51/79

SUPREME COURT OF VICTORIA

RHODES v PETEROPOULOS

McGarvie J

4 June 1979

FISHERIES – AQUARIUM CONTAINING EUROPEAN CARP – "NOXIOUS FISH" – EUROPEAN CARP A NOXIOUS FISH – DEFENDANT STATED THAT HE DID NOT KNOW THE SPECIES OF FISH IN HIS AQUARIUM AND DID NOT KNOW THAT EUROPEAN CARP WAS A NOXIOUS FISH – NATURE OF OFFENCE – WHETHER ABSOLUTE OFFENCE – WORD "KNOWINGLY" NOT USED IN SECTION – EFFECT OF – WHETHER GUILTY KNOWLEDGE REQUIRED TO BE PROVED – CHARGE DISMISSED BY MAGISTRATE ON GROUND THAT DEFENDANT HAD NOT KNOWINGLY COMMITTED AN OFFENCE – WHETHER MAGISTRATE IN ERROR: *FISHERIES ACT* 1968, SS38(1), 39(a).

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court for determination in accordance with the law.

1. The central question in the present case was whether evidence which established that the defendant kept European carp established the offence, although it was not established that he knew that the fish was European carp.

2. As Parliament had not expressly answered this question by the words it used in the *Fisheries Act* 1968 ('Act'), it was necessary to determine it as a matter of interpretation. In interpreting the section one seeks to find what must have been the intention of Parliament.

***Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at 149-150; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470, applied.**

3. A number of considerations lead to the conclusion that in this section Parliament must have intended that the offence was to be established by establishing that the defendant kept European carp without it being necessary to show that he knew that it was European carp.

4. There is some significance in the use of the word "knowingly" in s40 but not in s39 of the Act. While this is not of decisive significance and may in some cases be of slight significance, it is not without some significance.

***Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at 156; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470; and**

***Bergin v Stack* [1953] HCA 53; (1953) 88 CLR 248 at 260; [1953] ALR 805, applied.**

5. The conduct which was made an offence by s39(a) of the Act was not conduct which was described as criminal in any real sense nor was it conduct which involved serious moral turpitude or carried with it a serious social stigma. It was conduct which had been made an offence as part of a general scheme under the Act to regulate in the community interest the raising, taking, keeping and availability of fish. In such legislation Parliament was less likely to have intended guilty knowledge as essential, than it was in the case of legislation prohibiting conduct which was criminal in the real sense.

6. It is relevant that it would be likely to be difficult to enforce the provision if it were necessary to show that the defendant knew that the fish was European carp or another species of noxious fish.

***Myerson v Collard* [1918] HCA 39; (1918) 25 CLR 154 at 159 and 163; 24 ALR 306;**

***Warner v Metropolitan Police Commissioner* (1969) 2 AC 256 at 301; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303; and**

***R v McGrath* (1971) 2 NSWR 181 at 188, applied.**

7. Parliament in regulating in the public interest activity connected with fish, was intending to place upon persons who kept fish the responsibility for informing themselves whether or not the fish were European carp or other noxious species.

8. Accordingly, the Magistrate was in error in dismissing the information for the reasons which he noted. The fact that the defendant had not kept the fish in a commercial aquarium and that he did not intend to do mischief to the community by keeping it were relevant to penalty but were not

relevant to liability to conviction. It is also relevant to penalty that the defendant did not know that the fish was European carp.

McGARVIE J: This is the return of an order nisi to review an order made on 3rd October 1978 by the Magistrates' Court at Frankston constituted by a Stipendiary Magistrate. The respondent, Harry Peteropoulos, was charged on an information charging that at Frankston on 11th July 1978 he kept a noxious fish to wit a European carp in Victorian waters to wit an aquarium in contravention of s39(b) of the *Fisheries Act* 1968. Although no point seems to have been made of it, the facts alleged in the charge would involve a contravention of sub-s(a) not sub-s(b) of s39. Section 39 provides:

> "Any person who—
> (a) keeps hatches rears consigns or conveys or causes to be kept hatched reared consigned or conveyed; or (b) releases or causes to be released into any Victorian waters; or
>
> (c) puts into any container— (covering (a), (b), (c))
> any noxious fish shall be guilty of an offence and liable to a penalty of not more than $2,000".

Section 38(1) contains this definition:

> "'Noxious fish' means—
> (a) European carp *Cyprinus carpio (Linnaeus)* in all its sub-species races varieties or domesticated forms,
>
> (b) any species of fish or any races varieties or domesticated forms of any species of fish or any fish hybrid which the Governor in Council by Order published in the *Government Gazette* declares to be a noxious fish for the purposes of this Part—
>
> and includes the eggs of any noxious fish."

The information was heard on 3rd October 1978, the respondent appearing in person but not being legally represented. Evidence was given that on 11th July 1978 Fisheries and Wildlife officers went to the take-away food premises owned by the respondent and found in an aquarium at the rear of the serving area a fish which was a variety of European carp. When asked about the fish the respondent said in effect that he did not know the species of fishes in his aquarium and that he did not know that European carp were noxious fish. He told the officers that he had purchased the fish about six months before from an aquarium business in a shop a few doors away from his shop.

After the close of the informant's case the respondent gave evidence that since he bought the fish it had always been in the aquarium in his shop and that he was not aware that it was a noxious fish. At the conclusion of the case the Magistrate dismissed the information. In his reasons for his decision he said:

> "I accept the evidence of Mr Fallu that the fish is a species of European carp and therefore a noxious fish. I am fully aware of the tremendous damage European carp has done to Victorian water-ways. I also accept that the defendant was keeping the fish and I accept his explanation that he was not aware of the nature of this fish. I note that the word 'knowingly' is used in s40 but not in s39. I feel that the legislation is directed to commercial aquariums, I consider that for an offence to be committed there must be an element of mischief. The defendant had not knowingly kept a noxious fish and, therefore, had not committed an act of mischief. The information will be dismissed."

Mr Uren of counsel appeared before me, for the informant in the court below, the applicant before me. The defendant in the court below, the respondent before me, was served but did not appear before me. The order nisi was granted on three grounds but the ground argued before me was to the effect that the Magistrate was wrong in holding that because the respondent had not known the species of the fish he was keeping and had not known that it was a noxious fish he was not guilty of the offence charged.

I accept Mr Uren's submission that this is not a case in which it is necessary to consider the general rule that an honest and reasonable belief in a state of facts which, if they existed, would make the respondent's act innocent, affords an excuse for doing what would otherwise

been offence. That rule was referred to by Dixon J in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at 540-41. The respondent did not either in the interview or in his evidence say that be had an affirmative belief that the fish was not a European carp. The effect of what he said was that he did not address his mind to this question at all. That is not enough: *Gherashe v Boase* [1959] VicRp 1; (1959) VR 1 at 3; [1959] ALR 218. The question whether a European carp was a noxious fish within the meaning of Part VI of the *Fisheries Act* was a question of law not a question of fact. As one would expect, the respondent did not indicate any positive belief that a European carp was not a noxious fish. It would not have been a defence if he had had such a belief.

The central question in the case is whether evidence which establishes that the respondent kept a European carp establishes the offence, although it is not established that he knew that the fish was a European carp.

As Parliament has not expressly answered this question by the words it has used, it is necessary to determine it as a matter of interpretation. In interpreting the section one seeks to find what must have been the intention of Parliament: *Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at 149-150; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470.

A number of considerations lead me to the conclusion that in this section Parliament must have intended that the offence is to be established by establishing that the respondent kept a European carp without it being necessary to show that he knew that it was a European carp.

The conduct which is made an offence by s39(a) of the Act is not conduct which is to be described as criminal in any real sense. It is not conduct which involves serious moral turpitude or carries with it a serious social stigma. Before the section came into operation it is unlikely that the keeping of a European carp in an aquarium would have been widely regarded in that light. It is conduct which has been made an offence as part of a general scheme under the Act to regulate in the community interest the raising, taking, keeping and availability of fish. In such legislation Parliament is less likely to have intended guilty knowledge as essential, than it is in the case of legislation prohibiting conduct which is criminal in the real sense: *Sweet v Parsley* (1970) AC 132 at 149-150 and 156.

It is relevant that it would be likely to be difficult to enforce the provision if it were necessary to show that the respondent knew that the fish was a European carp or another species of noxious fish. *Myerson v Collard* [1918] HCA 39; (1918) 25 CLR 154 at 159 and 163: *Warner v Metropolitan Police Commissioner* (1969) 2 AC 256 at 301; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303; *R v McGrath* (1971) NSWLR 181 at 188.

In my opinion in s39(a), Parliament in regulating in the public interest activity connected with fish, is intending to place upon persons who keep fish the responsibility for informing themselves whether or not the fish are European carp or other noxious species: See *Sweet v Parsley* (1970) AC 132 at 183.

There is some significance in the use of the word "knowingly" in s40 but not in s39 of the Act. While this is not of decisive significance (*Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at 156; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470) and may in some cases be of slight significance, it is not without some significance, e.g. *Bergin v Stack* [1953] HCA 53; (1953) 88 CLR 248 at 260; [1953] ALR 805.

In my opinion, s39 of the Act is a section of the type referred to by Lord Pearce in *Sweet v Parsley* [1969] UKHL 1; (1970) AC 132, at 156 where he said:

> "But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that Parliament intended that the Act should be prevented by punishment regardless of intent or knowledge."

See also *Goldwater v Di'Gioacchino* [1968] VicRp 5; (1968) VR 40 at 45-3; 12 FLR 122.

The result is that evidence which establishes that the respondent kept a European carp establishes an offence under s39(a) although it is not established that he knew that the fish he was keeping was a European carp.

It follows that the Magistrate was in error in dismissing the information for the reasons which he noted. The fact that the respondent had not kept the fish in a commercial aquarium and that he did not intend to do mischief to the community by keeping it are relevant to penalty but are not relevant to liability to conviction. It is also relevant to penalty that the respondent did not know that the fish was the European carp. See *Myerson v Collard* [1918] HCA 39; (1919) CLR 154, at 163; 24 ALR 306.

As Mr Uren pointed out, in the case of a fish kept in Victoria, as the evidence showed this one to have been, it is not necessary in a charge under s39(a) to rely on any definition of Victorian waters as it would be with a charge under s39(b).

The applicant is entitled to have the order nisi made absolute. I will set aside the dismissal of the information and remit it to the Magistrates' Court at Frankston to be determined in accordance with law by the Magistrate from whose order this appeal has been brought or to be heard and determined in accordance with law by another Magistrate. If practicable, the former course is a preferable one. As the information alleges facts which would amount to a contravention of s39(a) but alleges a contravention of s39(b), it should be amended to refer to s39(a) of the Act.

(Discussion ensued.)

I make this order. Order nisi made absolute. Set aside the order dismissing the information. Remit the information to the Magistrates' Court at Frankston to be determined in accordance with law by the Magistrate from whose order this appeal has been brought or to be heard and determined in accordance with law by another Magistrate. Order the respondent to pay the applicant $200 as the costs of this application. Reserve liberty to the respondent to apply to me for a certificate under the *Appeal Costs Fund Act* in Chambers upon notice to the applicant's solicitor.
