34/75

SUPREME COURT OF VICTORIA

McLENNAN v TREET PACKERS (MELB) PTY LTD

Harris J

13 June 1975

PUBLIC HEALTH – SELLING ADULTERATED GRAPEFRUIT JUICE – PROOF OF CONTENTS OF CONTAINER – LABEL AN ADMISSION OF CONTENTS – CERTIFICATE OF ANALYSIS TENDERED – NO STATEMENT IN THE CERTIFICATE THAT THE PRODUCT WAS GRAPEFRUIT JUICE – CASE TO ANSWER – REASONABLE DOUBT – ABSENCE OF EXPLANATORY OR ANSWERING EVIDENCE BY DEFENDANT – MAGISTRATE DISMISSED CHARGE – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, S238.

The information alleged the sale of grapefruit juice which was adulterated contrary to s238 of *Health Act* 1958. Evidence was adduced that the informant McLennan, a Health Inspector, had gone to a shop conducted by a Mr Steere and requested "a litre of grapefruit juice"; paid for and was handed a plastic container which bore a label, the main part of which said, "100 per cent grape fruit juice ... processed and packed by 'The One Hundred Per Cent Juice Company' ... grapefruit is a rich source of natural vitamin C" ... *etc.* (The company named is a business name of which the defendant company is the registered proprietor.)

It was submitted to the Magistrate at the conclusion of the informant's case that there was no case to answer on the basis that there was no evidence before the Court to identify the substance in the container as grapefruit juice. Mr Alston drew the Magistrate's attention to Rule 64(1) of *Food & Drugs Standard Regulations* (No 289 of 1970) which specifically defines "fruit juices" as against regulations making provision for something called "concentrated fruit juices", and yet another regulation which made provision for something called "fruit drinks".)

The Magistrate ruled against the submission and held there was a case to answer. Mr Alston announced he did not intend to call evidence whereupon, the Magistrate stated that on the basis of the submissions made, he was not satisfied upon reasonable doubt that the substance in the container was grapefruit juice and dismissed the charge. Upon order nisi to review—

HELD: Order absolute. Dismissal set aside. Remitted for hearing in accordance with the law.
1. In view of the way the container was shown to be the defendant's container, what was said on the label amounted to a statement by the defendant which was an admission by it that it put out the substance that was in the container and a statement by it that the substance was grapefruit juice.

2. An admission made by a defendant may be used against it. There are all sorts of qualifications about that branch of the law, but basically that is the law; and provided you can show that the material does amount to such an admission, it is admissible. It may be made orally or it may be made in writing. In this case it was, in fact, made in writing. Accordingly, there was admissible evidence before the Magistrate upon which he could rule that there was a case for the defendant to answer.

3. The whole transaction and everything about the circumstances of it suggested, as a matter of common sense, that the situation was one in which the defendant put out a product as grapefruit juice, that it did put out what it purported to put out, and that the shopkeeper resold that substance.

4. The Court should take into account the absence of evidence by the defendant in deciding whether or not it should convict. Whether that absence will play any important part, or part at all, for that matter, in the conclusion arrived at, is another matter. But it ought to be looked at.

5. Here, one cannot help but see that the defendant company would have been able to have provided an explanation to show that this substance which it said was grapefruit juice was not grapefruit juice. It was all the better able to do that because it had a sample of the very substance in its possession. It did not do so.

6. One would have thought that the truth, as to whether or not this was grapefruit juice, was something that was well known to the defendant. The absence of evidence from the defendant in this case was a factor which must have played a quite important part in deciding whether or not on this one point was whether or not the substance was grapefruit juice.

7. Having regard to the evidence there was no reason why the conclusion should not have

been drawn that the information had been made out. Consequently, the Magistrate was wrong in holding that although the evidence tendered by the informant was sufficient to satisfy him *prima facie* that the substance sold to the informant was grapefruit juice, and although such evidence was not contradicted in any way, it was not sufficient to satisfy him beyond reasonable doubt that the substance was grapefruit juice.

8. Accordingly, Ground 1 of the order nisi was made out and the order made absolute.

HARRIS J: ... The argument that was put by Mr Alston to me took as its primary line the submission that there was no evidence before the Magistrate to identify the substance in the container as grapefruit juice. If that submission were made out it would follow that the Magistrate was clearly right in dismissing the information.

The evidence which was considered to be possibly capable of establishing the identity of the substance fell into three compartments. The first related to the evidence of the sale by Mr Steere to the informant. It was submitted by Mr Alston that the request for grapefruit juice, followed by the delivery over of a container labelled 'Grapefruit Juice', was not in any way evidence against his client. He conceded that the evidence was admissible to prove the sale which had to be proved under s273(1) but he strongly contended that even though it involved the reference to 'Grapefruit Juice' it could not be used against the defendant as evidence of the identity of the substance.

The second aspect of the evidence was that of the label. As I have indicated, the label says that the substance is grapefruit juice and adds words which suggest that it is pure grapefruit juice. The evidence also shows that the container is one put out by the defendant. (The container was traced to the defendant by the evidence of Mr Steere and the evidence of the invoice).

Again, it was submitted by Mr Alston that notwithstanding that evidence, the statement on the label did not amount to any evidence by way of an admission by his client that what was in the container was grapefruit juice. He submitted that none of the sections of the *Health Act* provided for the use of such a label as evidence. That does not appear to be the case and it was not suggested that there was any such provision. The question, therefore, is whether the statement on the label amounts to an admission by the defendant which can be used against it.

The third compartment of the evidence related to the certificate of analysis. It was submitted that there was nothing in that to show that the substance analysed by the analyst was grapefruit juice. Thus, the first matter that I must deal with is whether or not there was any evidence upon which the Magistrate could make a finding against the defendant.

So far as the certificate of analysis is concerned, in my opinion, it does not purport to say that the substance analysed was grapefruit juice. It merely states the result of the analysis insofar as the content of ascorbic acid is concerned. Hence, the certificate of analysis does not provide any evidence of the identity of the substance in the container.

The evidence with respect to the sale that was made by Mr Steere to the informant raises an interesting question which has not been fully developed by the argument before me. The authorities if there are any just have not come to light before me. I propose to put that matter on one side except to observe this: that there was, at least, nothing in the evidence of the sale by Mr Steere to the informant to suggest that the substance was anything other than grapefruit juice.

That leaves the question of the label. In view of the way the container was shown to be the defendant's container, in my opinion what is said on the label does amount to a statement by the defendant which is an admission by it that it put out the substance that was in the container and a statement by it that the substance was grapefruit juice.

An admission made by a defendant may be used against it. There are, of course, all sorts of qualifications about that branch of the law, but basically that is the law; and provided you can show that the material does amount to such an admission, it is admissible. It may be made orally or it may be made in writing. In this case it is, in fact, made in writing. I am satisfied that there was admissible evidence before the Magistrate upon which he could rule that there was a case for the defendant to answer.

That then leaves the question as to his finding that he had a reasonable doubt, when he knew what all the evidence was going to be, as to whether the defendant was guilty or not. The final decision on that point is a question of fact. Where a Magistrate reaches a decision on a question of fact, then for that decision to be disturbed in this Court involves a conclusion by this Court that the finding was one that was not open to the Magistrate and that it was one which could not reasonably have been arrived at on the evidence before the Magistrate.

The situation, therefore, was that the Magistrate had before him at least the evidence constituted by the label that the substance was grapefruit juice. It was strongly urged by Mr Alston that any inference to be drawn from that was an unreliable one because even if the label were admissible there was still the possibility that there had been some confusion in the defendant's premises with respect to the various types of fruit juices, and that something other than grapefruit juice had been put into it. He said that really the only proper way in which the identity of the substance could be proved was by expert evidence given by an analyst that the substance was grapefruit juice. That expert evidence would have to be to the effect that the substance constituted 'the liquid portions with or without pulp of sound fresh fruits' and that there was not any added water. One would have to show that, as well as showing what the proportion of ascorbic acid was in the substance. It probably is true that this matter is capable of being proved by expert evidence, but that by no means rules out the possibility of proving it in other ways.

Mr Alston said that doubts were raised by the absence on the certificate of analysis of any affirmative finding that the substance was grapefruit juice. Mr Morris said that the significance of the certificate of analysis was that there was nothing in it to suggest that the substance was anything except grapefruit juice. On the whole, it seems to me that the way the certificate should be looked at is to say that it was neutral about the matter, and that if there was to be a doubt raised it would come about if there was something in the certificate to suggest that the substance was not grapefruit juice. So that really the certificate of analysis did not tell one way or the other. It certainly did not do anything to raise a doubt that the prosecution had not proved all the elements of its case.

The next matter relates to the evidence of the sale in Mr Steere's shop. Even if that evidence was not directly admissible to prove that the substance was grapefruit juice, once again there is nothing whatsoever about the circumstances of the sale to raise any suspicion that the substance was not grapefruit juice. It seems to me that the whole transaction and everything about the circumstances of it suggest, as a matter of common sense, that the situation was one in which the defendant put out a product as grapefruit juice, that it did put out what it purported to put out, and that the shopkeeper resold that substance.

There is another aspect about the matter that Mr Morris drew my attention to. This is that by virtue of the requirements under the *Health Act*, the substance purchased had to be divided so that a sample was given to the defendant. The defendant had in its possession a quantity of fluid and was fully able to make any tests that it wished to do on that substance. A copy of the certificate of analysis was submitted to the defendant, too. The defendant was not just confronted at the Court with evidence about it. That fact is, I think, of some significance, because the result is that you have a situation that the defendant has had full opportunity to investigate and to see whether there had been some mix-up and that somehow the substance that had got into his container is not what the defendant has said it was. There was no evidence that that was so.

It was said by Mr Alston that I should not draw any adverse inference against the defendant from his not calling evidence, because, if the fact were that the substance was not grapefruit juice, then by giving evidence, the defendant would be incriminating itself.

That might provide an explanation for not giving the evidence, but it seems to me that the probability is that, if the substance were not grapefruit juice, the defendant would have given evidence about it, notwithstanding the fact that to do so might have revealed that the defendant had committed some other offence. I think that, on the whole, it is more probable that a defendant would want to explain that something had gone wrong, if that was so, than that it would remain silent. It seems to me that, on the whole, if there is no evidence against the substance being what it purports to be, then that renders it more probably that it was true to label.

The way in which the Court can go about reaching a conclusion in a criminal case such as this, where there is no evidence, is the subject of the decision of the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671. In the joint judgment of the High Court, the Court pointed out that there was a difference between the situation where the Court was being asked to rule whether or not there was a case to answer and the situation where the Court had to make a decision whether the offence alleged had been established beyond reasonable doubt. At p658 the Court cited with approval a passage from a judgment in the Supreme Court of South Australia, which includes this sentence:

> "When this stage has passed (that is to say, when there has been a case to answer) and the defendant has been called upon for his explanation or answer, and no evidence has been forthcoming, the Court or jury is entitled to take into consideration the probable means of knowledge on either side. If the truth is not easily ascertainable by the prosecution, but is probably well known to the defendant, then the fact that no explanation or answer is forthcoming as might be expected if the truth were consistent with innocence, is a matter which the Court or jury may properly consider."

Then the Court said towards the bottom of that page:

> "After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question ii may in some cases be legitimate, as is pointed out in *Wilson v Buttery* [1926] SASR 150 for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear: cf. *Morgan v Babcock & Wilcox Ltd*, per Isaacs J [1929] HCA 25; (1929) 43 CLR 163, p178; [1929] ALR 313."

Those passages do show that the Court can take into account the absence of evidence by the defendant in arriving at a decision as to whether there should be a conviction. Indeed, in my opinion, it really goes further than that: the Court should take into account the absence of evidence by the defendant in deciding whether or not it should convict. Whether that absence will play any important part, or part at all, for that matter, in the conclusion arrived at, is another matter. But it ought to be looked at. Certainly, as part of the process of review of the Magistrate's decision, I must look at it.

Here, one cannot help but see that the defendant company would have been able to have provided an explanation to show that this substance which it said was grapefruit juice was not grapefruit juice. It was all the better able to do that because it had a sample of the very substance in its possession. It did not do so.

It is perfectly true, as Mr Alston pointed out, that a defendant is not obliged to make any answer. He is perfectly entitled to say nothing at all and rely upon the rule that the onus rests on the prosecution throughout to establish the case beyond any reasonable doubt. But, as *May v O'Sullivan* (*supra*) shows, if he chooses not to make an explanation, the Court may take that into account in deciding what conclusion it should come to. As was there said:

> "If the truth is not easily ascertainable by the prosecution but is probably well-known to the defendant, then the fact that no explanation or answer is forthcoming as might be expected if the truth were consistent with innocence, is a matter which the Court or jury may properly consider."

I do not know that it can be said in this case that the truth is not easily ascertainable by the prosecution, but, certainly, one would have thought that the truth, as to whether or not this was grapefruit juice, was something that was well known to the defendant. In my opinion, the absence of evidence from the defendant in this case is a factor which must play a quite important part in deciding whether or not on this one point is whether or not the substance is grapefruit juice.

I do not need to describe grapefruit juice by the description that is given in the *Food and Drug Standards Regulations*. The defendant is using the expression in the context of putting out a product which is governed by the *Food and Drug Standards Regulations* and indeed, it represents that it complies with the standards of those Regulations. There was no air of improbability about the evidence of the label which, in my opinion, was clearly admissible against the defendant.

I do not regard the point about the possible confusion with other fruit juices as one of any substance. One must regard it as a possibility, but in the absence of evidence to the contrary, it seems to me that the inference that should be drawn is rather that the defendant ran its premises properly so that it put out products which were true to label. As I have said, there is nothing in the other aspects of the evidence either, to suggest that one ought to be at all suspicious or cautious about accepting the evidence that the substance was what it purported to be.

The Magistrate in his reasons does not really amplify why he had the doubt in his mind at the end of the whole case. What has concerned me about this is that it is clear that his finding is a finding of fact and involved a weighing up of the evidence. Nothing turns in this case upon the credibility of witnesses. It is all a question of what is the proper inference to be drawn from the evidence that was led and from the absence of evidence from the defendant.

I am unable to see any reason why, on that evidence, the conclusion should not be drawn that the information has been made out. Consequently, in my opinion, the Magistrate was wrong in holding that although the evidence tendered by the informant was sufficient to satisfy him *prima facie* that the substance sold to the informant was grapefruit juice, and although such evidence was not contradicted in any way, it was not sufficient to satisfy him beyond reasonable doubt that the substance was grapefruit juice. I do not find it necessary to deal with Ground 2. To do that properly would really require a fuller examination of the extent of the use which could be made of the evidence of the actual sale itself.

I have come to the conclusion that Ground 1 of the order nisi had been made out, and that therefore the order below should be set aside.
