59/77

SUPREME COURT OF VICTORIA

KLINBERG v TUCKER;
HOME PRIDE BAKERIES (WODONGA) PTY LTD v TUCKER

Gillard J

6, 10 May 1977 — [1977] VicRp 61; [1977] VR 552

LABOUR & INDUSTRY – INTERPRETATION OF SECTION 104B CONSIDERED – TWO DISTINCT MEANINGS OF "ONUS OF PROOF" DISCUSSED – DEFENDANT CONVICTED OF DELIVERING BREAD IN CONTRAVENTION OF THE ACT – WHETHER COURT IN ERROR: *LABOUR & INDUSTRY ACT* 1958, s104B.

HELD:

1. To establish that a person had committed an offence under the subsection, the prosecution was required to prove: (a) the defendant was carting or delivering bread; (b) he was doing it in the course of his own trade or business, or of some other person's trade or business and (c) he was carting the bread beyond the specified distance from the place where it was made or baked.

2. If, in the course of introducing evidence for the prosecution of an alleged offender, admissible evidence is led from which an inference (however tenuous) might be drawn (i) that bread was being carted or delivered or sold by the alleged offender in the course of trade or business, or (ii) that bread was carted or delivered or sold by the alleged offender beyond the specified distance from the place where it was made or baked, or (iii) that bread was carted or delivered or sold by the alleged offender on behalf of any person then, in such circumstances, the ultimate onus would be imposed on the defendant to disprove the allegation arising from such inference. And if the evidence called by him or on his behalf left the issue *in dubio*, then the defendant must be convicted.

3. Since there was no authorized allegation, in the relevant sense, made under para (b)(ii) relating to bread being delivered, the provisions of the section did not impose any onus of proof on Klinberg or his employer in relation to that issue. It must follow that the prosecution should have failed in the appeal to the Industrial Appeals Court.

4. The consequences therefore are that the order nisi for *certiorari* in relation to Klinberg's prosecution should be made absolute and the conviction quashed. The order in relation to his employer should suffer the same fate.

GILLARD J: On 22 October 1976, the Magistrates' Court at Wangaratta convicted Peter Eric Klinberg on a charge that on 7 September 1975 at the corner of Gray Street and Rowan Street, Wangaratta, he did deliver bread in the course of trade or business beyond a distance of 48.3 kilometres from the place where it was made or baked in contravention of the provisions of s104 of the *Labour and Industry Act* 1958.

Klinberg appealed from such conviction to the Court of Industrial Appeal. On 1 September 1976, that Court after a rehearing of the information, dismissed his appeal.

On 4 February 1977, an order nisi for a writ of *certiorari* to remove that proceeding to this Court to quash the record of order and decision of the Industrial Appeals Court was granted by Anderson, J on the following grounds:—

> (a) The Court was in error in holding, in the absence of any evidence that the bread delivered by Peter Eric Klinberg was delivered beyond a distance of 48.3 kilometres from the place where it was made or baked, that Peter Eric Klinberg was guilty of the said offence.
>
> (b) The Court was in error in holding that on proof of delivery of the bread by Peter Eric Klinberg, the provisions of s104B of the *Labour and Industry Act* 1958, were to be construed to cast the burden or onus of proof on Peter Eric Klinberg of establishing that the bread so delivered was not delivered beyond a distance of 48.3 kilometres from the place where it was made or baked.

(c) The Court was in error in holding that the expression: 'The onus of proof' contained in s104B(b) of the said Act referred to the burden of leading evidence on a particular point rather than the ultimate burden of persuasion.

(d) In upholding the said conviction the Court misconstrued s104B of the said Act."

It should perhaps be added that Klinberg's employer, Home Pride Bakeries (Wodonga) Pty Ltd, was also convicted of an offence under s104 in relation to Klinberg acting on its behalf on that day. The employer also appealed to the Court of Industrial Appeal from its conviction and its appeal was also dismissed. An order nisi for writ of *certiorari* was also obtained from Anderson J on similar and other grounds.

Since the case of Klinberg will raise necessarily the issues in law covered by both orders nisi, I for the time being shall postpone consideration of the proceedings by the employer.

Evidence was given at the Industrial Appeals Court by an inspector that at about 8.25 a.m. on Sunday 7 September 1975 be observed a van with markings "Home Pride" on the side thereof parked outside a shop at the corner of Gray and Rowan Streets, Wangaratta. He said he saw Klinberg delivering bread from the van into the shop. He intercepted Klinberg who admitted he was delivering bread which that morning he had picked up at the Home Pride depot at Beechworth, and which he had sold to the shopkeeper. On such evidence, he was charged with an offence, under s104(4) *Labour and Industry Act* 1958. That subsection reads as follows:—

"A person who carts or delivers bread in the course of trade or business beyond a distance of thirty miles from the place where it was made or baked, shall be guilty of an offence against this Division."

It is to be observed that the distance has been converted into metric measure in the way stated in the information.

To establish that a person had committed an offence under the subsection, the prosecution would be required to prove: (a) the defendant was carting or delivering bread; (b) he was doing it in the course of his own trade or business, or of some other person's trade or business (compare subs(8)) and (c) he was carting the bread beyond the specified distance from the place where it was made or baked.

In the proceedings at the Court of Industrial Appeal, it was undoubtedly proved that Klinberg was delivering bread at Wangaratta, bread which he had picked up at Beechworth.

In the course of his evidence, the inspector, who interviewed Klinberg, swore:

"I said: 'Where was this bread baked or made?'. He said: 'I do not know, I am only a casual, it was at Beechworth this morning'. I said: 'What time did you pick this bread up?'. He said: 'Seven a.m. this morning'. I said: 'I have reason to believe that the bread you have just delivered, and which you are carting now, was baked and made more than 48.3 kilometres away, what do you say to that?'. Klinberg replied: 'I do not know what to say'."

On that evidence, there was no proof of where the bread was baked or made, and, accordingly, there was no proof whether it had been delivered beyond the prescribed distance.

Accordingly, the prosecution relied on the provisions of s104B which was enacted in 1971 and which became operative by way of amendment to the *Labour and Industry Act* 1958, on 1 January 1972. It reads as follows:—

"In any proceedings of an offence against this Division—

(a) it shall be sufficient to allege that bread found on premises or in a vehicle was carted, or delivered, or sold (whichever is applicable) beyond a distance of thirty miles from the place where it was made or baked, if because of--

(i) a label or wrapping or any writing or mark on a label or wrapping on the bread, or any impressing or imbossing on the bread;

(ii) any document on the premises or in the vehicle purporting to be a document with respect of sale or delivery;

(iii) the ownership or the vehicle or the employment of its driver; or

(iv) a statement made by the occupier of the premises or the owner or driver of the vehicle the inspector who examines the bread on the premises or the vehicle has reason to believe that the bread was carted or delivered or sold (as the case may be) beyond the distance of thirty miles from the place where it was made or baked;

(b) the onus of proof—

(i) that bread alleged to be carted or delivered or sold in the course of trade or business was not carted or delivered or sold in the course of trade or business;

(ii) that bread alleged to be carted or delivered or sold beyond a distance of thirty miles from the place where it was made or baked was not carted or delivered or sold beyond the said distance of thirty miles;

(iii) that bread alleged to be carted or delivered or sold on behalf of any person was not carted or delivered or sold on behalf of that person—
shall in all cases be upon the defendant."

Broadly, it may be stated that para (a) thereof was intended to deal with a situation that might arise in the course of the prosecution presenting its case.

The purpose of the provision, on its face, is quite obscure. But it will be necessary to examine it more closely later when I shall interpret the section as a whole.

Paragraph (b) on the other hand deals with imposing the onus of proof on defendants in relation to three issues of fact that could arise in prosecution of offences against that division of the Act. In the Industrial Court, the prosecution had suggested that, having regard to the evidence, para (a) had no application at all to the prosecution; but that para (b) was of extreme importance since it imposed on Klinberg the burden of disproving the various elements constituting the offences against s104(4). It was further argued in that Court that proof by the prosecution of the elements to establish Klinberg's guilt was unnecessary since by para (b) the onus of proving his innocence was imposed on Klinberg. Because no evidence of exoneration was given by him or on his behalf, the prosecution claimed it was bound to succeed. It was submitted by the prosecution that the word "alleged" in para (b) referred to the allegations of fact to be found in and constituting the averments in the information.

In this Court, however, Mr Fajgenbaum, who appeared for the informant in the Court below, somewhat concerned with the rigorous nature of such argument, submitted in the alternative that the word "alleged" referred to what the prosecution should allege in the course of introducing its evidence of the identity of time, place, and by whom, the offence was alleged to have been committed. The statutory provision at that stage, he said, provided an evidentiary device of imposing a shifting onus on the defendant in the proceedings; but he submitted that in the ultimate decision of the case, the onus would remain on the prosecution to prove its case. Cf. *Purkess v Crittenden* [1965] HCA 34; (1965) 114 CLR 164, at p167; [1966] ALR 98; 39 ALJR 123.

Mr Fajgenbaum advanced this alternative argument in order to meet the submission of a fundamental character advanced by Mr Fagan who appeared on behalf of Klinberg.

Mr Fagan submitted that both paragraphs of s104B were introduced together by an amendment to the Act to commence on 1 January 1972 and it was intended that the new section should be read as an entirety, in the nature of a code of proof. His argument finds some support in the method used in the section to separate the two provisions dealing with different subjects.

Where in other parts of the Act a section contains two separate and independent matters of legislation, the usual pattern of dividing the section was into subsections, designated by a number. Two or more independent specifications of statutory enactment were made in the same

section, but the method of a division gave an indication of their being read separately and applied separately. In this particular section, however, that method has not been adopted. The section has been divided into lettered paragraphs in relation to proof of facts by the prosecution. Mr Fagan accordingly submitted that where, in para (a), it was stated: "It shall be sufficient to allege", this gave the prosecution in its evidence a basis to allege that bread "was carted or delivered or sold beyond the specified distance from the place where it was made or baked". Since the legislature had seen fit to specify what was sufficient to enable the prosecution to make an allegation of that character in the presentation of its case, the legislation required that proof of certain specified facts should be given before the prosecution could rely upon the provisions of para (b)(ii).

In the face of such competing arguments, it becomes patently necessary to examine closely the provisions of s104B in order to determine its true meaning. To say the least, the section does introduce into the Act a novel, obscure and unique piece of legislation.

There are several preliminary matters to which some attention should be given. The first matter to note in the section is that the provisions thereof may be invoked "in any proceedings for an offence against this Division".

At the time of its introduction in 1971, there were no less than six types of offences against the division, namely, under s103 (since repealed), under s104(1), s104(2), s104(4), s104(8), and s104A. Because of the difference in the nature of these various offences, it was probably for this reason that para (b) was divided into three separate sub-paragraphs. At the same time, it would have been quite unnecessary to rely upon such sub-paragraphs in prosecutions under s103 and s104(2) of the Act.

Secondly, at the time of the introduction of the section, there existed in s105 various evidentiary provisions. (It should perhaps be interpolated that this section has since been repealed and a new section substituted by Act No. 8384 passed on 19 December 1972 and to come into operation when proclaimed.) By the original s105, in any proceedings for an offence against the division, there were statutory provisions which expressly made evidence of certain facts *prima facie* evidence of certain elements necessary for the prosecution to establish in order to prove its case of offences against the various sections.

For instance, para (a) enabled certain evidence to be given by the prosecution to establish one of the elements of an offence against s103. So para (b) expressly provided that if evidence were led that at any time when the carting or delivering of bread in the course of trade or business was prohibited, a person was found carting or delivering bread, then it should be prima facie evidence that the person was carting or delivering bread in the course of trade or business. This was primarily concerned with a prosecution under s104(1) but the width of terminology "at any time" may give it a much wider application. (It should be noted that the new s105 is substantially in the terms of this paragraph alone.)

Paragraph (d) enabled ease of proof of the place where bread was being baked during prohibited hours.

Thirdly, I have perused other sections of the Act, and although there are provisions which deal with other trades or with greater social evils than envisaged in s104(4)(2), (for example, child labour), there is no legislation of a similar character to cover proof of offences specified in other trades or businesses, or in respect of greater social evils.

I therefore accept the approach to a proper interpretation of the section as suggested by Mr Fagan. He relied primarily upon the now oft-used dictum of Younger LJ, in *In re Jordison, Raine v Jordison* [1922] 1 Ch 440, at p465, where his Lordship said:

> "The legislature is not, by the use of other than the clearest words, to be taken to have subverted in any statute fundamental principles whether of law or of equity. It is a matter of judicial obligation to the legislature itself that the Court, in construing a statute, shall make that presumption."

(See also *Fergusson v The Union Steamship Co of New Zealand Ltd* (1884) 10 VLR 279, at p284; *Nolan v Clifford* [1904] HCA 15; (1904) 1 CLR 429, at p447; *Wade v New South Wales Rutile Mining*

Co Pty Ltd and Ors [1969] HCA 28; (1969) 121 CLR 177, at pp181-5; [1969] ALR 577; 43 ALJR 247.)

If I understand Mr Fajgenbaum correctly, he did not challenge this approach. Indeed, it appears that it was because of this judicial obligation that Mr Fajgenbaum did not in the forefront of his argument adopt the very rigorous interpretation placed upon the section by the prosecution and accepted in the Industrial Appeals Court, but put forward a much more reasonable alternative.

Coming back then to consider the terms of s104B, and looking at para (b) first, it must be emphasized that it is a provision relating to "onus of proof". This expression was examined by the High Court in the recent case of *Purkess v Crittenden*, *supra*, where the majority adopted the following statements from *Phipson on Evidence* 10th ed., paras. 92 and 95. In para 92 it was stated:

> "As applied to judicial proceedings, (it) has two distinct and frequently confused meanings: (1) The burden of proof as a matter of law and pleading—the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of introducing evidence."

The second statement was:

> "The burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly..."

In what sense is the expression used in this paragraph? Since the statutory provisions make it a part of the law, it seems to me that it is inescapable that in relation to issues of fact specified in the three sub-paragraphs, para (b) imposes a burden on the defendant to establish his defence in relation to any of the issues so specified. If when all the evidence in relation to any of the specified issues is admitted, the proof of such fact in issue remains *in dubio*, then the defence on such issue fails. The defendant has not sustained the onus imposed on him (cf. *R v The Governor of Metropolitan Gaol; Ex parte Di Nardo* [1963] VicRp 10; [1963] VR 61 at p62; (1962) 3 FLR 271.) In prosecution for offences against the division, then there is a statutory burden imposed on the defendant to exonerate himself on certain specified issues. But under what circumstances does that situation arise. To say the least, the circumstances are ill-defined and uncertain. Taking sub-para (ii) as an example, the onus imposed only operates where bread is "alleged" to be carted or delivered or sold beyond a specified distance from where it was made or baked. How, under what circumstances, and by whom, should such allegation be made? Ordinarily, one would suppose that the relevant allegation referred to would be found in the averment of fact contained in the information. But if this were the legislative intent, it might have been expected that the provision should explicitly say so. It is that kind of legislative direction that one would expect not to arise from implication.

Counsel has been good enough to give me a list of some eleven cases where Federal legislation on averments have been examined in various courts. The form of such statutory provision is to make the averments in the information prima facie evidence of the facts alleged therein, and to fortify such presumption, it is stated that it is not to be affected even if evidence were led, or if the matter alleged consisted of mixed fact and law. (See *Brady v Thornton* [1947] HCA 29; (1947) 75 CLR 140; [1947] ALR 438; 8 ATD 269). Such statutory provisions however have been strictly construed and, despite the width of terms used in some of the statutory provisions, on a number of occasions they, for various reasons, have failed to be of any value to the prosecution. (See *Adelaide Steamship Co Ltd and Ors v R* [1912] HCA 58; (1912) 15 CLR 65; 18 ALR 465; *Symons v Schiffmann* [1915] HCA 65; (1915) 20 CLR 277; *Schiffmann v Whitton* [1916] HCA 60; (1916) 22 CLR 142; *Ex parte O'Sullivan, Re Craig and Anor* (1944) 44 SR (NSW) 291; 61 WN (NSW) 197; *Stuckey v Iliff* [1960] HCA 57; (1961) 105 CLR 164; [1961] ALR 79; 12 ATD 239; 34 ALJR 185.)

But para (b) is not concerned with expressly or impliedly making the averments in the information *prima facie* evidence of anything. It deals, under three headings, with the onus of proof only, where a certain fact should be "alleged". By the initial words of the section, such allegation is required to be made in "the proceedings," but the section does not explicitly state when, at what particular stage of the proceedings, or by whom, the allegation is to be made.

Since the statutory provisions furthermore do not relate to the matters of where, when

and by whom the offence has been allegedly committed, it may be assumed that the prosecution would be compelled initially to introduce evidence of these vital facts. Patently, no onus could be imposed on anyone until evidence should be given to identify the person concerned to bear the burden of proof? At what stage of the proceedings then should the statutory allegations be made? What would constitute an authority for someone to make the relevant allegations in order to impose the onus of proof? The answers to these questions are not to be found in para (b).

In order to discover the answers to these questions, in my view, one is compelled to return to consider the terms of para (a). Therein it is provided that in any proceedings "it shall be sufficient to allege" relevant facts if, for certain reasons, an inspector has reason to believe the existence of those facts. But what is comprehended by the word "sufficient"? What is to be sufficient? Is the word "sufficient" used in relation to proof or is it used in relation to authority or to what other matter does it refer?

The first of these alternatives appears to be quite unnecessary. A person does not necessarily require proof to make an allegation. On the other hand, having regard to the rigorous and unusual character of para (b), it may be expected the legislature would not permit inspectors lightly to make allegations. The legislature, therefore, has adopted the precaution and, at the same time, an aid to permit an inspector to make an allegation which would bring about serious consequences if he should form the belief, based on proof of any one of the matters specified.

It seems to me, therefore, that the word "authority" should be implied after the words "it shall be sufficient". There would then be sufficient authority to an inspector to make an allegation if he believed the relevant facts on the basis of his observation of any of the four specified matters.

So interpreted, it gives some indication when and at what stage of the proceedings and by whom the allegation of each of the facts set out in para (b) might justifiably be made. If, in the course of introducing evidence for the prosecution of an alleged offender, admissible evidence is led from which an inference (however tenuous) might be drawn (i) that bread was being carted or delivered or sold by the alleged offender in the course of trade or business, or (ii) that bread was carted or delivered or sold by the alleged offender beyond the specified distance from the place where it was made or baked, or (iii) that bread was carted or delivered or sold by the alleged offender on behalf of any person then, in such circumstances, the ultimate onus would be imposed on the defendant to disprove the allegation arising from such inference. And if the evidence called by him or on his behalf leaves the issue *in dubio*, then the defendant must be convicted.

In so far as sub-para(ii) of para(b) is concerned, the prosecution, however, is given a further aid by the provisions of para(a). It is not required to give any evidence from which a reasonable inference might be drawn, but it shall be sufficient in any proceedings to authorize the prosecution to allege that bread was carted or delivered or sold beyond a specified distance, if it were proved that an inspector, for any one of the specified reasons, had reason to believe it had been so carted, delivered or sold. But the inspector must give evidence of one of the four matters set out in para(a) and his belief based thereon. Clearly, evidence of any of these four matters would ordinarily have no relevance to the matters in issue and would afford no logical proof that bread had been carted, delivered or sold beyond the specified distance.

Evidence of any of the four matters referred to, and the inspector's belief based thereon, would normally be ruled out as inadmissible in any prosecutions of an offence against the division. But para(a) makes it admissible. Furthermore, it justifies the prosecution calling no direct evidence from which an inference might be drawn that bread had been carted or delivered or sold beyond the specified distance.

On the other hand, if the prosecution's interpretation of para(b) were correct then para(a) becomes redundant and unnecessary. It seems to me, therefore, inevitable that in interpreting the whole section, the use of the word "alleged" in the two paragraphs must be related in the manner I have just stated, and indicates that an allegation in the relevant sense in para(b) must arise from, and in course of, the prosecution leading its introductory evidence to implicate the defendant.

Applying these views to the prosecution of Klinberg, it appears to me first that evidence

having been given by an inspector that Klinberg was driving a van containing bread with the name of a well known producer of bread and delivering it to a shop in Wangaratta, the circumstances suggest he was doing it in the course of trade or business and, accordingly, an inference might be drawn that Klinberg was carting or delivering bread in the course of trade or business. Therefore, the ultimate onus of proof of such issue was imposed by the terms of sub-para(i) of para(b) on Klinberg to disprove that fact.

Secondly, from the evidence of admissions given, an inference might be drawn that he carted or delivered such bread on behalf of his employer, Home Pride Bakeries (Wodonga) Pty. Ltd. Accordingly, the ultimate onus of proof was imposed by para(b)(iii) on Klinberg's employer to disprove such fact.

But, on the other hand, thirdly, there was no evidence that the bread was carted or delivered beyond the specified distance from a place where it was made or baked. Furthermore, there was no evidence given by the inspector of any of the four matters referred to in para(a), or of his belief based on any of the specified reasons.

Accordingly, since, in my view, there was no authorized allegation, in the relevant sense, made under para(b)(ii) relating to bread being delivered the provisions of the section did not impose any onus of proof on Klinberg or his employer in relation to that issue. Because of the views I have ventured to express it must follow that the prosecution should have failed in the appeal to the Industrial Appeals Court.

I perhaps should add that Mr Fajgenbaum did not, because of the decision of *R v Industrial Appeals Court; Ex parte Henry Berry and Co (Australasia) Ltd* [1955] VicLawRp 29; [1955] VLR 156; [1955] ALR 675 and the decisions following that, argue that this Court had no power to grant *certiorari* in the circumstances of this case.

The consequences therefore are that the order nisi for *certiorari* in relation to Klinberg's prosecution should be made absolute and the proceedings brought into this Court and his conviction quashed. The order in relation to his employer should suffer the same fate. In order to give the informant an opportunity to consider these reasons and to decide whether he wishes to challenge them elsewhere, I shall adjourn the remaining two orders nisi to a date to be fixed until any appeal against my decision has been finally completed or the decision is reached that no appeal shall be taken from it.

The costs of Klinberg and Home Pride Bakeries (Wodonga) Pty Ltd are to be taxed, and when taxed paid by Tucker, the informant in the court below. Orders absolute and convictions quashed.

Solicitors for the applicant: Don and Edney.
Solicitor for the respondent (informant): EL Lane, Crown Solicitor.
