, of counsel, for the defendant.

On 1 June 1970 the following judgment was delivered:

The defendant is charged with having committed two offences against section 33 of the *Stevedoring Industry Act*. It is charged under sub-section (1) (b) thereof that it committed a breach of the requirement that it shall ensure that the performance of stevedoring operations by waterside workers engaged by it is at all times properly supervised, and under sub-section (1) (c) (i) which requires that it shall ensure as far as practicable that stevedoring operations for which it has engaged waterside workers are expeditiously, safely and efficiently performed.

On 25 September 1969 the defendant was carrying out stevedoring operations on a vessel known as the *Good Faith* at Port Kembla. Evidence was given by Derek Robert Grimmer, then the local representative of the Australian Stevedoring Industry for the port of Port Kembla, that on that day he went aboard the *Good Faith* and as he approached number 2 hatch he saw a waterside worker named Bailey and a foreman named Bedwell standing together talking.

Bailey was smoking a cigarette. Grimmer said to Bailey, 'Don't you know you should not be smoking over the hatch', and pointed out the No Smoking sign to them which was immediately behind their position. Bailey replied that the no smoking rule only applied in respect of the hold.

1970.
SYDNEY,
April. 28;
June 1.
—
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Grimmer said 'It is dangerous to smoke over an open hatchway'. Bailey then moved to the ship's side and extinguished his cigarette and proceeded down below on the ladder at the forward end of the hatch. Bailey had been half seated two feet from the open hatchway. Open type bales and flax waste were being discharged from the hatch at the time. The whole of the top deck of No. 2 hatch was open. The no smoking sign was about 10 feet away from Bailey.

Grimmer subsequently had a conversation with Bedwell who said, 'I am allowing them to smoke on deck'. Grimmer said, 'Don't you know it is a dangerous practice to smoke over a hatch, particularly with this type of cargo'. Bedwell agreed that this was so. Bedwell was the only supervisor on the vessel.

Grimmer also deposed that at about 11.45 a.m. the workmen commenced leaving the vessel, although their meal break was from 12 noon to 12.30 p.m. This was due to the fact that there was no road truck available to cart the slings away. Grimmer said they could have been employed making up further slings ready for discharge once road transport became available.

In cross-examination Bailey was asked to assume that the gang of 11 men. then engaged in the operation, moved 200 bales of the cargo up to the termination of the noon shift. On this assumption Bailey was questioned at some length as to whether this was a high rate of discharge. But although this was all a matter of assumption and no evidence was called as to what was the rate of discharge on 25 September, it was finally put to the witness that the rate of discharge that day was a high rate and the witness said that it was higher than the average figure achieved.

Then in his submissions counsel put it thus:

'Your Honour will recall that Mr Grimmer accepted that there was a high rate of discharge of cargo that day.'

All this was entirely misleading. There was no evidence as to what was the rate of discharge and counsel's submission is entirely incorrect. The whole debate was based on the original assumption. Counsel tendered no evidence to show the assumption was correct.

Raymond John Knowles, the branch manager of the respondent company, pursuant to subpoena *duces tecum* to produce documents in his custody, care or control which showed or evidenced the port of origin of the cargo discharged from the vessel *Good Faith* at port Kembla on 25 September 1969 produced a bill of loading from the Far East Enterprise (H.K.) Limited in relation to goods shipped on board the *Good Faith* and consigned to Port Kembla and shown as flax waste, and an export freight manifest from China Ocean Shipping Agency in relation to goods on the *Good Faith* from Hsinking to Port Kembla showing flax waste. These documents and the subpoena were put in evidence as part of the informant's case.

The defendant called Bedwell and Bailey as witnesses. I accept the evidence of Mr Grimmer and I do not accept the evidence of the defendant's witnesses.

The first submission made on behalf of the defendant was that both charges arose out of the same set of circumstances and for that reason there could not be convictions on both charges. It was put that the informant should be required to elect upon which charge he wished to proceed to conviction. Alternatively, it was submitted that in any event, if the informant obtained a conviction on one charge, the other charge should be withdrawn and only one penalty be imposed.

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Mr Dey for the informant submitted the view that there may be more than one conviction where different offences arise out of the same set of circumstances. He cited *Australian Stevedoring Authority v. Burns Philp*⁽¹⁾ before Kerr J. which was a case under the *Stevedoring Industry Act* and there were three convictions and three penalties imposed although the three offences arose out of the same set of circumstances.

It would seem that the point now taken was not taken before Kerr J., but I am not prepared to assume that it was not present to His Honour's mind and that he had not satisfied himself that it created no difficulty. In another case before Kerr J. cited to me, after conviction on one charge a second charge was withdrawn, as has in the alternative been suggested to me should be done in the present instance.

The contention that where the facts relied upon are the same in each case there cannot be more than one conviction is not a novel contention and has on a number of occasions been rejected. Thus in *Connelly v. Director of Public Prosecutions*⁽²⁾ it is put that it is immaterial that the facts under examination are the same as those in earlier proceedings and it is pointed out⁽³⁾ that for a plea such as *autrefois* acquit or *autrefois* convict to succeed the two offences must be the same offence both in fact and in law. In *R v. Barron*⁽⁴⁾, a plea that the facts relied upon were the same on two trials was rejected, since the offences charged were not the same. In *Sherwood v. Spencer*⁽⁵⁾ the contention that the defendants when they were charged upon the second occasion had already been convicted of another offence upon substantially the same facts was rejected.

It is also clear from *Li Wan Quai v. Christie*⁽⁶⁾ that although the facts relied on are the same in both prosecutions this is not a defence where the charges are different. It was stated quite clearly that in order that a previous conviction or discharge can be a bar to subsequent proceedings the charges must be substantially the same. It was also stated that the true test whether such a plea is a sufficient bar in any particular case is whether the evidence necessary to support the second charge would have been sufficient to support a legal conviction upon the first. No doubt this was an adequate test in the circumstances of this case, but it has been pointed out that there are cases where it is not applicable and it is not to be regarded as a broad proposition necessarily covering all cases (see *R. v. Cleary*⁽⁷⁾; *Tucker v. Noblet*⁽⁸⁾.)

It is now considered that to establish a plea of *autrefois* acquit it must be shown either that the defendant had been previously acquitted of the same offence or could have been convicted at the previous trial of the offence with which he is subsequently charged or that the two offences are substantially the same (*R. v. Barron*⁽⁹⁾; *Tucker v. Noblet*⁽¹⁰⁾; *R. v. McNichol*⁽¹¹⁾ *ex parte Horner Re McElligitt*⁽¹²⁾).

This however, does not affect the position previously adverted to. As was said by the Court of Criminal Appeal in *R. v. Thomas*⁽¹³⁾:

'It is not the law that a person shall not be liable to be punished twice for the same act; it has never been so stated in any case . . . Not only is it not the law that a person shall not be punished twice for the same act, but it never has been the law.'

It is true that there is the principle of interpretation that:

'Where in the one Act or in two Acts dealing with the same subject matter two provisions which overlap in terms are found, the one being general in terms and the other dealing with a special class of case, the general rule of interpretation is that the special

⁽¹⁾ *Infra* p. 1179 ⁽²⁾ (1964) A.C. 1254 at p. 1306 ⁽³⁾ *Ibid* at p. 1339 ⁽⁴⁾ (1914) 2 K.B. 570 at p. 576
⁽⁵⁾ 2 C.L.R. 250 at p. 251 ⁽⁶⁾ 3 C.L.R. 1125 at p. 1131 ⁽⁷⁾ (1914) V.L.R. 571 at p. 575 ⁽⁸⁾ (1924) S.A.S.R. 326 at pp 332, 333 and 339 ⁽⁹⁾ (1914) 2 K.B. 570 ⁽¹⁰⁾ (1924) S.A.S.R. 326 ⁽¹¹⁾ (1916) V.L.R. 350
⁽¹²⁾ (1933) 50 W.N. (N.S.W.) 158 ⁽¹³⁾ (1950) 1 K.B. 26 at p. 31

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provision, as to cases to which it applies, overrides the general provision. Parliament is taken prima facie to intend that the special provision is to cover the special case to the exclusion of the general provision.'

per Fullagar J. in *Bergin v. Stack* (1953)⁽¹⁾. This, however, has not application here.

Accordingly the submission that since both charges arise out of the same set of circumstances and so there can only be one conviction is bad in law and fails. The charges are in relation to separate offences though they arise out of the same set of circumstances.

The second submission on behalf of the informant was that before stevedoring operations are attracted by section 37 of the Act, in terms of section 7 (3) (a) the operations are to be performed on goods that are in the course of trade or commerce with other countries and that this has not been established.

It was said that the bill of lading shows the place of shipment as Hsinkang, and the place of destination as Port Kembla. Against this, it was said on behalf of the defendant that it was not the defendant's document; it was marked with the word 'Copy'; the defendant is not named in it, and it did not identify the goods being discharged from the ship.

The informant said, in reply to this, that it was a document produced on behalf of the defendant, being a document in its possession, in answer to a subpoena to produce documents in the care, custody and control of its manager, which showed the port of origin of the cargo discharged from the *Good Faith* on the day in question. It shows the goods as including flax waste, which were the goods being discharged, and it is the authority the defendant possessed to discharge the goods.

It appears to me that the effect of producing the bill of loading in answer to the subpoena, worded as it was, shows that the defendant was engaged in discharging goods which it must have known were shipped from Hsinkang. The printed word 'Copy' does not to my mind, in the circumstances, indicate that the document produced was other than a genuine, operative document. There is only one bill of loading, though it may be represented by different parts.⁽²⁾

Bills of loading are usually issued in a set and numbered. The bill of loading in question is numbered one. Where no transferee is named in a bill of loading, the goods are deliverable to bearer (*Sewell v. Burdick*⁽³⁾), and the defendant was the bearer having regard to the answer to the subpoena.

Apart from internal evidence in the shipping documents, no evidence was led as to where this port is and whether it is in a country outside Australia. The question is can the court take judicial notice that it is outside Australia. Courts are entitled to take notice of matters of common knowledge and experience open to all which can be verified by reference to standard works and the like sources.

Certain cases show that a court can take judicial notice of places in Australia. It seems to me to follow from this that, if a Court can take judicial notice of the places in Australia, it follows that other places are outside Australia and it can take judicial notice of this, also. It is true that, in *Dutch Commercial Society v. De Young*⁽⁴⁾ it was said that the court does not take notice of the situation of places, which was a matter for proof. However, this view has not been followed. In *Clifford v. Kearney*⁽⁵⁾, judicial notice was taken that Parrakie is in South

⁽¹⁾ 88 C.L.R. 248 at p. 270 ⁽²⁾ *Halsbury's Laws of England* (Third Edition) Vol. 35, p. 345 ⁽³⁾ (1884) 10 A.C. 74 at p. 83 ⁽⁴⁾ (1856) 1 V.L.T. 159 ⁽⁵⁾ (1920) S.A.L.R. 294

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Australia. In *Sherwood v. Haccles*⁽¹⁾ it was held that the court could take judicial notice that Sydney was in New South Wales. In *Pera Te Hikumata v. Tucker* (1894)⁽²⁾, judicial notice was taken that Dunedin is more than 200 miles from Gisborne.

The court has also taken judicial notice as to the situation of places outside its jurisdiction. Thus, in *Cooke v. Wilson*⁽³⁾ judicial notice was taken that Geelong, in the colony of Victoria, was outside England. In *Hough v. Ah Sam* (1912)⁽⁴⁾ the evidence relied on as to importation of goods was the statement of the defendant 'Singapore man bring it from steamer' or 'From Singapore, man bring it from steamer.'

Griffith said:

'The magistrate sitting at Fremantle was, I think, entitled to take notice of the fact that ships trade from Singapore to Fremantle.'⁽⁵⁾

This may suggest that the Fremantle magistrate was entitled to rely on local knowledge, but the difficulty as to that suggestion is that Singapore was not within the magistrate's locality. Barton J. makes no such limitation. After referring to the defendant's alternative statements quoted above, he says:

'It does not matter which is the actual expression, because either points in only one direction, that is to say, that the opium came from Singapore, and that a man brought it ashore from the steamer, or, that a Singapore man brought it ashore from the steamer. In either case, if that is a true confession, the opium was imported.'

It would seem that Barton, J. took judicial notice that Singapore is overseas and also that a statement by the accused as to the origin of the goods, if accepted as true, is admissible in proof.

The most recent reference which I have found is *Clerk Equipment Company v. Registrar of Trade Marks* (1964), where Mr Justice Kitto says:

'Michigan is the name of a State of the United States of America . . . It is a matter of common knowledge, of which I take judicial notice, that in the State there are important manufacturing centres.'⁽⁶⁾

Having regard to these authorities, I consider I am entitled to take judicial notice that the port in question is outside Australia. It also seems to me that that is a proper inference from the shipping documents. Accordingly, I find that the goods were goods in the course of trade or commerce with other countries, and that the defendant's second legal submission fails.

I am satisfied that both charges have been established.

I am quite satisfied that there were serious omissions, and that, as far as the charge relating to expeditiously, safely and efficiently performing the work on the day in question, that charge has been substantiated, and that there should be a substantial penalty for breach of the provision of the Act.

As I have said on previous occasions, this is an Act which provides high safety provisions for the protection of waterside workers, and that the obligation is on the employer—the stevedores, in this instance—to make sure that the obligations which the Act provides are carried out.

The penalty in this case which I propose to impose is a penalty of \$1,250, and there will be that order, together with the costs of the proceedings, made against the defendant.

The other charge (B No. 210 of 1970) will be withdrawn.

Solicitor for the informant: *B. J. O'Connor*.

Solicitors for the defendant: *John White and Co.*

⁽¹⁾ (1904) 21 W.N. (N.S.W.) 61 ⁽²⁾ 12 N.Z.L.R. 368 ⁽³⁾ (1856) 1 C.B.N.S. 153, 140 E.R. 65 ⁽⁴⁾ 15 C.L.R. 452 ⁽⁵⁾ *Ibid* at p. 455 ⁽⁶⁾ 111 C.L.R. 511