Vilaisonah v Hilton [2009] NTSC 28

PARTIES:	KOVIT VILAISONAH v EMMA HILTON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 13 of 2009 (20809138)
DELIVERED:	25 June 2009
HEARING DATES:	25 May 2009
JUDGMENT OF:	MILDREN J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – appeal – importation of prohibited imports – s 233 Customs Act 1901 (Cth) – honest and reasonable mistake of fact as to what was being imported – whether appellant's evidence plausible – onus on Crown – no cross examination on issues resulting in adverse findings by Court – whether resulted in perverse or unfair findings – whether Court could take judicial notice of foreign laws – whether sex trade in Thailand relevant – appeal allowed – conviction quashed – verdict of not guilty

Criminal Code (Cth) s 9.2, s 9.2(2), s 13.1(2), s 13.2, s 13.3, s 13.4, s 411(2)
Customs Act 1901 (Cth) s 233(1)(b), s 233(1AA), s 233(1AB)
Justices Act s 177(1)
Supreme Court Rules (NT) O 83.16(3)

Cross on Evidence, 4th Aust ed, Butterworths, Sydney, 1991- (loose-leaf edition)

Holland v Jones (1917) 23 CLR 149; *R v Ofori (No 2)* (1994) 99 Cr App R 223; *Saxby v Fulton* [1909] 2 KB 208 at 211; followed

Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation [1983] 1 NSWLR 1 at 26; (1983) 44 ALR 607; *Browne v Dunn* (1893) 6 R 67 (HL); *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546; *Poricanin v Australian Consolidated Industries Ltd* [1979] 2 NSWLR 419; *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362; referred to

REPRESENTATION:

Counsel:

Appellant:	J Lawrence
Respondent:	C Wyatt

Solicitors:

Appellant:	Pipers
Respondent:	Commonwealth Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	18

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Vilaisonah v Hilton [2009] NTSC 28
No. JA 13 of 2009 (20809138)

BETWEEN:

KOVIT VILAISONAH
Appellant

AND:

EMMA HILTON
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 25 June 2009)

Background

[1] This is an appeal against conviction by the Court of Summary Jurisdiction.

[2] The appellant was charged with two counts of importing prohibited imports, contrary to sub-ss 233(1)(b) and 233(1AA) of the Customs Act 1901 (Cth). Count 1 related to the importation of films of an abhorrent nature in such a way as to offend against the generally accepted standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be imported. Count 2 related to the importation of films that describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who appears to be, a child under 18.

The appellant pleaded not guilty to both charges. There was no dispute at trial that the films met the criteria of being prohibited imports within the meaning of the relevant provisions of the Act. The appellant's defence was that, although these are strict liability offences,[1] the appellant was excused from criminal responsibility because he made an honest and reasonable mistake of fact (mistake) about the content of the films he was importing.[2] It is not in dispute that once mistake is raised, the burden of proving that there was no mistake within the meaning of s 9.2 of the Criminal Code (Cth) rests on the prosecution.[3] The standard of proof is beyond reasonable doubt.[4]

[3] Certain basic facts are not in dispute. The appellant is a 47 year old Thai citizen who resides in Australia on a working visa. The charges and convictions arose from the finding, on 3 March 2008, at Darwin Airport, that the appellant had, in the main section of one of his bags, two plastic bags which contained a total of 65 DVDs. Within those DVDs were 10 which were prohibited imports. The appellant had arrived in Darwin from Singapore on Tiger flight TR702. He had filled out his Incoming Passenger Card and stated that he had in his luggage both medicines and herbs.

[4] Upon searching his bags, the DVDs were found by customs officers. The appellant was asked to whom they belonged. He admitted that they were his. He was asked where the DVDs were from. He said Thailand. He was

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[1] See sub-s 233(1AB).
[2] See s 9.2 of the *Criminal Code* (Cth).
[3] *Criminal Code* (Cth) s 13.3, s 13.4, s 13.1(2).
[4] *Criminal Code* (Cth) s 13.2.

asked who they were for. He said himself. He was asked whereabouts did he buy them. He said in a shop. He was asked how much they cost. He said he did not know.

[5] Some of the DVDs were taken and viewed by another Customs Officer who considered that they contained prohibited material. All 65 DVDs were then seized, 10 of which became the subject of the two charges.

[6] Ten days later, pursuant to a search warrant, Customs Officers searched the appellant's home and person and seized a number of things, including more DVDs. Nothing seized on this occasion has ever been made the subject of charges. He was arrested and taken to the Darwin Watch House and formally interviewed with the assistance of an interpreter. The prosecution did not lead evidence of the record of interview at the trial, at which the appellant gave evidence.

[7] The appellant's evidence at trial was to the effect that he bought the DVDs from a shop in a shopping centre at Bangkok where he had previously purchased X rated videos. His evidence was that he intended to purchase only X rated videos as he had done before, that on previous occasions he had not been supplied with videos containing offensive material and that this purchase followed the same pattern as before, in that the shop did not have them in store and it was necessary for him to return to the shop later to pick them up. Having bought the DVDs, he did some shopping, returned to his room and counted the DVDs by merely looking in the bag and counting them

with his fingers. His flight left Bangkok in the morning. He believed that the DVDs were X rated. He had no intent in obtaining offensive material of the kind the subject of the charges. It will be necessary to refer to the appellant's evidence in more detail later.

[8] The learned Magistrate found that the appellant's evidence raised mistake and that it was incumbent upon the prosecution to disprove it beyond reasonable doubt. His Honour delivered written reasons for his judgment. In short, he found that the purchase on this occasion was not substantially the same as on the previous occasions that he had purchased DVDs from the same shop, that the appellant did not honestly and reasonably believe that the circumstances were the same,[5] that the appellant did not believe that the DVD he had purchased, the subject of the charges, were only X rated DVDs and, alternatively, that even if he did hold such a belief, it was not reasonable in the circumstances.

The Grounds of Appeal

[9] The grounds of the appeal are:

> "1. Having regard to the evidence the learned Magistrate's finding[s] of guilt [were] unreasonable.[6]
>
> 2. The learned Magistrate erred in law in excluding beyond reasonable doubt the reasonable hypothesis consistent with

[5] The relevance of this finding is s 9.2(2) of the *Criminal Code* (Cth).
[6] The Notice of Appeal uses the singular rather than the plural.

innocence which was established by the sworn[7] evidence of the appellant in the absence of any other evidence.

3. The learned Magistrate made findings rejecting the Appellant's sworn evidence on bases that were not put to the Appellant by the Respondent in cross examination.

4. The learned Magistrate erred in law by finding that previous transactions attested to were not "substantially the same" as the subject transaction.[8]"

A Preliminary Matter

[10] The learned Magistrate specifically found that the appellant's evidence was sufficient to raise, evidentially, mistake as an issue. At the hearing of the appeal, counsel for the respondent, Ms Wyatt, sought to argue that there was no such finding. When I pointed out the learned Magistrate's finding at para [69] of his Honour's written reasons, she then sought to argue that this finding was wrong. Neither of these contentions was raised in Ms Wyatt's written outline of submissions.

[11] Order 83.16(3) of the Supreme Court Rules requires a respondent to an appeal to file a notice of contention in these circumstances. This was not done and Mr Lawrence said that he was taken by surprise and had not come prepared to argue that matter. I gave Ms Wyatt the opportunity of an adjournment to file a notice of cross appeal (it should have been more correctly a notice of contention), but she declined the invitation and elected

[7] In fact the appellant was affirmed. Nothing turns on this.
[8] Ground 4 was added by leave at the hearing of the appeal.

to abandon that argument. The matter has therefore proceeded before me on the basis that the learned Magistrate's finding on that issue is correct.

The Grounds of Appeal

[12] It is convenient to deal with all of the grounds together as they overlap considerably.

[13] The appellant's counsel, Mr Lawrence, at the hearing of the appeal submitted that the learned Magistrate made findings of fact adverse to the appellant on maters which were not the subject of cross examination or submissions by the prosecutor at trial. In essence Mr Lawrence complained that the verdict was unreasonable and that the appellant was denied natural justice. No authorities were cited by either counsel on this issue, but plainly Mr Lawrence was relying on the rule in *Browne v Dunn*[9] and the line of cases which flow from it, to the effect that, if a Court makes findings adverse to a party based upon matters not properly raised in cross examination of the party's witnesses, the Court's decision is liable to be set aside as a wrong finding of fact, or a perverse finding, or unfair.[10] However, there are exceptions to the rule; for example where a witness' evidence is a "so incredible and romancing a character that the most effective cross

[9] (1893) 6 R 67 (HL).
[10] *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1 at 26; (1983) 44 ALR 607 at 633-634; *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 370-371; *Poricanin v Australian Consolidated Industries Ltd* [1979] 2 NSWLR 419 at 426.

examination would be to ask him to leave the box";[11] and there are many other exceptions.[12]

[14] During the trial, all of the DVDs seized were tendered in evidence, including the ones not the subject of the charges. Some of the DVDs which formed the subject of the charges had "foreign writing" on them in the Thai language on the discs and covers. Evidence was given by an interpreter, Mr Rerksirathai, as to what was written on them. The writing and pictures on seven of the DVDs, the learned Magistrate found, "would have raised a real concern in any reasonable person that they may contain offensive material and/or child sex material" and 21 of them had no cover or words to indicate what any of the contents may have been. His Honour described the DVDs as follows:

> "In the instant case, none of the DVD's were packed in hard plastic cases as one would normally purchase such items from a legitimate source. Further, none of them were sealed in plastic as one would also expect if purchasing from a legitimate source. They generally appeared to be films that were copied onto readable CD's. They gave the appearance of being 'bootleg' or 'backyard' cheap copies. Those that did have covers comprised of a single sheet of paper which was with the CD in a plastic bag. Some of the DVD's had pictures or words written on them as well but most didn't."

[15] The appellant's evidence at trial was given through an interpreter. He said that when he picked up the DVDs from the shop, they were in a plastic bag.[13] He did not look at them in the shop. After that he went shopping to

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[11] *Browne v Dunn* (1993) 6 R 67 (HL); *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 560.
[12] See generally *Cross on Evidence*, 4th Aust ed, para [17445].
[13] Later it became apparent that there were two bags.

buy some clothes before returning to an apartment where he was staying with his sister and three male friends. When he got back to the apartment he counted the DVDs, using his fingers, without taking them out of the bag and then packed them in his backpack. He said he caught the plane the next day.

[16] In cross examination he was asked by counsel:

> "Q: you said that you went into a shop in Thailand and asked for X movies, is that right? --- Yes, that's right.
>
> And when you asked for those movies did you ask for specific actors in those movies?
>
> HIS HONOUR: Specific what, sorry?
>
> MS COOPER: Actors? --- Yes, I asked for the X films of Thai and Japanese performers.
>
> Did you ask for specific titles? --- No.
>
> You said that you made your order for the X movies and then you returned to the shop two hours later, is that right? --- That's right.
>
> So is it fair to say you made a special order? --- Yes.
>
> But you didn't look at what you specially ordered? --- No, I didn't look at them.
>
> And you left first thing the following morning, is that right? --- That's right.
>
> You didn't have any opportunity to return them? --- That's right.
>
> And the salesman told you he gave you some extras for free, is that right? --- Yes.

You didn't look at what you had been given for free, had you? --- No, I didn't look at them.

Did you notice the blank discs you'd been given? --- No, I didn't know that.

So you didn't know what you'd got on those discs? --- No, I didn't know.

And you didn't check the discs? --- I only counted them but I didn't check, I didn't see them what they are.

So you don't know if you'd got what you specially ordered? --- Usually when I order things I got what I ordered.

But you didn't check if you'd got what you ordered, did you? --- That's right. I didn't check in details.

Did you check at all? --- What do you mean by that? You mean by opening them and looking at them?

Well, checking you got what you ordered? --- I only counted – checked and counted the numbers that I ordered, whether it's exactly as I ordered or not.

So you didn't check if you had been given films of Thai and Japanese performers? --- I didn't look at them because I didn't have time, I have to go home and pack things.

And you packed those DVDs into your baggage, is that right? --- Yes, I put my clothes in first and then put the DVDs, the bag of DVDs in.

Both bags of DVDs? --- Yes.

Did you see any of the titles to the DVDs? --- No, I didn't look.

Not when you were counting? --- No, I just used my fingers to count.

> You didn't see any of the covers? --- No.
>
> But you knew that all the discs contained X movies, is that right? --- Yes. Yes, I think so.
>
> And you knew that you had some extras as well? --- Yes, because the salesperson told me that."

[17] Apart from asking the appellant whether he could speak and read Thai, and some questions confirming that he bought the DVDs into Australia in his luggage, that was the extent of the cross examination.

[18] In para 48 of his reasons, the learned Magistrate said that he did not accept the appellant's explanation that he did not have time to check or look at the DVDs:

> "I find that this is simply not plausible or truthful. If he said that he was a bit embarrassed and therefore did not want to inspect his purchases in the shop, then I could have understood that. But he did not say this or offer this as any part of his thinking. If he had said that he was a bit embarrassed and did not want his travelling companions to know about his purchase, then I could have understood this. But he did not say this, or offer this as any part of this thinking. On his own evidence he went to buy some clothes after collecting the DVD's before going back to the apartment. I was not told what time he got back to the apartment, nor was I told what time he had to leave the apartment in order to get to the airport. It wasn't suggested in his evidence that he was running late for his plane and had to rush to the airport. In my view he had ample opportunity to look at his purchase before deciding whether to pack it all to bring into Australia."

[19] It was submitted that the learned Magistrate was wrong to have rejected the appellant's evidence because no cross examination was directed to any of the matters referred to in this paragraph. Bearing in mind that the burden of

proof had shifted to the Crown there is force in this submission. At no stage did the learned Magistrate rely on the appellant's demeanour in rejecting his evidence. If the Crown had wanted to challenge his evidence that he did not have time to check or look at the DVDs, the prosecutor should have cross examined him on this issue. The appellant may have had an explanation for all we know. In fact the explanation that he had no time seems to be a reference to the time when he was still at the shop, which apparently was about to close. Why he did not take them out of the bags and look at them before putting them in his backpack at the apartment was not explored at all.

[20] The learned Magistrate rejected the appellant's evidence that he did not look at or peruse any of the DVDs that he had purchased before packing them for bringing to Australia because he found "this to be so implausible as to be not acceptable as a statement of truth". Later in his reasons, his Honour said that if he was wrong in his conclusion, he was satisfied beyond all reasonable doubt "that any such belief (which I do not find he actually held)" was not reasonable. There was no cross examination directed towards whether or not he in fact believed that, of the 65 DVDs, none of them contained offensive material. The learned Magistrate's comment in parenthesis suggests that the burden of proof had been inverted in his mind. The appellant did not have to prove on the balance of probabilities that he held the belief; it was up to the Crown to prove that he did not hold such a belief beyond reasonable doubt. Of course an explanation can be so implausible that, notwithstanding that it is not challenged in cross

examination, the trier of fact is entitled to reject it. But I have difficulty in accepting that his evidence was implausible, or at least so implausible that it should in fairness have been rejected when it was not cross examined upon.

[21] The second limb of the learned Magistrate's reasons for finding that the prosecution had discharged its burden of proof on the question of whether he had a mistaken belief was his Honour's finding that the Crown had proved that s 9.2(2) did not apply. That sub-section is in the following terms:

> "A person may be regarded as having considered whether or not facts existed if:
>
> (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
>
> (b) he or she honestly believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion."

[22] The essence of the appellant's evidence at trial was that he had on four or five previous occasions attended at the same shop and bought adult X rated films and he had got what he had purchased. On no previous occasion had he been sold offensive material. There was virtually no cross examination on this aspect of his evidence and no cross examination as to his belief.

[23] The learned Magistrate's finding was that the facts of the occasion in question were not, as a matter of objective fact, the same or substantially the same, as the previous occasion and that he did not honestly and reasonably believe that they were the same or substantially the same.

[24] The critical question is not whether the facts of the occasion in question were, as a matter of objective fact, the same or substantially the same as the previous occasions, but whether the appellant did not hold an honest and reasonable belief that they were the same or substantially the same. In determining this question, regard may be had to the question of whether or not, as a matter of objective fact, the facts were the same or substantially the same.

[25] The learned Magistrate's finding that, objectively, the facts were not the same or substantially the same was based on the following matters:

1. There was no evidence to suggest that the appellant knew the person he was dealing with at the shop in March 2008 whom he described as a "salesperson". On previous occasions he said he dealt with the owner of the shop.

2. There was no evidence that he dealt with this salesperson previously.

3. There was no evidence he had been given extra DVDs previously. On this occasion he received an additional 15 DVDs free of charge (he asked for 50 DVDs and received 65 DVDs).

4. There was no evidence that he asked for "adult X movies" as he had on previous occasions.

5. There was no evidence that apart from asking for Thai and Japanese actors, he asked for any particular content; nor asked that any particular content be excluded.

6. It was not suggested that on previous occasions he had purchased DVDs with the intention of bringing them into Australia.

[26] Mr Lawrence submitted that there were no substantial differences. Importantly, he submitted that the appellant was not cross examined as to his honest belief that the occasions were substantially the same. There is substance to this submission.

[27] As to the objective circumstances, he submitted that the evidence did not support the finding that there was a difference between "adult X movies" and "X movies". In context, I consider that the appellant, when he referred to "X films" probably meant adult X films:

> "Q: Those other times what CD movies did you buy from this shop? --- I bought some films in general, some music and also some rate X film.
>
> Q: Those other times in that shop what did you ask for to buy? --- I told the owner of the shop that I wanted to buy the adult X film. I asked whether he had it or not and he was – he said Yes, and he put them together for me.
>
> Q: And those other times what did he (sic)[14] receive? --- I got what I asked for. They were the X films."

[14] The evidence was being given through an interpreter.

[28] No cross examination was directed towards whether he thought X films were in any way different from "adult X films".

[29] As to the finding that there was a difference between buying films to be viewed in Thailand and films to be imported into Australia, the learned Magistrate said:

> "Thailand is a country which is well known to have an 'active' sex industry. Anecdotally, it is also reported to be a destination for paedophiles and others with perverse and/or criminal sexual interest. It is a country where sexual exploitation is prevalent.
>
> As such, in my view, any reasonable person would be extremely cautious before buying any pornographic DVD's from Thailand particularly if they were intending to bring them back to Australia (where the laws are considerably stricter)."

[30] No evidence was led to support any of the contentions in para [29] as a matter of objective fact nor was any of this put to the appellant in cross examination as to his state of knowledge or belief. As a general rule, judicial notice cannot be taken of foreign law unless it is sufficiently notorious.[15] I do not think that judicial notice can be taken of any difference between Thai and Australian law. Likewise, I do not think that the learned Magistrate was entitled to take judicial notice that Thailand had a reputation as a destination for paedophiles and others with perverse and/or criminal sexual interest, or as a place where sexual exploitation was prevalent. The guiding principle is "whether a fact is so generally known that every

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[15] *Saxby v Fulton* [1909] 2 KB 208 at 211; although there is some authority that judicial notice of foreign law cannot be taken in criminal proceedings: *R v Ofori (No 2)* (1994) 99 Cr App R 223.

ordinary person may be presumed to be aware of it".[16] In my opinion, these matters are not sufficiently notorious.

[31] As to the honesty of his belief, there were some indications, apart from the appellant's evidence. First, the appellant had in fact declared that he had medicines and herbs on his incoming passenger card. Usually this results in a passenger's bags being searched. There is no evidence that the appellant tried to avoid a search, or tried to disguise the covers on the DVDs. Secondly, the subsequent search at his home did not reveal any prohibited material. Thirdly, no cross examination was directed to the honesty of his belief.

[32] As indicated before, the learned Magistrate held that even if he did hold the relevant belief, it was not a reasonable belief. The reasons for so holding were as follows:

1. Because the DVDs were pornographic DVDs from Thailand, any reasonable person would be cautious if he or she intended to bring them into Australia. As noted previously, this reason was based upon judicial notice being taken of alleged notorious facts and foreign law and is plainly in error.

2. The DVDs had the appearance of being "bootleg" or "backyard" cheap copies. This may have suggested that the DVDs were copied in breach of copyright, but otherwise is not helpful.

[16] *Holland v Jones* (1917) 23 CLR 149 per Isaacs J at 153.

3. The learned Magistrate did not accept that the appellant did not have at least five minutes to look at the titles. No cross examination was directed towards this issue. The Crown did not therefore prove that he did or should have inspected them if he did not.

4. Had the appellant looked at the titles he ought to have realised that at least several of the DVDs were likely to be highly offensive and highly likely to be illegal in Australia. That being so a reasonable person would not have brought into Australia the 21 DVDs with no identifying material into Australia either. I do not think that this finding can be criticised and no submission was made that it should be. However, this finding, to be relevant, depended upon acceptance of the view that the appellant did or ought to have inspected all of the covers before bringing them into Australia.

Conclusion

[33] In summary, I consider that the appellant has established that adverse findings of fact made by the learned Magistrate were not reasonably open. The respondent submitted that, notwithstanding that any of the grounds of appeal had been made out, I should dismiss the appeal vide sub-s 177(1) of the Justices Act on the ground that no substantial miscarriage of justice has actually occurred. I am unable to accept that submission. The Crown bears the onus when relying on this provision, which is equivalent to s 411(2) of the Criminal Code. I am not satisfied that the evidence led at trial was proved beyond reasonable doubt that the appellant was guilty. I am not

satisfied that no substantial miscarriage of justice in fact occurred. The appeal is allowed, the conviction is set aside and I enter a verdict of not guilty. I will hear the parties on the question of costs.