11/89

SUPREME COURT OF VICTORIA

VAUX v SE DICKINS PTY LTD

Vincent J

5 December 1988; 16 March 1989

WEIGHTS AND MEASURES – CERTAIN GOODS FOUND TO BE UNDER WEIGHT STATED ON PACKAGE – DEFENCES AVAILABLE TO EMPLOYER – WHETHER INCONSISTENCY BETWEEN DEFENCE - WHETHER *MENS REA* INGREDIENT OF OFFENCE – COSTS – DENIED TO SUCCESSFUL DEFENDANT – INFORMANT REGARDED AS ACTING REASONABLY IN LAYING CHARGE – WHETHER PROPER BASIS IN EXERCISE OF DISCRETION: *WEIGHTS AND MEASURES ACT* 1958, SS82H, 82L, 92; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S97(b); *MAGISTRATES' COURTS RULES* 1980, R157.

> Section 92 of the *Weights and Measures Act* 1958 provides (so far as relevant):
>
> "A person shall not be guilty of an offence against this Act if he proves—
> (a) ...; and
>
> (b) that he took all due precautions and exercised all due diligence to prevent the commission of the offence and had at all times acted innocently..."

1. Section 92 of the *Weights and Measures Act* 1958 ('Act') is a provision having general application to all offences against the Act, and it enables an employer to avoid liability by proving that all reasonable precautions were taken and due diligence exercised. S82L of the Act is a specific provision which permits an employer to avoid liability by proving the absence of knowledge of the commission of the offence and that commission of the offence could not have been prevented by the exercise of due diligence. S82L of the Act is not inconsistent with the provisions of S92 but operates in a complementary fashion. Accordingly, a magistrate was not in error in holding that S92 had application to the charge being determined.

***Tesco Supermarkets v Nattrass* 69 LGR 403; [1971] UKHL 1; [1971] 2 All ER 127; [1972] AC 153; [1971] 2 WLR 1166, referred to.**

2. *Mens rea* is not an essential ingredient of an offence against S82L of the Act.

***He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, indicia of Gibbs CJ, applied.**

3. A successful defendant in both civil and criminal proceedings is neither entitled to costs as of right nor prevented from obtaining them because of the nature of the proceedings. The court has an unfettered discretion to award costs which must be exercised judicially so as to achieve what is fair and just between the parties. The fact that an informant may be regarded as having acted reasonably in laying and prosecuting a charge does not, of itself, constitute an adequate basis for declining to award costs to a successful defendant.

***Hamdorf v Riddle* (1971) SASR 398, not followed.**

VINCENT J: *[After setting out the facts, the nature of the charge, relevant legislative provisions, part of the Magistrate's findings and reasons, and deciding that it was proper for the informant to be substituted by another, His Honour continued]* ... **[11]** In support of his contentions in relation to the first application, Mr Dwyer of Her Majesty's Counsel, who appeared to prosecute the matter, argued that the defence **[12]** under s92 of the *Weights and Measures Act* 1958, upon which the learned Magistrate based his decision, was not available to the company as its operation was excluded by virtue of the terms of s82L of the Act which provides (so far as relevant) that:

> "(1) Notwithstanding any other law or rule of law, where any person, as the employee of another person (who in this section is referred to as "the employer"), packs an article for sale, marks a package containing an article, or sells an article, and commits an offence against this Act or the regulations in relation to that packing marking or sale, the employer shall be guilty of an offence in like manner as the employee (whether or not the offence was committed without his authority or contrary to his orders or instructions) and may be proceeded against and convicted accordingly unless he proves

> that he had no knowledge of the commission of the offence and could not, by the exercise of due diligence, have prevented the commission of the offence."

He submitted that this section made an employer vicariously liable for an offence committed by an employee and did not contemplate or permit a "defence of reasonable precautions". Furthermore, the cases of *O'Connor v Jenner* [1909] VicLawRp 83; (1909) VLR 468; 15 ALR 519; 31 ALT 71 and *Tesco Supermarkets v Nattrass* 69 LGR 403; [1971] UKHL 1; [1971] 2 All ER 127; [1972] AC 153; [1971] 2 WLR 1166 upon which the company had relied concerned different statutory procedures and did not, it was submitted, enunciate general principles applicable to s82L, which was expressed to operate "notwithstanding any other rule of law". Finally Mr Dwyer submitted that even if a defence under s92 was **[13]** available to the respondent, the necessary elements of this defence had not been established by it.

Each of these propositions was disputed by Mr Francis, who argued further on behalf of the respondent, that *mens rea* was a necessary ingredient of the statutory offence created by s82L. Accordingly it was submitted that as there was no evidence that "the mind of" the Company had any knowledge of the offence until after it had occurred, this element of the offence had not been proved. Finally he argued that the principles in the *Tesco* case were applicable and on the basis of this authority the company could not be held liable pursuant to s82L in respect of the offence committed by its employee under s82H(2).

Turning then to the submission of Mr Dwyer that the defence of "reasonable precautions" under s92 was excluded by s82L, it is to be noted that in its terms s92 is a provision of general application to all offences against the Act. Whether or not it is to be interpreted as having such an extensive operation involves an analysis of the provisions of the Act and the consideration of what might be perceived to be the legislative intention underlying them.

Acts of Parliament sometimes contain general enactments relating to the whole subject matter of the statute, and specific enactments relating to certain particular matters. Where the general and specific provisions prove to be in any way repugnant to one another, the question will arise, which is to govern the situation. In *Pretty v Solly* [1859] EngR 249; 53 ER 1032; (1859) 26 Beav 606, Romilly MR set out the rule of construction under such circumstances:

> **[14]** "The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply." (at p610)

This approach, which has been applied on a great many occasions over the ensuing years, was considered by the Federal Court of Australia in *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-Stock Corporation & Ors* [1980] FCA 38; (1980) 44 FLR 455; (1980) 29 ALR 333 where Deane J (as he then was) stated:

> "As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions ... Repugnancy can be present in the cases where there is no direct contradiction between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter." (at p347)

On this basis, in the event that some inconsistency between the provisions was detected, s82L would prevail. However, in my view no such inconsistency of language or intention exists between the two provisions such that the operation of s92 is excluded in situations in which an employer is otherwise liable under s82L. The sections encompass distinctly different sets of circumstances. Section 92 requires for its operation (*inter alia*) that a defendant has taken "all due precautions and exercised all due diligence to prevent the commission of an offence" whereas taking of such **[15]** precautions and care is irrelevant to the establishment of a defence under s82L. What is required by that provision is proof of the absence of knowledge of the commission of the offence, (which might possibly be equated with the requirement of s92 that the defendant act

innocently in relation to the commission of the offence) and, importantly for the purposes of this matter, proof that the commission of the offence could not have been prevented by the exercise of due diligence.

It is readily apparent that this provision does not require that any precautions should have in fact been taken or that any diligence whatever should have been exercised to prevent the commission of the offence. If a defendant is able to show that the offence could not have been avoided by the exercise of due diligence, then it would not matter that no care at all was taken to prevent it. It is difficult to imagine a situation in which whilst the requirements of s92 had been satisfied, no defence had been made out under s82L. Yet as has been pointed out the reverse circumstance is clearly contemplated by the legislation. Obviously a defendant, particularly one who was actively engaged in a retail operation, would prefer, in order to preserve its public reputation, to succeed, in relation to a charge laid against it, on the basis of s92, which involves a positive finding that an appropriate measure of care has been taken, rather than s82L. The legislation does not provide any indication that a defendant is to be denied this opportunity.

I consider that s82L to this extent operates in a complementary fashion to s92 and provides additional **[16]** protection to an employer in circumstances where strict liability upon it for an offence committed by an employee "notwithstanding any other law or rule of law". Contrary to the submission which was made by Mr Dwyer on this aspect, I do not consider that this expression has anything whatever to do with the possible exclusion of s92 to circumstances covered by s82L.

The attribution of criminal responsibility to one party for the acts performed by another has been the subject of extensive consideration by the various legislatures and the Courts over a long period of time and in wide variety of contexts. A number of principles, with which it is not necessary to deal in this judgment, have been developed to deal with the problem in these circumstances and it is to them, that in my view the expression obviously refers.

It is clear enough that s82L renders an employer guilty of a criminal offence in circumstances where that person would not be liable in accordance with the general principles applicable to the determination of criminal complicity, including a situation where the employer may have possessed no knowledge whatever of the commission of the offence and even where it was committed contrary to the employer's specific instructions. The apparent harshness of such an imposition of responsibility, the purpose of which is quite obvious, has been ameliorated by two provisions, each of which is consistent with the legislative intention that an employer should be self policing in this area and casts the onus of proof upon it. Liability may be avoided under s92 if the employer is able **[17]** to establish (*inter alia*) that he took all reasonable precautions and exercised due diligence, or under s82L if it is able to provide that such activities would not have been of any avail in the circumstances.

I consider that it is highly unlikely that if the expression was intended to exclude the operation of other parts of the Act, in the fashion for which Mr Dwyer contended, a different form of language would have been employed involving either the enumeration of the particular sections or sub-sections which were to be so affected or the incorporation of some specific reference to the Act itself. Accordingly, I have arrived at the view that the argument presented by Mr Dwyer on this aspect cannot succeed and that it has not been demonstrated that the learned Stipendiary Magistrate fell into error in determining that s92 had application to the matter before him.

The further argument advanced in support of this application; that it was not open in any event to His Worship to find that the defendant had satisfied the onus cast upon it, had two limbs each of which, in my opinion must also fail. The first of these as I have previously indicated concerned the applicability of the principles set out by the House of Lords in *Tesco Supermarkets v Nattrass* (*supra*). It was contended that the Court was there concerned with statutory provisions which were importantly different from those under consideration in the present matter, and the approach of the Court to their **[18]** interpretation could therefore provide little, if any, assistance.

In my view the weakness of this argument can be easily demonstrated by a simple comparison of the two sets of provisions. The relevant sections of the Victorian legislation have already been set out. Those considered by the House of Lords in the *Tesco Supermarkets Case* read: *[His honour set out the provisions and continued]* ... The provisions have been expressed in what

might be regarded, generally speaking, as a common legislative form and are concerned with a roughly similar set of problems. The legislation in each case clearly reflects a desire of the Parliament to provide a form of consumer protection by casting upon corporations or individuals an obligation to ensure that an adequate degree of care and control was exercised in the conduct of their operations.

[19] The question which arose for determination before the House of Lords was – when could it be said that that had been done, or perhaps more accurately when could it be said that all reasonable precautions have been taken and all due diligence exercised by a defendant charged with an offence under the relevant legislation. The test provided by the Court where the defendant was a company which would enable an answer to be given to that question and which was correctly applied by the Magistrate in the present case appears in the following passage: *[His Honour referred to part of the reasons given by the Magistrate and also to part of Lord Diplock's opinion in the* Tesco Supermarkets Case *and continued]* ... **[21]** I can see no reason for the adoption of a different test in relation to s92 or s82L.

Careful reading of the opinions handed down in the *Tesco Supermarkets* case reveals that the operation of the principles there set out are not excluded by the expression "notwithstanding any other rule of law" and with which I have already dealt briefly as was further contended by Mr Dwyer. Whatever meaning is attributed to that language it clearly does not have any relevance to this issue. Neither does the *Tesco* case establish the separate ground of defence for which Mr Francis argued. As the passages referred to above clearly indicate it is concerned with the problem of determining when the defence available under the legislation has been made out.

Finally, and with reference to the second limb of Mr Dwyer's argument on this aspect it has not been shown that an adequate evidentiary basis was lacking for the findings made by His Worship and no error has, in my view been demonstrated. It will be obvious from the opinions just expressed that I have rejected the argument advanced by Mr Francis on behalf of the company that *mens rea* is an essential ingredient of an offence under s82L. In view of the decision at which I have arrived on the first application I will deal with this argument only briefly.

English and Australian Courts have generally propounded the doctrine that save in exceptional cases, statutory offences require proof of a guilty mind or *mens rea*, the precise nature of which may vary from statute to **[22]** statute. Not only must the intention of Parliament as to whether *mens rea* is an element of a statutory offence be gleaned from the language, subject matter, and purpose of the particular enactment concerned, but, if *mens rea* is such an element, the specific nature of that which is required to justify a conviction must be obtained from the same source.

In *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 where the High Court was called upon to consider whether this presumption had been displaced by s233B(1) of the Commonwealth *Customs Act*. Gibbs CJ at pp528-530 referred to several indicia which were relevant to this question of statutory interpretation, namely:

(i) the language of the section creating the offence;
(ii) the subject matter of the statute;
(iii) the consequences for the community of an offence;
(iv) potential consequences for an accused if convicted;
(v) whether strict liability would assist in the enforcement of the regulations.

He concluded that although these indicators did not all point in the same direction, the view that Parliament did not intend that the offence defined in par.(b) should be an absolute one was clearly open and thus the presumption of *mens rea* remained. Unlike the legislation which arose for consideration in that case, there are in my view no **[23]** conflicting indicia or factors which could tend to make the interpretation of the relevant sections of the *Weights and Measures Act* complicated or difficult insofar as an intention to displace the presumption is concerned.

Each of the matters to which the learned Chief Justice referred points directly against the necessity for establishment of *mens rea* before liability under s82L is proved. This proposition in my opinion is almost self evident and I do not therefore propose to deal with them *seriatim*. In

any event with the exception of the potential consequences for an accused if convicted, which in this case involves the imposition of a small monetary penalty, I have already dealt with each of the other matters in different contexts.

Turning then to the second application which concerns the issue of costs, argument for both parties was directed to the question as to whether or not it had been demonstrated that the Magistrate had incorrectly exercised his discretion under s97(b) of the *Magistrates (Summary Proceedings) Act* 1975.

Although no written reasons were provided by His Worship for his refusal to grant costs to the company, he did indicate verbally the foundation upon which his decision rested and this has been set out earlier in this judgment. The first factor which he appears to have taken into account was, it was submitted, that he considered that the informant had acted reasonably in the circumstances in prosecuting the matter. However, Mr Francis argued this must be regarded as irrelevant in the determination of the question of costs which is concerned with the provision of **[24]** proper indemnity to a successful defendant for expense to which he has been put without lawful justification. [See *Anstee v Jennings* [1935] VicLawRp 27; (1935) 41 ALR 216; (1935) VLR 144; per Mann J].

With respect to the other factor to which the learned Magistrate referred in dealing with this question, Mr Francis submitted that His Worship had clearly used the reliance by the company upon the statutory defence provided by s92 of the *Weights and Measures Act* as a justification for depriving that party of costs. To do this, it was argued, was to deny to the defendant the full benefit of the defence available to it and because such a limited operation was not contemplated by the section it was an irrelevant consideration.

Both of these bases, it was argued, (relying upon the judgment in *Puddy v Borg* [1973] VicRp 61; (1973) VR 626 at 627-8), rested upon an irrelevant policy consideration; namely, that an award of costs in this situation might deter informants generally from performing their duties. Finally, it was submitted, there is a rule of practice according to which, in the absence of special circumstances, costs should follow the event, and be awarded in favour of the successful party [*See Berbette Pty Ltd v Hansa* [1976] VicRp 35; (1976) VR 385].

Section 97(b) of the *Magistrates (Summary Proceedings) Act* 1975 provides as follows:

> "Where the Court dismisses the information or complaint, or makes an Order in favour of the defendant the Court may order the informant or complainant to pay to the defendant such costs as the Court thinks just and reasonable."

Furthermore, Rule 157 of the *Magistrates' Courts Rules* 1980 provides:

> **[25]** "Costs of and incidental to all proceedings in a Magistrates' Court shall be in the discretion of the Court."

Clearly, therefore, subject to the requirement that any costs awarded be just and reasonable, s97(b) and Rule 157 leave the question of costs entirely in the discretion of the Court. The general rule referred to by Mr Francis is one which has found favour in civil proceedings. In criminal proceedings however, a practice has emerged whereby, in ordinary circumstances, costs are not normally awarded against the informants in police prosecutions (See *Ex parte Jones* (1906) 6 SR (NSW) 313 at 315; 23 WN (NSW) 93; *Berry v British Transport Commission* (1961) 3 All ER 65 per Devlin LJ). Although the Full Court of the Supreme Court of South Australia, in *Hamdorf v Riddle* (1971) SASR 398 has rejected this practice in such matters on the by no means unreasonable basis that it offends against the concept of even handed justice, and has held that generally, a defendant acquitted in a Court of Summary Jurisdiction should receive costs unless there are reasons why he should be deprived of them, this approach has not been adopted in Victoria. Instead, when the question of costs has arisen in this context, the Courts in this jurisdiction have relied upon the fact that the power to award costs given by s97(b), or its predecessor, is entirely within the discretion of the Court concerned, or have noted that although it is not the practice to award costs against police informants this does not amount to a fixed rule of law which limits the Court's discretion (See **[26]** *Puddy v Borg* (*supra*); *Heddich v Dike* (1981) 3 A Crim R 139).

Clearly therefore, despite the general rules or practices which have arisen in this area, a successful defendant in both civil and criminal proceedings is neither entitled to costs as of right nor is he prevented from obtaining them because of the nature of the proceedings. The Court has an unfettered discretion to award costs and this is to be exercised judicially so as to achieve what is fair and just between the parties according to the circumstances of the particular case. Certainly the exercise of this discretion is open to challenge, according to well-established rules (See *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513 at 532-4; [1950] ALR 944; *Australian Coal and Shale Employees Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621 at 627; *McKenna v McKenna* [1984] VicRp 58; (1984) VR 665 at 683; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986-7) 167 CLR 24 at 71-2); 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109. Accordingly, in order to succeed in this application, the applicant must show that His Worship has taken into account irrelevant matters or has failed to take into account those which were relevant to the determination of the question or that for some other reason there has been a demonstrable miscarriage of the discretion vested in him.

In my view, although the material before this Court is very limited, it would appear to be likely that the learned Magistrate has fallen into error. Whilst it is possible to conceive of situations in which the nature of a defence relied upon any an accused might permit an argument to be accepted that an award of costs should not be made in **[27]** favour of that party upon its success, I am not at all confident that I could properly predict under what precise circumstances that eventuality might arise. Certainly there is nothing about the defence of reasonable precautions which it might be considered would place it within this rather exceptional class. In other words I consider that there would be no justification, in a situation where an award of costs in favour of a successful defendant would otherwise be made to refuse to make such an order simply on the basis that reliance has been placed upon the defence of reasonable precautions I suspect however that when His Worship referred to this aspect, he was doing so with reference to his earlier comment that the informant had acted reasonably in laying and prosecuting the charge.

Again it is difficult to see how the reasonableness as opposed to the unreasonableness of an informant's behaviour could provide a proper basis for the exercise of discretion adversely to the applicant. If an informant acted out of malice, or without exercising proper care to avoid a defendant being exposed to unnecessary expense being incurred in order to defend himself against a totally misconceived charge, the unreasonableness of such behaviour might militate in favour of an order for costs being made against that informant. However, the fact that an informant might be regarded as having acted reasonably in relation to the institution and conduct of proceedings could hardly of itself constitute an adequate basis for refusing costs to an innocent, or at least, unconvicted defendant. Yet, it would appear to be clear that the **[28]** learned Magistrate did regard the reasonableness of the informant's actions as determinative of the issue.

I am satisfied that His Worship was in error on this aspect. However I do not consider that in all of the circumstances any order for the costs of the original proceedings should be made in favour of the company. It does not appear to me that any reason exists and indeed none has been seriously suggested in the course of argument presented in this Court that the practice which prevails in relation to police prosecutions should not have application to the present matter. Therefore the Order to Review in relation to this question of costs should also be dismissed.

APPEARANCES: For the applicant Vaux: Mr Dwyer QC with Mr Keon-Cohen, counsel. AFA Lindeman, solicitor. For the respondent SE Dickins Pty Ltd: Mr C Francis QC with Mr T Morris, counsel. Hollingdale & Page, solicitors.
