08/05; [2005] VSCA 111

SUPREME COURT OF VICTORIA — COURT OF APPEAL

AB OXFORD COLD STORAGE CO PTY LTD v ARNOTT

Callaway and Nettle JJ A, Byrne AJ A

20 April, 11 May 2005 — (2005) 11 VR 298; (2005) 145 IR 61

OCCUPATIONAL HEALTH AND SAFETY – PROCEEDINGS TO BE BROUGHT BY AN INSPECTOR AUTHORISED IN WRITING – WRITTEN AUTHORISATION APPOINTED INFORMANT TO BRING PROCEEDINGS AGAINST COMPANY – WHETHER AUTHORITY SUFFICIENTLY PARTICULAR – POWER OF AUTHORITY TO AUTHORISE INSPECTOR – WHETHER POWER DELEGABLE – WHETHER POWER CAPABLE OF DELEGATION TO PERSON HOLDING OR PERFORMING DUTIES OF A SPECIFIED OFFICE – EMPLOYER TO PROVIDE "ADEQUATE FACILITIES" FOR WELFARE OF EMPLOYEES – WHETHER FAILURE TO PROVIDE FIRST-AID AND MEDICAL FACILITIES AMOUNTED TO BREACH OF DUTY: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, SS4, 21(1)(D), 47(1), 47(3), 48(3); *ACCIDENT COMPENSATION ACT* 1985, S21.

Seven employees working for the defendant ('Oxford') were adversely affected by carbon monoxide fumes coming from a forklift in a freezer room at Oxford's premises. Four of the employees spoke to the general manager (Hilton) and were told that there was a possibility that their symptoms could have been caused by exhaust emissions from a forklift and that they should "take a break" and if they felt better to return to work and if they did not feel better, to go home. Later that day all of the employees were admitted to hospital showing signs of substantial exposure to carbon monoxide.

Subsequently, charges were authorised to be laid against Oxford for breaches of the *Occupational Health and Safety Act* 1985 ('Act') including the failure of Oxford to provide adequate facilities for the welfare of employees. At the hearing it was submitted that the informant was not authorised either generally or in the particular case to bring the proceedings. This submission was rejected and after a hearing the magistrate found the charges proved. Upon appeal to a Judge of the Supreme Court Oxford's appeal was dismissed. Upon appeal—

HELD: Appeal dismissed.

1. The Act by s48(2) provides that an inspector must have authority in writing of the Authority "given generally or in any particular case". It is not necessary for the prosecutor to give evidence that the prosecution case answers the description of the prosecution to which consent has been given. It is for the accused to rebut the presumption that the consent refers to this prosecution. The informant's authority to prosecute was an authority to prosecute in this particular case. Despite that it did not refer to the circumstances with which the proceeding was concerned, it described the prosecution in terms which were capable of accommodating the prosecution and Oxford did not show that the approval did not relate to the prosecution. It is clear that proof of authorisation is essential to the validity of a prosecution for an offence. But it is not an element of the offence and therefore, so long as a defendant does not object that a prosecutor's authorisation has not been proved, the authorisation will be presumed in accordance with the presumption of regularity. Needless to say, if objection is taken, it will be necessary for the prosecutor to prove the authorisation. But because the authorisation is not an element of the offence, the standard of proof of the authorisation is only on the balance of probabilities. In the result, an authorisation may ordinarily be proved by production of an authority in writing and oral testimony as to the nature and provenance of the document.

2. The offence alleged was one of failing to provide first aid or medical treatment and of failing to provide transport home. It was not alleged that the appellant failed to ensure that the employees availed themselves of first aid or medical treatment or transport home. In the circumstances, the court was not in error in finding the charges proved.

CALLAWAY JA:

1. This was an appeal to the Trial Division from the Magistrates' Court pursuant to s92 of the *Magistrates' Court Act* 1989. The case was heard on 4th June 2003 and the learned trial judge handed down reasons on 18th November 2003. His Honour said that he would hear counsel in relation to consequential orders and costs. On 2nd December 2003 his Honour ordered that the appeal be dismissed and that the appellant pay the respondent's costs, including any reserved costs. Those orders were authenticated on 4th December 2003. They are the orders from which Chernov JA and I granted leave to appeal, limited to two grounds only, on 17th December 2003.

2. The appeal book contains not only the orders of 2nd December 2003 but also another document purporting to be an authenticated order. It recites that orders were made on 18th November 2003, mistaking the reasons for the orders. Unsurprisingly, it does not record the orders that were made on 2nd December 2003. The document is a nullity. The Court should order that it be cancelled and removed from the file. The notice of appeal, dated 19th December 2003, also refers to "the judgment ... delivered on 18 November 2003". The notice of appeal should be amended to refer to the orders made on 2nd December 2003.

3. In his outline of submissions counsel for the appellant advanced two contentions which, arguably, were not within the scope of the limited leave to appeal that was granted. One contention was that s21 of the *Accident Compensation Act* 1985 did not empower the Victorian Workcover Authority to delegate its power under s48(2) of the *Occupational Health and Safety Act* 1985 to authorize an inspector to bring proceedings for an offence against that Act. The other contention was that, in any event, the delegation was ineffective because it was not made to an individual personally but to the person for the time being holding an office or position.

4. It is unnecessary to decide whether those contentions were within the scope of the leave granted because, for the reasons given by Nettle JA, which I have had the benefit of reading in draft, the appeal should in any event be dismissed.

NETTLE JA:

5. This is an appeal from orders made on 2 December 2003 in the Common Law Division, dismissing an appeal from orders made on 13 December 2002 in the Magistrates' Court at Sunshine that the appellant be convicted of offences against s21(1) of the *Occupational Health and Safety Act* 1985.

6. On 29 December 1999, seven students working as casual employees of the appellant were adversely affected by carbon monoxide produced by a forklift operating inside a freezer room at the appellant's premises. After suffering symptoms of headache, dizziness, nausea and lethargy, four of the employees attended at the appellant's office. They asked to speak to the general manager, Mr Gabor Hilton, who was known to some of them, but before Mr Hilton came to speak to them, another officer of the appellant, Mr Luiz Fleiszig, entered the reception area and they began to describe their symptoms to him. As they did so Mr Hilton arrived and mentioned that it was possible that their symptoms had been caused by exhaust emission from the forklift. He told them to "take a break" and if they felt better to return to work, and if they did not, to go home. The three employees who had not gone to the office continued working for a short period of time, but as they felt progressively more unwell, they too attended at the office and met the four employees who had spoken to Fleiszig and Hilton. All seven of them then decided that they did not feel well enough to continue work and that they would go home. Later that day, all were admitted to hospital suffering markedly elevated carboxy-haemoglobin blood levels, a sign of substantial exposure to carbon monoxide.

7. The appellant was charged with four offences against s21(1) of the *Occupational Health and Safety Act*, namely:

> (1) In contravention of ss21(1) and 21(2)(a), failing to provide and maintain plant and systems of work that are so far as is practicable safe.
>
> (2) In contravention of ss21(1) and 21(2)(c), failing to maintain the workplace in a condition that is safe.
>
> (3) In contravention of ss21(1) and 21(2)(d), failing to provide adequate facilities for the welfare of employees at any workplace under the control and management of the appellant.
>
> (4) In contravention of ss21(1) and 21(2)(e), failing to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe.

After a hearing that spread over five days, the appellant was found guilty as charged and convicted and fined the sum of $50,000.

8. On appeal to the judge below, his Honour was required to consider two questions[1]:

"(a) whether for the purposes of section 48(2) of the *Occupational Health and Safety Act* 1985 the informant was authorised either generally or in the particular case to bring the proceeding against the Appellant? And

(b) whether for the purposes of section 21(2)(d) of the *Occupational Health and Safety Act* 1985 the alleged failure of the Appellant to do the acts alleged against it in the Respondent's further and better particulars of charge in respect of charge 3 amounts to or is capable in law of amounting to a failure to provide adequate facilities for the welfare of employees?"

The judge answered both questions affirmatively and, as Callaway JA has noticed, the leave to appeal granted on 17 December 2003 was confined to grounds that the judge had erred in so answering. Two grounds of appeal are advanced.

Ground 1 - Authority to prosecute

9. Section 48 of the *Occupational Health and Safety Act* 1985 provides that:

"48. Proceedings may be brought by inspectors etc.
(1) Proceedings for an offence against this Act may be brought by the Authority[2] or an inspector.

(2) No proceedings for an offence against this Act shall be brought by an inspector without the authority in writing of the Authority given generally or in any particular case.

(3) An authority under sub-section (2) shall be sufficient authority to continue proceedings in any case where the Court amends the charge, warrant or summons.

(4) An inspector may conduct before the Court any proceedings brought by the inspector.

(5) The Authority must issue general guidelines for or with respect to the prosecution of offences under this Act.

(6) The Authority must publish guidelines under sub-section (5) in the *Government Gazette*."

10. Section 21 of the *Accident Compensation Act* 1985 provides, however, that:

"21. Delegation (1) The Authority may, by instrument under its common seal, delegate to any person any function or power of the Authority under this Act or any other Act including, subject to sub-section (3), this power of delegation.
…
(3) A person to whom a function or power has been delegated under sub-section (1) may, subject to and in accordance with the approval of the Authority given generally or in a particular case, by instrument in writing, or in the case of a body corporate that has a common seal, under its common seal, authorise another person to perform the function or exercise the power so delegated.

(4) An authority given by a delegate of the Authority under sub-section (3) may be revoked at any time by the delegate by instrument in writing and, where a delegation under which the authority was given is revoked, the authority is revoked.

(5) Any act or thing done in the performance of a function or the exercise of a power by a person to whom that function or power is delegated by the Authority under sub-section (1) or by a person authorised by a delegate of the Authority under sub-section (3) to perform that function or exercise that power has the same force or effect as if it had been done by the Authority.

(6) Where the performance of a function or the exercise of a power by the Authority is dependent on the opinion, belief or state of mind of the Authority in relation to a matter and that function or power has been delegated under sub-section (1), that function or power may be performed or exercised by the delegate or by a person authorised by the delegate under sub-section (3) upon the opinion, belief or state of mind of the delegate or of the authorised person, as the case may be, in relation to that matter.

(7) The giving of an authority under sub-section (3) does not prevent a performance of the function or the exercise of the power by the person by whom the authority was given.

(8) Where a person purports to perform a function or exercise a power under this Act, it shall be presumed, unless the contrary is established, that the person is duly authorised by a delegation under sub-section (1) or by an authority under sub-section (3) given pursuant to such a delegation to perform the function or exercise the power.

(9) A delegation under sub-section (1) or the giving of an authority under sub-section (3) may be made subject to such conditions or limitations as to the performance or exercise of any of the functions or powers to which it relates or as to time or circumstance as is specified in the instrument of delegation or in the authority.

(10) A delegation must not be made under this section to any person, other than a Director of the Board appointed under section 25 or 26 or an officer or employee of the Authority, in respect of any power, function, authority or discretion to which section 14 of the Dangerous Goods Act 1985 applies."

11. Before the Magistrates' Court the informant relied on an authority to prosecute dated 5 June 2001, purportedly issued under s48(2) of the *Occupational Health and Safety Act*, as follows:

AUTHORISATION OF PROCEEDINGS
Occupational Health and Safety Act 1985 (VIC)
Equipment (Public Safety) Act 1994 (Vic)
Barry Durham, being the person occupying the position or performing the duties of Executive Director, Health & Safety of the Victorian WorkCover Authority ("the Authority"), is duly AUTHORISED by William Raymond Mountford, Chief Executive of the Authority, to authorise Inspectors in writing generally or in any particular case to bring proceedings for offences against *the Occupational Health and Safety Act* 1985 (Vic) ("the OHSA") (and any regulations made thereunder) in accordance with the requirements of section 48(2) of the OHSA and/or for offences against the *Equipment (Public Safety) Act* 1994) (Vic) ("the EPSA") (and any regulations made thereunder) in accordance with the requirements of section 28(2) of the EPSA, under and by virtue of an instrument of authorisation executed by William Raymond Mountford on 17 April 2001 ("the instrument of authorisation").

William Raymond Mountford, being the person occupying the position or performing the duties of Chief Executive of the Authority, is a person to whom all of the Authority's powers, functions, authorities, duties or discretions under, *inter alia*, the OHSA (and any regulations made thereunder) and the EPSA (and any regulations made thereunder) have been delegated by the Authority pursuant to section 21(1) of the *Accident Compensation Act* 1985 (VIC) ("the ACA"), except and excluding the power of the Authority to appoint any officer or employee of the Authority to be an Inspector for the purposes of the OHSA and the EPSA, by an instrument of delegation dated 8 July 1996 and executed by the Authority under its common seal ("the instrument of delegation").

The instrument of authorisation is made pursuant to the power to authorise under the instrument of delegation in which the Authority approves the authorisation by the Chief Executive of any officer or employee of the Authority in the performance or exercise by that officer or employee of any of the powers, authorities, functions, duties or discretions delegated by the Authority to the Chief Executive and pursuant to section 21(3) of the ACA.

Pursuant to the instrument of authorisation, I Barry Durham, HEREBY AUTHORISE JAMES O'NEIL ARNOTT being Inspector appointed under the OHSA to bring these proceedings against A.B. OXFORD COLD STORAGE COMPANY PROPRIETARY LIMITED A.C.N.: 005 104 361 for offences pursuant to section 47(1) of the OHSA in relation to the following sections:
Occupational Health and Safety Act 1985 (Vic)
Section 21(1) & (2)(a) & 47(1) – one charge
Section 21(1) & (2)(c) & 47(1) – one charge
Section 21(1) & (2)(d) & 47(1) – one charge
Section 21(1) & (2)(e) & 47(1) – one charge
Dated this 5th day of June 2001
[SGD.]
Barry Durham
Executive Director, Health & Safety

12. The informant also gave oral evidence, in the course of which there were tendered:

• an instrument dated 8 July 1996 purporting to be a delegation by the Victorian WorkCover Authority pursuant to s21(2) of the *Accident Compensation Act* 1985 of its powers functions authorities duties and discretions under the *Occupational Health and Safety Act* 1985 (excluding the power to appoint a person to be an inspector but otherwise including the power of delegation), to the person from time to time occupying the position or performing the duties of Chief Executive of the Authority; and

• a further instrument dated 17 April 2001 purporting to be the delegation by William Raymond Mountford, as the person occupying the position of the Chief Executive Officer of the Authority, to Barry Durham of the power to approve prosecutions under s48(2) of the *Occupational Health and Safety Act* 1985.

Authority sufficiently particular

13. Before the judge below, the appellant submitted that the authorisation was so lacking in particularity as to be bad in law. It argued that although the tenor of the document was to authorise proceedings, it failed to specify the dates or other particular circumstances with which the proceedings were concerned. Thus in the appellant's submission, the document did not identify the proceedings which it purported to authorise. That meant, it was said, that the document failed to qualify as an "authority" within the meaning of s48(2).

14. The judge below rejected that argument. His Honour said that:

> "43. The written authorisation provided by the Authority to the informant was to bring 'the proceedings' against Oxford..., in relation to specified sections of the OHS Act. The charge and summons served on [the] defendant contained charges which accorded completely with the document granting authority to bring proceedings. One needs to do no more than look at the authorities given to the informant and at the charges alleged against the [party] to see that the authorities authorise those charges. As Higgins J said in *Berwin v Donohoe*[3], the prosecution brought 'answers the description of the prosecution to which consent has been given ... It is for the accused to show that the written consent which on its face, and without any straining of words, can fit this prosecution, does not relate to it'. In my view, the informant was authorised to bring proceedings for the alleged offences against the specified sections of the OHS Act." .

15. The appellant contends that the reliance which the judge placed on *Berwin v Donohoe* was misplaced. It says that his Honour overlooked or ignored what the appellant contends is an important distinction between s3(6) of the *Trading with the Enemy Act* 1914 (Com)[4], which provided simply that "... A prosecution for an offence against this section shall not be instituted without the written consent of the Attorney-General," and the requirements of s48(2) of the *Occupational Health and Safety Act*: that an inspector must have authority in writing of the Authority "given generally or in any particular case". The appellant submits that whereas it may have been sufficient compliance with s3(6) of the *Trading with the Enemy Act* to produce an authority which did not specifically identify the authorised proceedings, under s48(2) of the *Occupational Health and Safety Act* it is necessary to produce an authority which is either general or which specifically authorises a particular case, and that the authority in fact produced was neither. It was not a general authority, because it was confined to specified charges and, according to the appellant, it was not an authority in a particular case, because it did not specify sufficient dates, facts and circumstances to enable identification *ex facie* of the offences the subject of the case.

16. In my opinion there is no relevant difference between s3(6) of the *Trading with the Enemy Act* and s48(2) of the *Occupational Health and Safety Act*. Section 3(6) of the *Trading with the Enemy* Act provided that:

> "(6) A prosecution for an offence against this section shall not be instituted without the written consent of the Attorney-General."

And as has been seen, s48(2) of the *Occupational Health and Safety Act* provides that:

> "(2) No proceedings for an offence against this Act shall be brought by an inspector without the authority in writing of the Authority given generally or in any particular case."[5]

The only significant difference between the two provisions is the words "given generally or in any particular case", and as it appears to me those words do not say anything about the degree of precision required of an authority in a particular case. Their purpose and effect is to make clear that an authority may be given generally as well as in a particular case[6].

17. Strictly speaking, the words may have been an unnecessary inclusion in s48(2) because, if s48(2) referred simply to "authority", it would presumably encompass general authority as well as authority in a particular case. But I suspect the fear was that, without the words "given generally", s48(2) might be construed as requiring a separate authority in each particular case, and that having then decided to include the words "given generally", it was thought necessary as a matter of drafting to make express reference to authority "in any particular case", lest the express reference to the general be taken as excluding the particular[7]. The technique appears to be common enough. Examples of it may be found in several other statutes[8].

18. As it seems to me, the appellant's argument also proceeds upon a misconception that s3(6) of the *Trading with the Enemy Act* is to be read as providing only for general consents and that that was the basis of the decision in *Berwin v Donohue*. For the reasons already given, I consider that s3(6) provided just as much as s48(2) for consent in particular cases – the point of distinction between the two provisions is that s3(6) may not have gone as far in providing for general consents – and in my opinion the consent which was in issue in *Berwin v Donohue* was a consent in a particular case. As the consent is set out in the judgment of Higgins J it was that:

> "The Attorney-General for the Commonwealth of Australia hereby consents to a prosecution being instituted against Alfred George Berwin of Sydney in the State of New South Wales for an offence against the *Trading with the Enemy Act* 1914."[9]

Higgins J left no doubt that he regarded that as a specific consent:

> "It is said that this consent is not sufficiently specific, does not specifically refer to this particular prosecution. It is not pretended that there is any other prosecution to which it could possibly refer. There is only one offence specified in the information, an offence under sec 3 (see *Acts Interpretation Act* 1904, sec 8); and there is no offence mentioned in the Acts that requires the consent of the Attorney-General except an offence against sec 3. It is quite true that the words in the written consent might also be applicable to some other offence than that specified in the information; but the words are distinctly applicable to that so specified. An indictment of John Smith would not be bad because there are other John Smiths to whom it might refer. A devise in a will of 'my farm in the parish of 'Wycombe' is not void for uncertainty even if the testator had two farms in that parish; and evidence would be admissible to show which farm was referred to. Here there are not two prosecutions of Berwin, and the difficulty of showing which prosecution is referred to does not arise. The words of the Act providing for the consent of the Attorney-General are similar to those found in leases providing for the consent of the landlord to an assignment. If we had before us the words 'an assignment of the lease shall not be made without the written consent of the lessor', and if the lessor signed a written consent to 'assignment', without restricting it to assignment to any definite person, how could anyone say that there was a breach of the covenant?
>
> Inasmuch as the prosecution in this case answers the description of the prosecution to which consent has been given, it is not necessary for the prosecutor to give evidence identifying the former with the latter. It is for the accused to rebut the presumption that the consent refers to this prosecution (*Sewell v Evans*[10] ; *Leake on Contracts*, 5th ed., p137). It is for the accused to show that the written consent which on its face, and without any straining of words, can fit this prosecution, does not relate to it (and see *R v Metz*[11]). Even if there were two prosecutions to which the consent would be equally applicable, evidence would be admissible to show to which the consent is applicable; the consent would not be a bad consent. There would be a sufficient description even if evidence had to be given to show to which prosecution the consent referred *Shardlow v Cotterell*[12]; *Plant v Bourne*[13]). I am clearly of opinion that the objection to the conviction is groundless, and that the rule nisi, so far as it relates to this ground, should be discharged."[14]

To the same effect, Isaacs J said:

> "Now, here the Attorney-General signed a consent in these terms:– "The Attorney-General of the Commonwealth hereby consents to a prosecution being instituted against Arthur George Berwin for an offence against the *Trading with the Enemy Act*."
>
> No other section than sec. 3 requires such consent, and the presumption is that the consent was given with reference to sec. 3. No other prosecution or offence or challengeable conduct on the part of Berwin within the purview of the Act is suggested. In short, there is nothing but the present set of circumstances to which, so far as appears, the consent could possibly have reference, and the consent was entrusted to the Crown officer Donohoe actually prosecuting in this particular case."

And later:

> "...If the defence definitely challenges the fact that the Attorney-General has examined the facts of that particular case, the prosecution may be put to prove that he has; but, as I say, no such challenge was made here. The objection was merely as to the form of the documents. Then I see no distinction between this and a consent specifying sec 3. Sec 3 embraces a multiplicity of offences any one of which may have been or may not have been the subject of a consent merely specifying the whole section. In my opinion the protection intended by the sub-section has been fully afforded, and the objection should be overruled."[15]

Powers J agreed with Higgins and Isaacs, JJ[16].

19. The net result of the reasoning[17] in *Berwin v Donohue* was therefore that a consent for a prosecution was to be regarded as valid for the purposes of a section which contemplated that consent might be given in a particular case, and only arguably allowed consent to be given generally, if the prosecution fell within the terms of the consent, and that was so whether or not there were any other prosecutions capable of falling within the terms of the consent.

20. Since s48(2) of the *Occupational Health and Safety Act* is a section which contemplates that authority may be given in a particular case, and which allows consent to be given generally, logic implies that the same reasoning is applicable. In each case it is simply a question of whether the prosecution answers to the description of a prosecution which has been authorised.

21. Consequently, I agree with the judge that the informant's authority to prosecute was an authority to prosecute in this particular case. Despite that it did not refer to the circumstances with which the proceeding was concerned, it described the prosecution in terms which were capable of accommodating the prosecution and the appellant did not show that the approval did not relate to the prosecution.

S48(3) not redundant

22. The appellant submitted that the adoption of that view would render s48(3) redundant. I do not think that is so. The fact that s48(2) expressly provides for general authorities means that there may be authorities cast in general terms. In such cases s48(3) is unlikely to apply. But it is distinctly possible that an authority might be drafted with precision, and s48(3) appears designed to deal with the possibility of amendment in such a case. To take an example suggested by Mr Holdenson, it may be that an authority specifies precisely the paragraph of s21(2) upon which reliance is placed, and after the evidence begins it is realised that the case is more accurately to be characterised as falling under another paragraph. The prosecutor could well be given leave to amend, but if it were not for s48(3) it might be said that the charge as amended was not authorised.

Authority not unintelligible

23. In the course of reply the appellant's solicitor advanced a further argument, that the authority was in any event unintelligible. As I understood that contention, it was that because the authority refers to "these proceedings against A.B. OXFORD COLD STORAGE..." without defining "these proceedings", it is impossible to know what it means. But the answer is surely as Mr Holdenson submitted, that in context the expression "these proceedings" is to be read as "the following proceedings" and then in what follows the proceedings are defined in terms of proceedings for offences pursuant to section 47(1) of the *Occupational Health and Safety Act* in relation to the following sections:

> *Occupational Health and Safety Act* 1985 (Vic)
> Section 21(1) & (2)(a) & 47(1) – one charge
> Section 21(1) & (2)(c) & 47(1) – one charge
> Section 21(1) & (2)(d) & 47(1) – one charge
> Section 21(1) & (2)(e) & 47(1) – one charge.

That is intelligible and in the absence of any suggestion that there may have been some other proceedings, it is sufficiently precise.

The admissibility of *viva voce* evidence

24. The appellant argued that the magistrate was wrong in law and that the judge below was in error in not determining that the authorisation was deficient on its face. The thrust of that contention was that the magistrate was wrong to act on the basis of oral testimony as to the administrative steps taken preceding the issue of the authority and to place reliance upon the presumption of regularity. The appellant submitted that:

- s48(2) requires authority in writing and accordingly that there was no basis for the receipt of oral evidence for the purposes of proving the authorisation;

- the presumption of regularity is only capable of application in circumstances where there is a gap in the evidence, and it is said that there were no gaps in the evidence;

- in any event, it was not permissible to invoke the presumption of regularity, because the effect of the presumption would be to shift the burden of proof to the defence.

25. Taking each of those propositions in turn, there is in my opinion no inconsistency between the requirement for authority to be in writing and the receipt of oral testimony to establish the nature and provenance of the authority in writing. As has already been seen, *Berwin v Donohoe* explains why it was not necessary that an authorisation to bring a prosecution precisely identify the authorised proceeding. It is sufficient that the description of the authorised proceeding be adequate to encompass the actual proceeding and that there be no suggestion of other prosecution or offence or challengeable conduct on the part of the accused[18]. Consistently with that sort of approach, an informant might well give oral evidence or tender other documentary evidence to prove that the description of proceedings in an authority in writing relates to the subject proceeding. Oral and other written evidence might also be given to prove such things as the execution of the authority and that the prosecutor holds an office to which the authority applies.

26. Turning then to the presumption of regularity, it is trite that courts will not presume the existence of facts which are central to an offence[19]. It is also clear that proof of authorisation is essential to the validity of a prosecution for an offence[20]. But it is not an element of the offence[21] and therefore, so long as a defendant does not object that a prosecutor's authorisation has not been proved, the authorisation will be presumed in accordance with the maxim *omnia praesumuntur rite et solemniter esse acta*[22]. Needless to say, if objection is taken, it will be necessary for the prosecutor to prove the authorisation. But because the authorisation is not an element of the offence, the standard of proof of the authorisation is only on the balance of probabilities[23]. In the result, an authorisation may ordinarily be proved by production of an authority in writing and oral testimony as to the nature and provenance of the document[24].

27. I see nothing in what was decided by the magistrate or the judge that runs counter to those principles.

Power to approve – delegable

28. As Callaway JA has explained, the appellant sought leave to put a further argument, which was not put below: that the Authority's power to approve a prosecution under s48(2) of the *Occupational Health and Safety Act* should be construed as a non-delegable power and that, since the prosecution of the appellant was approved only by a delegate of the Authority, the prosecution was invalid. The argument is based on s47(3) of the *Occupational Health and Safety Act*, which. provides that:

> "(3) An offence against this Act (not being a contravention of or failure to comply with a provision of the regulations) shall be an indictable offence."

29. According to the appellant, there is a long established principle of law that the class of persons who may bring proceedings for indictable offences is limited. The appellant says that it would be contrary to that principle, and a result that Parliament cannot possibly have intended, if the Authority were able to delegate its power to approve prosecutions to a wider class of persons. The appellant submits therefore that s21 of the *Accident Compensation Act* must be construed purposively so as to exclude that possibility, and that the appropriate way to do that is to treat the power to approve prosecutions as a power to which s21 simply does not apply.

30. I do not think that the argument is persuasive. I accept of course that a presentment for an indictable offence may only be preferred against an accused person by the Director of Public Prosecutions or a Crown Prosecutor[25]. So unless an indictable offence is to be tried summarily, it follows that the class of persons who may initiate a prosecution for an indictable offence is effectively limited to the Director of Public Prosecutions and the Crown Prosecutors[26]. But there are a number of exceptions, like s48 of the *Occupational Health and Safety Act*, which specifically authorise other persons to institute summary proceedings for certain types of indictable offences, and there are also a large number of indictable offences that may otherwise be tried summarily[27]. In those cases the procedure is governed by s54 of the *Magistrates' Court Act* 1989 and the class of persons authorised to institute summary proceedings is much broader. Furthermore, since the power conferred by s48(2) to prosecute offences under the *Occupational Health and Safety* Act is given only to inspectors, and since inspectors may only be appointed by the Authority (and the Authority may not delegate its power to appoint inspectors), the persons who may institute a prosecution are necessarily limited to persons appointed by the Authority. It is plainly not the case that the decision to prosecute may devolve upon just any one regardless of how appropriate they may be to make the decision.

31. The argument was also put in an alternative form which I do not think to be any more persuasive. As I understood it, it was contended that the Authority's own power to prosecute under s48 of the *Occupational Health and Safety Act* should be construed as a non-delegable power – because, it was said, if the Authority could delegate its own power to prosecute to any one it chose, it would render otiose the provisions of s48 of the *Occupational Health and Safety Act* that enable prosecutions to be brought by inspectors – and hence unless the power to approve prosecutions is also construed as a non-delegable power, there would be a nonsensical inconsistency as between the power of prosecution and the power to approve prosecutions.

32. If I have understood the contention correctly, it may be disposed of without making any determination about the extent to which the Authority may delegate its power to prosecute. Assuming without deciding that the scope for delegation were unlimited, it would mean only that while the Act contemplates that prosecutions will ordinarily be brought by inspectors, the Authority retains the ability to authorise others from time to time also to bring prosecutions. Prosecutions by inspectors must be approved under s48(2) on a case by case basis, by the Authority or its delegate. But it is conceivable that the Authority might wish to delegate the power to prosecute under s21 of the *Accident Compensation Act* in a fashion which does not require any further approval. If on the other hand the Authority's ability to delegate its power to prosecute were limited, it would not follow that the same limitation should apply to the ability to delegate the power to approve a prosecution by an inspector. Since all inspectors must be appointed by the Authority, and it is clear that the Authority may not delegate the power to appoint inspectors, there will always be the protection that prosecutions brought by inspectors will be brought by persons whom the Authority has individually approved for the task.

Delegation to holder of an office

33. The appellant argued as well that if s21 of the *Accident Compensation Act* allows the Authority to delegate its power to approve prosecutions, the delegation can only be given to a named person and thus not to the holder of an office for the time being or from time to time and that, since the power to approve prosecutions was in this case delegated to the person from time to time occupying the position or performing the duties of Chief Executive of the Authority, the authority was invalid. The appellant concedes, as it must, that s42A(2) of the *Interpretation of Legislation Act* 1984 provides that a power to delegate to the holder of an office includes a power to delegate to the person acting in or performing the functions and powers thereof for the time being. But the appellant submits that because the powers or functions of some positions or offices may be ill-defined or uncertain, one could never be sure whether a person purporting to act in or perform the functions and powers of an office or position was an eligible recipient of a delegation, and hence it must be supposed that the power of delegation is limited to delegation to named delegates.

34. I am not persuaded by either aspect of that argument. As to the first aspect, authority makes plain that a power of delegation expressed in terms like s21 of the *Accident Compensation Act* allows for delegation to the holder of an office or to a person performing the duties of an officer. In *Owendale Pty Ltd v Anthony*[28] Windeyer J at first instance was concerned with a notice given by a delegate of the Minister of the Interior to terminate a lease under the *City Area Leases Ordinance* 1936-1963 (ACT). Section 6 of the Ordinance provided that the Minister might delegate to any person or authority all or any of his powers and functions under the Ordinance (except the power of delegation). The delegation in fact given was to "the person for the time being holding or performing the duties of an office specified in the First Schedule to this Instrument" and then in the Schedule a number of offices were named. It was argued that the delegation was ineffective because it was not to a named person but to the holder of an office or person performing the duties of that office. Windeyer J rejected the argument as follows:

> "...there might perhaps have been some room for argument, were it not for the decision of Starke J. in *Noble and Bear v The Commonwealth*[29]. Since then, delegations to the holders of specified offices have become commonplace in the administrative system of the Commonwealth; and provided that there be an identifiable person the holder of the office, I consider they are a valid exercise of a statutory power to delegate 'to any person'. Whether it is desirable that Ministers should make wholesale delegations of discretionary powers and functions was questioned. But it is not a matter which can concern me. The Minister remains responsible for the action of his delegate."[30]

35. The appellant submits that *Owendale* is distinguishable because it was concerned with

civil proceedings, and that it should be assumed that a higher standard is expected in criminal proceedings. But subsequent authorities have held that it is applicable to criminal proceedings, and to judicial review proceedings involving the liberty of the subject[31], and in point of principle there is no reason why it should not be. As has already been noticed, even in criminal proceedings the standard of proof required in establishing authority to prosecute is proof on the civil standard.

36. As to the second aspect of the argument, whatever be the functions and powers of a particular office, common sense and experience suggest that it will ordinarily be clear enough whether a person is for the time being holding or performing the duties of the office[32]. Consequently, in the ordinary case there will be adequate certainty as to whether such a person is an eligible recipient of a delegation. Problems might arise occasionally, but they are likely to be of a sort capable of being dealt with on a case by case basis. The possibility that they may occur is therefore not a reason to suppose that the power of delegation in s21 of the *Accident Compensation Act* excludes delegations to the holder of an office or person acting in or purporting to perform the duties of the office.

Ground 2 – Failing to provide adequate facilities

37. The appellant's sole contention in support of ground 2 is that the judge erred in holding that the facts of which particulars were given were capable in law of constituting the offence of failing to provide adequate facilities for the welfare of employees in the workplace within the meaning of s21(2)(d) of the *Occupational Health and Safety Act*[33]. According to the appellant, the obligations imposed by s21(1) including those imposed by s21(2)(d) are obligations of an ongoing or continuous nature: to provide appropriate systems of work, facilities and the like, and they do not require an employer to ensure that employees make use of such systems and facilities as may be provided. On that basis the appellant argues that the alleged failure to provide first aid or medical treatment was incapable of constituting a failure to provide systems of work, facilities and the like. It says that at most it was a failure to ensure that employees made use of facilities.

38. In my opinion the argument proceeds upon a misconception of the way in which the case was put below. The offence alleged was one of failing to provide first aid or medical treatment and of failing to provide transport home. It was not alleged that the appellant failed to ensure that the employees availed themselves of first aid or medical treatment or transport home. Perhaps the particulars might have been drafted more precisely: in terms of failing to provide facilities for first aid and medical treatment and failing to provide facilities for a lift home. But even as drafted, they seem to have left no doubt as to what was intended[34]. As the appellant rightly says, employees cannot ordinarily be compelled to receive first aid or medical treatment, or to be driven home. Usually, therefore, an employer charged with an offence of failing to provide facilities is unlikely to conclude that he has been charged with failing to ensure that his or her employees made use of facilities. And in this case the appellant was under no such mistake. It is plain from the way in which the case was run before the magistrate and before the judge below that such a possibility did not cross anyone's mind. It follows that even if the particulars could be construed in the fashion now suggested, it would not be a basis for setting the convictions aside.

Conclusion

39. In my opinion, the appeal should be dismissed.

BYRNE AJA.:

40. I have had the benefit of reading in draft the reasons for judgment of both Callaway JA and Nettle JA. I concur in their reasons and agree that the appeal should be dismissed. I agree also with the other, essentially procedural, orders proposed by the presiding judge.

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[1] Among other issues.

[2] The WorkCover Authority: see *Occupational Health and Safety Act* 1985, s4.

[3] [1915] HCA 79; (1915) 21 CLR 1 at 28-29.

[4] Which was the provision in question in *Berwin v Donohue*.

[5] Emphasis added.

[6] Or particular cases, see: *Interpretation of Legislation Act* 1984, s37.

[7] In accordance with the maxim *expressum facit tacitum cessare*: *Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9; (1932) 47 CLR 1 at 7; 38 ALR 355; *R v Wallis; Ex parte HV Mackay Massey Harris Pty Ltd* [1949] HCA 30; (1949) 78 CLR 529 at 550; [1949] ALR 689; (1949) 23 ALJR 299; *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at

575; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service [1995] HCA 36;* (1995) 184 CLR 301 at 311-312; (1995) 131 ALR 377; (1995) 69 ALJR 829; *Ousley v R* [1997] HCA 49; (1997) 192 CLR 69 at 111; (1997) 148 ALR 510; (1997) 71 ALJR 1548; (1997) 17 Leg Rep C1.

[8] *Evidence Act* 1995 (Com), s110(1): "... either generally or in a particular respect ... of good character"; *Legal Profession Act* 1987 (NSW), s55(1): "a person appointed by instrument...either generally or in a particular case"; *Migration Act* 1958 (Com), s66D(1): "either generally or as otherwise provided by the instrument of delegation", and see *Singh v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 90 ALR 397 at 402.

[9] [1915] HCA 79; (1915) 21 CLR 1 at 28; it appears in a slightly different form in the judgment of Isaacs J, ibid at 25.

[10] 4 QB 626.

[11] 31 TLR 401.

[12] (1881) 20 Ch D 90; LR 20 Eq 492.

[13] [1897] 2 Ch 281.

[14] [1915] HCA 79; (1915) 21 CLR 1 at 28-29.

[15] [1915] HCA 79; (1915) 21 CLR 1 at 25-26.

[16] [1915] HCA 79; (1915) 21 CLR 1 at 38. The other three judges said nothing about the issue.

[17] On this issue.

[18] [1915] HCA 79; (1915) 21 CLR 1 at 25, per Isaacs J.

[19] *Scott v Baker* [1969] 1 QB 659 at 672-674; [1968] 2 All ER 993; [1968] 3 WLR 796 and *Dillon v R* [1982] AC 484 at 487; *Impagnatiello v Campbell* [2003] VSCA 154; (2003) 6 VR 416 at 427 [27]-[29]; (2003) 39 MVR 486; *Cross on Evidence*, Aust Ed, at [7280].

[20] *R v Waller* [1910] 1 KB 364 at 366; 26 TLR 42; *R v Bates* [1911] 1 KB 964 at 965.

[21] *Thompson v R* [1989] HCA 30; (1989) 169 CLR 1 at 12-13; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134.

[22] *R v Metz* (1915) 11 Cr App R 164 at 165-166; *R v Waller* [1910] 1 KB 364 at 366; 26 TLR 42; *Berwin v Donohue* [1915] HCA 79; (1915) 21 CLR 1 at 28-29; *Palos Verdes Estates Pty Ltd v Carbon* (1991) 6 WAR 223 at 227.

[23] *Thompson v R* [1989] HCA 30; (1989) 169 CLR 1 at 12-13; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134.

[24] *MacCarron v Coles Supermarkets Australia Pty Ltd* [2001] WASCA 61; (2001) 23 WAR 355 at 366-367.

[25] *Crimes Act* 1958, s353.

[26] Fox, *Victorian Criminal Procedure* 12th ed. at [2.3.1.2].

[27] *Magistrates' Court Act* 1989, s53(1) and Schedule 4.

[28] [1967] HCA 52; (1967) 117 CLR 539; 40 ALJR 446.

[29] (1943) 17 ALJ 184.

[30] [1967] HCA 52; (1967) 117 CLR 539 at 563 and at 581.8 (per Kitto, J.), 587.1 and 598.5 (per Taylor, J.) and 611.5 (per Owen J).[31]; 40 ALJR 446 *Barton v Croner Trading Pty Ltd* [1984] FCA 195; (1984) 3 FCR 95 at 110, per Bowen CJ and Beaumont and Wilcox JJ; *Fyfe v Bordoni* [1998] SASC 6860 at [52] and [53], per Olsson J

[32] See for example, *Wouters v Deputy Commissioner of Taxation* (1988) 20 FCR 342 at 349-350; (1988) 84 ALR 577; 19 ATR 1884.

[33] In fact the judge held that it was only the appellant's failures to provide first aid and medical treatment that constituted the offence and that the appellant's failure to provide transport home was incapable of constituting the offence.

[34] cf. *R v Thomas, Ex parte Brodsky* [1963] HCA 25; (1963) 109 CLR 434 at 438; [1963] ALR 613; 37 ALJR 98.

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