

THE HIGH COURT

2008 1119 SS

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 51(1) OF THE
COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961**

BETWEEN:

THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT

PROSECUTOR/APPELLANT

AND

MICHAEL JOSEPH LENEGHAN and PATRICK MCHUGH

ACCUSED/RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on the 12th day of May, 2009

1. This is an appeal by way of case stated by District Judge Mary Devins pursuant to section 2 of the Summary Jurisdiction Act 1857 (as extended by section 51 of the Courts (Supplemental Provisions) Act 1961) on the application of the prosecutor who was dissatisfied with the determination of the learned District Judge as being erroneous in point of law.

2. The opinion of the High Court is sought on the following question:

Was the learned District Judge correct in her determination that an offence contrary to Regulation 4(3) of the European Communities (Conservation of Wild Birds)(Owenduff/Nephin SPA004098) Regulations 2005 (S.I. No. 715 of 2005) is not one of strict liability?

I. Factual and Procedural Background

3. The respondents are farmers from Ballycroy, County Mayo who first appeared before Ballycroy District Court on the 14th February, 2008, each being charged with one offence contrary to Regulation 4(3) of the European Communities (Conservation of Wild Birds)(Owenduff/Nephin SPA004098) Regulations 2005 ('the 2005 Regulations'). The specifics of the offence, as set out in the summons, were as follows:-

"That you, on the 2nd day of May 2007, within the District Court Area of Ballycroy in District No. 3 at an area of land known as Tarsaghaun More within the Owenduff/Nephin Complex special protection area in the County of Mayo, did graze livestock above a recommended density and period (as defined in REPS guidelines or approved farm plans) therein to wit: 9 sheep and 10 lambs without the prior consent of the Minister for the Environment, Heritage and Local Government in contravention of Regulation 4(3) of the European Communities (Conservation of Wild Birds) (Owenduff/Nephin Complex SPA 004098) Regulations 2005 (S.I. No. 715 of 2005) made under section 3 of the European Communities Act 1972 in contravention of the said Regulations."

4. During the course of the trial in respect of the alleged offences, the learned District Judge made a number of findings of fact, including the following:

- (a) A number of sheep and lambs had been observed grazing by a Conservation Ranger on the lands specified in the summons, before being rounded up and identified;
- (b) The lands on which the sheep and lambs had been grazing were part of a Special Protection Area covered by the 2005 Regulations;
- (c) The two respondents were the owners of the sheep and lambs, the subject-matter of their respective summons;
- (d) The function of the 2005 Regulations was to prohibit overgrazing and limit certain other activities, unless the prior consent of the appellant was obtained, in Special Protection Areas; and
- (e) No such consent had been obtained by the respondents in respect of the activities of their animals in the present case.

6. At the conclusion of the prosecution case on the 14th February, 2008, the respondents' solicitor indicated that he did not intend to go into evidence but submitted that, before proceeding any further, the Court should determine the issue of whether the offence under Regulation 4(3) of the 2005 Regulations was one of strict liability. The matter was therefore adjourned until the 26th March, 2008 to allow the parties to prepare submissions on this point.

7. On the 26th March, 2008, the District Judge heard extensive submissions from both sides as to the nature of the

offence in question. The appellant argued that the prosecution were not required to show any *mens rea* element and that the offence was in fact one of strict liability. The respondents contested this interpretation of the 2005 Regulations, contending that the prosecution were obliged to satisfy the Court that an element of intent had existed on their part. The District Judge, having heard these arguments, adjourned the matter once again until the 10th April, 2008.

8. On the 10th April, 2008, the District Judge decided, on the basis of the case-law and the relevant legislative provisions, that the presumption in favour of a *mens rea* element to the criminal offence had not been rebutted. She went on to conclude that since no evidence of intention had been adduced by the prosecution, the Court could only dismiss the charges against the respondents.

9. The appellant requested that the District Judge should seek a determination from this Court as to the correct construction of the 2005 Regulations. This appeal by way of case stated was therefore certified by her on the 23rd July, 2008.

II. The Submissions of the Parties

10. The appellant submits that the learned District Judge erred in law in ascribing a *mens rea* element to the offence under Regulation 4(3) of the 2005 Regulations. This, he contends, is something which is not mandated by the explicit terms of the provisions in question. He argues that the importing of such a requirement, to be proven beyond reasonable doubt before any conviction can be secured, would have the effect of completely neutralising the legislation. In the appellant's submission, it would be nigh on impossible to establish in any given case, to the requisite standard of proof, that an accused person had actually intended that his or her livestock should graze on protected lands.

11. The appellant further contends that there is a significant public interest in ensuring that the 2005 Regulations are complied with in full, since they are a necessary aspect of the State's obligations under European Law. He submits, therefore, that a moral imperative exists to ensure that farmers should not breach the legislation. The appellant asserts that these aspects of the 2005 Regulations serve to further accentuate the case for a strict liability construction of the provisions, in line with other regulatory offences. The effect of such an interpretation would not, in his view, have the effect of placing an overly onerous burden on livestock owners who are made clearly aware of the conduct being prohibited.

12. The respondents argue that the literal meaning of the regulations clearly imports a requirement of *mens rea* for the performance of the activity or operation of grazing. They further argue that the application of strict liability does not arise by necessary implication, since such is not essential for the effective operation of the 2005 Regulations. The respondents therefore submit that the interpretation being advanced by the appellant would amount to a re-drafting of the legislation by a Court in a manner calculated to be of assistance to the prosecuting authorities.

13. The respondents also contend that there are no public policy arguments which ought to incline the Court towards a strict liability construction of the offence under Regulation 4(3). In their submission, the offence is not one concerned with danger to public safety, health or morals. Furthermore, the offence is one in respect of which potentially severe penalties may be imposed, including a term of imprisonment of up to 6 months duration. On this basis, the respondents argue that the offence is not the kind of regulatory offence which ordinarily attracts the more onerous standard of liability.

III. The Decision of the Court

14. It is clear that a significant presumption exists, in respect of all criminal offences supported by penal sanction, that an element of *mens rea* must be shown before a conviction may be secured. This principle has been clear since decisions such as *Sherras v. De Rutzen* [1895] 1 Q.B. 918. In that case, Wright J. stated at page 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..."

15. In *Gammon (Hong Kong) Limited v. Attorney General* [1985] A.C. 1, Lord Scarman delivering the judgment of the Judicial Committee of the Privy Council further refined the applicable principles. He stated at p. 14:-

"(1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;

(2) the presumption is particularly strong where the offence is "truly criminal" in character;

(3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;

(4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;

(5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

16. The decision in *Gammon* was approved of in this jurisdiction in *Maguire v. Shannon Regional Fisheries Board* [1994] 3 I.R. 580 at p. 587. In that case, the High Court found that a criminal offence devised to deter water pollution did not involve a *mens rea* element, despite the fact that it was punishable by severe sanctions such as a heavy fine or 5 years' imprisonment. Lynch J. stated the following at p. 588:-

"It follows from the foregoing authority that *prima facie mens rea* is required for every offence be it a common law or a statutory offence and therefore including s. 171 of the [Fisheries (Consolidation) Act 1959]. However, it seems to me that s. 171 is regulatory in essence and does not create an offence which would be regarded as of a truly criminal character. The pollution of waters is an issue of social concern and legislation against the pollution of rivers

and streams has a long history and it has always been public policy to prohibit such pollution as far as possible and at least one of the grounds for this policy must be that such pollution creates a public nuisance. Moreover, it seems to me that the creation of strict liability in such pollution cases coupled with heavy penalties is effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act and therefore fulfils Lord Scarman's fifth condition for strict liability, the other conditions being in my view also fulfilled."

17. The presumption of a *mens rea* element can, however, be rebutted to varying extents. In *Shannon Regional Fisheries Board v. Cavan County Council* [1996] 3 I.R. 267, Keane J. (dissenting) approved of the analysis of Dickson J. in the Supreme Court of Canada in *R. v. City of Sault Sainte Marie* (1978) 85 D.L.R. (3d). He thus adopted the following propositions at p. 287:-

"I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two.

(1) Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

(2) Offences in which there is no necessity for the prosecution to prove the existence of *mens rea* ; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts, which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability...

(3) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault."

18. It seems clear that this tri-partite approach has now received endorsement from the Supreme Court in the decision of *C.C. v. Ireland* [2006] 4 I.R. 1. The Court is therefore obliged to entertain a number of different considerations in assessing whether the presumption of a regular *mens rea* element has been rebutted and to what extent. In *Reilly v. Patwell* [2008] IEHC 446, McCarthy J. engaged in a comprehensive analysis of the jurisprudence on this point and set out the following non-exhaustive list of relevant factors:-

1. The moral gravity of the offence;
2. The social stigma attached to the offence;
3. The penalty;
4. The ease (or difficulty) with which a duty is discharged or the law obeyed;
5. Whether or not absolute liability would encourage obedience;
6. The ease or difficulty with which the law might be enforced;
7. The social consequences of non-compliance; and
8. The *desideratum* to be achieved when considering the statutes.

19. Applying these principles to the present case, it seems clear to me that the offence under Regulation 4(3) of the 2005 Regulations must be one of strict liability. While the moral gravity of the offence in question, and the social stigma attached thereto, might not be as severe as certain other offences on the criminal calendar, the relevant provisions undoubtedly perform an important regulatory function. The prohibition or limitation of grazing on Special Protection Areas is an important aspect of the State's obligations under the environmental laws of the European Union. There is, without doubt, a pressing social and political interest in ensuring that legislative measures adopted in furtherance of these obligations are rigorously adhered to.

20. Furthermore, I am inclined to agree with the appellant's submission that the introduction of a regular *mens rea* element to the provisions at issue would render them largely ineffectual. The profound difficulty in demonstrating beyond reasonable doubt a conscious intention, or even subjective recklessness, on the part of a farmer in respect of the grazing activities of his livestock becomes obvious from even the most rudimentary application of ordinary common sense. Were a *mens rea* element to be read into the provisions of the 2005 Regulations, they would, I think, be impossible to enforce.

21. By contrast, I cannot accept the respondents' argument that the imposition of strict liability would afford an unfair advantage to the appellant in prosecuting such offences. The 2005 Regulations are very clear in delineating the conduct which they prohibit; there is no serious difficulty in compliance and no significant areas of uncertainty arise. Furthermore, I am supported in my conclusions in this regard by the presumption that the trial judges who come to consider such prosecutions will act fairly and will vindicate the rights of accused persons. In *M.M. v. Director of Public Prosecutions* [2007] IESC 1, the Supreme Court affirmed that this presumption applies not only to the conduct of any criminal proceedings but also to the application of sentencing principles in the event of a finding of guilt.

IV. Conclusion

22. In light of the foregoing, I am of the opinion that the offence created by Regulation 4(3) of the 2005 Regulations is one of strict liability. I would therefore answer the question referred in the case stated in the negative and hold that the learned District Judge was incorrect in finding that a *mens rea* element needed to be proven.