14/71

SUPREME COURT OF VICTORIA

MIGLIORINI v HODGE

Gillard J

29 April 1971

HEALTH – CONTAMINATED BREADSTICK – ENQUIRIES MADE OF THE MANUFACTURER – MANUFACTURER REFUSED TO ANSWER QUESTIONS ON THE GROUND THAT HE MIGHT INCRIMINATE HIMSELF – "IN ANSWER TO ANY ENQUIRY" – MEANING OF – PURPOSE OF INVESTIGATOR'S VISIT TO MANUFACTURER – WHETHER INVESTIGATOR SOUGHT ADMISSIONS TO COMPLETE HIS PROOFS FOR PROSECUTION – WHETHER SUCH ENQUIRIES WERE CONTEMPLATED BY THE ACT – WHETHER INVESTIGATOR WAS AUTHORISED BY THE COMMISSION – WHETHER PROVISIONS OF THE ACT SHOULD BE READ DOWN TO PRESERVE THE COMMON LAW RIGHT NOT TO INCRIMINATE ONESELF IN ANSWERING QUESTIONS – FINDING BY MAGISTRATE THAT CHARGE PROVED – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, S424(f).

HELD: Order nisi discharged with costs.
1. To make an enquiry means to seek information about some particular subject matter. Generally, it may be assumed that the information will be gleaned by a question and answer. Section 424(f) of the Health Act 1958 ('Act') assumes that this will be the mode of obtaining information since "in answer to any enquiry" appears in the provision.

2. But equally an enquiry could be carried out by obtaining a statement in the form of a narrative by an invitation to a person to give his evidence of a particular set of circumstances; in other words, to ask him to make a statement of all that he knew about a specified matter. In the end, the method of obtaining the information would depend primarily on the practice of the investigator.

3. Whatever method was adopted, it would have had to be established to the court's satisfaction that an effort was being made to obtain information, genuinely, for the purpose of the Act, by some authorised person.

4. That fact was clearly established by the evidence in this case. The informant was making a genuine enquiry on a complaint relating to bread sticks. He was making enquiries on a relevant matter. He was adopting a reasonable practice, as adopted in most inquisitorial exercises, of asking questions on facts which appeared to him material from a person which he believed knew something of the facts.

5. The purpose of the enquiry in this case was to discover the reasons for a complaint about contaminated food. The Commission, once it received such a complaint was bound to investigate it and to seek information from a person believed to have some knowledge of the facts, to prevent, if possible, and if necessary its repetition, and if proved to be a breach of the law, then to go the further step and prosecute an offender.

6. Accordingly, the defendant was bound to impart such knowledge as was relevant to the investigation of the complaint.

7. *Obiter*: Under s424 of the Act on the plain and ordinary meaning of the words used, it was intended that no role of interpretation could be applied so as to retain the common law privilege of refusing to answer on the ground that it might incriminate the person making the answer. The purpose of this Act would require that any duly authorised person should be given information so that remedial action might, if necessary, be taken for the public health of the community. It was only information required for the purpose of the Act that had to be supplied. It may be that in prosecuting such enquiries it would have led to informations being laid. Those were the sanctions laid down by the Act, but the purpose of the Act was to ensure the public weal and accordingly, statutory powers had been given of which this was but one example, whereby the public health might be safe-guarded by authorised persons making enquiries.

GILLARD J: This is the return of the order nisi to review the decision of the Magistrates' Court

at Carlton, when on the 19 November 1970 the defendant, Steve Migliorini of 13 Winters Way, Doncaster, was convicted and fined $30 with $60 costs, in that at Carlton on the 14 July he did refuse to give information in answer to an enquiry made for the purpose of the *Health Act* 1958 by John Hodge, the informant, being a person authorised in writing by the Commission of Public Health to make the enquiry.

It will be seen that there are some five elements that must be established to prove the defendant's guilt. The evidence disclosed that in fact the informant was authorised in writing by the Commission to make enquiries for the purposes of the *Health Act*. He was given a general authority.

On the 14 July 1970 at about 3.15 pm the informant went to the premises of E & U Bakeries, 20 to 22 Grattan Street, Carlton, and there interviewed the defendant. As Hodge has sworn in examination in chief, the purpose of his visit to the premises was as follows: "The purpose of my visit was to make enquiries in relation to a complaint concerning a packet of contaminated bread sticks".

The defendant was, at all material times, a director of E & U Bakeries Pty Ltd and he was asked pertinent questions as to whether that company had manufactured the bread sticks produced, whether the company had delivered a consignment of such bread sticks to a Supermarket in Essendon, and what reasonable precautions the company had taken to prevent its product becoming contaminated by rodents. The defendant refused to answer these and other questions because, as he swore in evidence, he did not want to say anything that might incriminate him and his solicitor had advised him that he was not obliged to say anything that might incriminate him.

Despite this reason given on oath for his silence, he was duly convicted of the offence as charged, of refusing to give information in answer to any enquiry by an authorised officer.

An order nisi was granted by Master Bergere on 7 December 1970 to review this decision. He granted it on three grounds which are as follows:

> (a) the Magistrate was wrong in law in holding the provisions of para 'f' of s42A of the *Health Act* 1958 required the defendant to answer all questions put to him by the informant despite the fact they might incriminate him;
>
> (b) that the Magistrate should have held that the said provisions did not make a person guilty of an offence against the Act if the person refused to answer a question put to him by an authorised person if the question was directed to ascertain only whether the person interrogated or some other person had committed an offence against the Act,
>
> (c) that the Magistrate should have held that the defendant was entitled to refuse to answer any question put to him by the informant if he had grounds for believing, and did believe, that he might incriminate himself by so answering."

In essence, the success or failure of a prosecution in the circumstances of this case primarily depends upon the interpretation of the provisions of para 'f' of s424, *Health Act* 1958, referred to in the grounds. Ignoring the statutory provisions immaterial to this prosecution, the provisions of the paragraph are as follows:

> "Every person who refuses to give information in answer to any enquiry for the purposes of the Act the making of which enquiry is hereby authorised by any person authorised in writing either generally or specially, by the Commission to make the enquiry, shall be guilty of an offence against the Act".

Mr Buckner for the defendant, to move the order absolute, relied upon two general propositions. He put these into the forefront of his submissions,

> (a) the statutory provisions in s424(f) do not relate to the situation where the officer authorised by the Commission is making enquiries for the purposes of possible prosecution. They provide, he submitted, general supplementary power for the purpose of prosecuting enquiries specifically authorised in other sections of the *Health Act*,

(b) the statutory provisions did not abrogate the common law right of any person being questioned to refuse to answer questions put to him by a person in authority or which are self-incriminating.

In support of the first proposition *Ex parte Grinham, re Sneddon* (1961) 61 SR (NSW) 862; 78 WN (NSW) 203 was cited. In that case, the Full Court of NSW held that the relevant regulations were not necessarily invalid even though they might have required the person interviewed to answer questions. The vital question was, what was the legislative power to make the regulation? On the facts of the case as I understand it, the Court was not satisfied that the information sought was being sought for the purpose of the Act under which the defendant was prosecuted, but was for the sole purpose of getting admissions with a view to a successful prosecution. This could not be justified by the law-making power in that Act and any regulation made thereunder insofar as it authorised this was *pro tanto* invalid.

As I understand the facts the authorised officer saw a taxi-cab stop at the kerb. In the taxi-cab was a driver, and a person seated next to him in the front seat. Another person then jumped from the footpath into the back seat of the taxi-cab. As I understand from a survey of the case with Mr Buckner it would appear that it was an offence under NSW law for a taxi driver to be carrying two fares at the same time.

The officer therefore saw two persons in the taxi-cab and that one of them joined the cab in his presence. *Prima facie* it would appear that the taxi-cab driver was breaking the law. The authorised officer then spoke to the taxi-cab driver, and asked questions as to who was the person seated next to him in the front seat, and who was the person in the back seat. Clearly the questions were made to complete proof of a prosecution for a breach of the regulations. In other words the officer was seeking an admission from the taxi-cab driver that the person in the front seat was one fare, and the person in the back seat was another fare.

It was therefore an easy inference to draw that the purpose of asking the questions was solely to bring about a conviction of the taxi driver, This was not justified since no regulation could be validly promulgated for this purpose. Mr Buckner sought to apply this reasoning to the circumstances of the present case. In particular, he relied upon the views expressed by Herron J. He also relied very strongly upon the canon of construction which constrains the court to construe penal provisions of the law strictly, and secondly, which directs that it was only by the clearest language that a Court should construe any legislation to abrogate the common law right of every citizen not to incriminate himself by answering questions given by some person in authority.

In particular Mr Buckner referred to the *dictum* of Herron J where the learned Judge pointed out

> "Laws which authorise interrogation under compulsion of persons in time of peace must always be scrutinised with care by the courts, although in some cases where the laws relate to members of the armed forces or disciplined services they may be more readily upheld".

Drawing an analogy between the NSW *Transport Act* and the *Health Act* Mr Buckner pointed out various sections of the *Health Act* under which enquiries were authorised to be made, and he submitted it was only for this purpose that the provisions of ss2, 424(f), were introduced, namely, to facilitate such enquiries being made.

In the end, however, Mr Buckner was forced to concede that the solution of the problems raised by him involved the proper interpretation of para. 'f'. He urged that the word 'enquiry' as used in the paragraph was to be distinguished from the word 'question'. It meant, he said something more formal, such as an enquiry similar to that provided in the *Evidence Act* 1958.

It can be readily conceded that there is a distinction to be drawn between the word 'question' and 'enquiry' but in my view it affords little assistance to interpret these statutory provisions. It will be noticed in the section itself the enquiry apparently was intended to be in the form of questions because it will be remembered that the requirement was to give information 'in answer to' an enquiry.

To make an enquiry means in my view to seek information about some particular subject matter. Generally, it may be assumed that the information will be gleaned by a question and answer.

As I said the sub-section rather assumes that this will be the mode of obtaining information since "in answer to any enquiry" appears in the provision.

But equally in my view, an enquiry could be carried out by obtaining a statement in the form of a narrative by an invitation to a person to give his evidence of a particular set of circumstances; in other words, to ask him to make a statement of all that he knew about a specified matter. In the end, the method of obtaining the information would depend primarily on the practice of the investigator.

Whatever method is adopted, it would have to be established to the court's satisfaction that an effort was being made to obtain information, genuinely, for the purpose of the Act, by some authorised person.

In my view that fact was clearly established by the evidence in this case. Hodge, the informant was making a genuine enquiry on a complaint relating to bread sticks. He was making enquiries on a relevant matter. He was adopting a reasonable practice, as adopted in most inquisitorial exercises, of asking questions on facts which appeared to him material from a person which he believed knew something of the facts. But it was submitted that Hodge was asking questions solely for the purpose of prosecution. Mr Buckner in a valiant submission this morning, atempted to reinforce this argumant he put to me yesterday. I then pointed out to him that the submission could not be supported by the evidence. This morning he has attempted to show that that view that I put to him was wrong.

I have already quoted what Hodge said in examination in chief. I now read the evidence that he gave in cross-examination. He said in cross-examination:

> "The purpose of my visit was to investigate and make enquiries in relation to a complaint concerning a packet of contaminated bread sticks, and a prosecution for breach of the *Health Act* or regulations against the company and/or the defendant may have followed such investigation."

Mr Buckner also relied very strongly on a statement by Mr Golden, who was the prosecuting officer, when Mr Golden was making his submissions to the bench after the evidence was closed. Mr Golden has sworn that at that period, he said this:

> "All the questions were directed towards obtaining evidence, if evidence was available, against the company, E & U Bakeries Pty Ltd, and since Migliorini was a person with a legal entity separate from that of the company, the questions called for answers that were not incriminatory of Migliorini."

If that were an accurate statement of the evidence, it might be said that the inspectors were asking someone who might have knowledge of the facts to assist the Commission in a prosecution of some other person who had offended against the *Health Act* and the regulations.

In my view, however, that was not a proper summary of the evidence. Going back to the best evidence in favour of the defendant, that is the informant's cross-examination the witness had made clear what was the purpose of his visit, and as to the possibility of a prosecution. The purpose of the visit was to investigate and make enquiries in relation to a complaint concerning a packet of contaminated food. In my view, this would be clearly within the purview of the provisions of the *Health Act* and the various regulations which have been promulgated thereunder for the purpose of ensuring pure food to the community.

Accordingly, I reject the view that has been put by Mr Buckner, that the sole purpose of this investigation was for the prosecution of the defendant or for that matter, of the company if it is necessary to go that far. I believe that the facts in *Grinham's Case* can be distinguished from the facts this case. There the authorised officer was making enquiries of the taxi-driver in relation to events which occurred in his presence. He sought admissions from the driver in order to complete his proofs for prosecution.

The purpose of the enquiry in this case, on the other hand, was to discover the reasons for a complaint about contaminated food. In my view, the Commission, once it received such a complaint was bound to investigate it and to seek information from a person believed to have some knowledge of the facts, to prevent, if possible, and if necessary its repetition, and if proved

to be a breach of the law, then to go the further step and prosecute an offender.

Are the enquiries comprehended by s424(f) only those enquiries referred to in other sections of the Act? Before answering that question it should be noted that the word 'authorised' is defined in the Act, to mean "authorised in writing either generally or specially by the Commission or by a council as the case may be". Having regard to this definition the expression 'any person authorised in writing either generally or specially by the Commission or by the council as the case may be' in paragraph (2) appears to be redundant. It would have been sufficient if the phrase 'any authorised person' had been adopted in lieu of the longer expression. It was said by Mr Buckner, however, that by adopting the longer expression, the legislature was emphasising that the Commission (or council) was only empowered to authorise a person to make an enquiry on such matters as the Commission (or council) was otherwise authorised to make under the other provisions of the Act.

This contention, however, in my view requires one to ignore two pieces of verbiage in the paragraph: (a) the words in brackets, namely, "the making of which enquiry is hereby authorised" and (b) the words "either generally or specially". As to the former expression, it would have been quite unnecessary to introduce it in the section if it were intended that the only enquiries to be made were already authorised under other sections of the Act, or, if the Commission (or municipal council) could have otherwise empowered a person to conduct such enquiries. The words in themselves clearly authorise the making of "an enquiry for the purpose of the Act". What person then would be authorised by these words? The answer must be the person generally or specially authorised to make the enquiry by the Commission (or council).

As in this case, the person might be generally authorised in writing by the Commission to make enquiries for the purpose of the Act. In itself, the written authority would ordinarily be sufficient to justify any enquiry which the law empowered the Commission to make under other sections of the Act. But the paragraph itself, by the introduction of the words in the brackets, supplies the statutory authority to a person generally so authorised in writing to make any enquiry "for the purposes of the Act". It should be here noted that the word "authorised" as used in brackets, does not have the same meaning as in the subsequent provision. It is obvious that the statutory definition of "authorised" referred to above could not apply to the word as used in the expression in the brackets. Accordingly, the opening words of the definition section would apply. The meaning of "authorised" as used in the brackets, is quite inconsistent with its context or subject matter, and accordingly the definition of "authorised" in the section cannot be applied to it. The statutory definition of "authorised" therefore should be ignored and the ordinary meaning given to the word as used in the brackets.

It follows therefore, that in my view (a) Hodge was authorised in writing by the Commission, generally, to make an enquiry for the purpose of the Act, (b) he had a complaint as to pure food, or rather in relation to contaminated food, and (c) he would be required to investigate this complaint, since such a complaint would be well within the purview and policy of the Act and regulations. To correct any faulty manufacture, and to discover any evidence which would show that the manufacturer had not taken appropriate precautions would be proper subjects for investigation.

I should here add that I have reservations as to whether, under paragraph (f) Hodge would not be entitled in such enquiries, to investigate only such facts that would justify a prosecution. I find it unnecessary to determine that in this particular case because of the informant's evidence, but it should be reserved for consideration in the future. Nothing I say should, in any sense, lead to the conclusion that I hold the view that having a complaint of contaminated food, Hodge would be prevented from investigating that complaint if his sole purpose was to prosecute somebody for having manufactured or distributed such food. I repeat I am not called upon conclusively to determine that matter. (d) Hodge therefore, was under the provisions of s424(f) authorised to make an enquiry for the purpose of the Act, that is, to ensure that the supply of food to the community was in accordance with the Act, and regulation standards. (e) He, in the course of that enquiry was entitled to ask a question, the answer to which would glean information relevant to his complaint. (f) The sole purpose of his asking the questions in this case was not for prosecution of the defendant, or for that matter, the company. This may have ensued as a result of his full investigation of the complaint, but it was not the sole purpose of his enquiry, (g) Unless Mr Buckner is correct in his second submission, the defendant was bound to impart such knowledge as was relevant to the investigation of the complaint indicated in para.(b) above.

I therefore now turn to Mr Buckner's alternative argument, namely, that the provisions should be read down to preserve the common law right not to incriminate oneself in answer to questions given by an authorised officer, or to put it in a negative fashion, as Mr Buckner invited me, there was nothing in the section which abrogated that common law privilege.

When one looks at the statutory provisions there is nothing expressed therein which would entitle a defendant to take refuge in the privilege of the common law, not to incriminate himself. The words of the paragraph are quite explicit! If any ambiguity did exist, then I agree the provisions should be interpreted in favour of the subject. But there is no lack of clarity in what was intended. Having regard to the nature of the Act itself and its policy, the purpose of the paragraph (f) becomes quite apparent. Where the public health is involved all kinds of powers have been conferred on authorised persons which ordinarily would be regarded as an anathema to those steeped in the common law. But the policy of the community is such that the health of the community is paramount to these well-established traditional rights and privileges, and they are frequently abrogated in the interests of the public weal. In my view, under this section, a person is bound to give any information in any enquiry made for the purposes of the *Health Act*. Save by implication, there is no saving a person from incrimination.

I am not concerned in this case to determine whether any incriminatory admissions that might be made by the defendant in consequence of the statutory authority of Hodge would have been admissible in subsequent prosecutions. Yesterday, in the course of discussion with Mr Buckner two concepts did become mixed up and confused, but if I might say so, Mr Buckner this morning has clearly defined the spheres of application of each of the two concepts. So far as the interpretation of statutory provisions such as s424(f) is concerned there is undoubtedly a canon of construction which requires a Court to read down any general provisions to meet the common law rule that a person should not be called upon to incriminate himself. This is difficult of application in the face of clear statutory expression as was well illustrated by the difference of opinion of the members of the High Court in *Kempley v R* [1944] 50 ALR 249.

On the other hand, there is equally a well established privilege which a person in entitled to claim in curial proceedings that an admission or confession obtained from him under pressure of statutory authority is not admissible since it was not a voluntary statement made by such person.

In the recent case of *The Commissioner of Customs and Excise v Harz & Power* (1967) 1 AC 760; (1967) 1 All ER 177; 51 Cr App R 123, the House of Lords have brought out very clearly the nature of the last-mentioned privilege.

In my view, the opinion expressed by Starke J in *Kempley's Case* at p253 may very well be applicable to any incriminatory statements so made. I believe the learned author of *Cross on Evidence*, the Australian edition, at p572-3, has given an accurate statement of the law. The learned author writes,

> "It is submitted that the House of Lords decision and the Australian authorities that anticipated it support the following propositions where the statute makes an offence at failing to answer questions and a threat of prosecution is made. First, if the law has provided a person must answer notwithstanding incrimination, the answers are admissible. Secondly, if the statute has left open the incrimination objection and the accused answers after an improper disallowance of objection properly taken, the answers are not admissible, because that then amounts to the exercise of improper compulsion of law."

I am not concerned to examine the position of a person who makes incriminating answers in response to questions under statutory provisions such as here being examined. My only reason for referring to this matter was that I felt that yesterday confusion had been introduced into the discussion but that confusion was removed and clearly removed by the clear exposition of the law given by Mr Buckner this morning.

I am not called upon really to give any concluded view on this aspect of the case. Nevertheless, it seems to me that under s424 on the plain and ordinary meaning of the words used, it was intended that no role of interpretation could be applied so as to retain the common law privilege of refusing to answer on the ground that it might incriminate the person making

the answer. In my view, the purpose of this Act would require that any duly authorised person should be given information so that remedial action might, if necessary, be taken for the public health of the community. It is only information required for the purpose of the Act that must be supplied. It may be that in prosecuting such enquiries it will lead to informations being laid. Those are the sanctions laid down by the Act, but the purpose of the Act is to ensure the public weal and accordingly, statutory powers have been given of which this is but one example, whereby the public health might be safe-guarded by authorised persons making enquiries.

For the reasons I have ventured to give, it seems to me that none of the three grounds set out in the order nisi can be sustained. Accordingly, the order nisi will be discharged with $120 costs.

APPEARANCES: For the applicant Migliorini: Mr GSH Buckner, counsel. Macpherson, Robinson & Co, solicitors. For the respondent Hodge: Mr FM Bradshaw, counsel. State Crown Solicitor.
