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SUPREME COURT OF VICTORIA — FULL COURT

COLBERT v PANTAZOPOULOS

Winneke CJ, Smith and Gowans JJ

15 October 1971 — [1972] VicRp 39; [1972] VR 350

MARKETING OF PRIMARY PRODUCTS – DEFENDANT CHARGED WITH SELLING EGGS WHICH HAD NOT BEEN MARKED OR STAMPED IN ANY WAY AS REQUIRED BY THE REGULATIONS – CHARGE DISMISSED BY MAGISTRATE – MAGISTRATE FOUND THAT THE PROSECUTION WAS REQUIRED TO PROVE THAT THE EGGS HAD NOT BEEN MARKED OR STAMPED AND GRADED FOR QUALITY AND STANDARD – WHETHER MAGISTRATE IN ERROR: *MARKETING OF PRIMARY PRODUCTS ACT 1958*, s41D(1).

HELD: Order nisi absolute. Order set aside and the information remitted to the Magistrates' Court for further hearing in accordance with law.

1. The *prima facie* meaning of the language of s41D(1) *Marketing of Primary Products 1958* ('Act') was that it specified as elements of the offence, first a sale, second a sale by retail, and third a sale of eggs which would satisfy a prescribed description, that description being that they had not been graded and tested for quality and standard and marked or stamped in accordance with the Act and the Regulations.

2. The prescribed description was satisfied if either the eggs had not been graded and tested for quality and standard or had not been marked or stamped. There was nothing in the context in the Act or in the purpose of s41D(1) of the Act as disclosed by the language used, to displace that *prima facie* meaning.

Harper v State of Victoria [1966] HCA 26; (1966) 114 CLR 361; [1966] ALR 731, per McTiernan and Owen JJ, applied;

Colbert v Gomesis, unrep, VSC (Gillard J), 2 April 1971, overruled.

WINNEKE CJ: (delivered the judgment of the Court (Winneke CJ, Smith and Gowans JJ): This is the return before the Full Court of an order nisi to review a decision of the Magistrates' Court at Kew on 29 April 1971, dismissing an information for an offence against s41D(1) of the *Marketing of Primary Products Act 1958*.

Section 41D(1) provides: –

"Any person who sells by retail any eggs which have not been graded and tested for quality and standard and marked or stamped in accordance with this Act and the Regulations—

(a) by the Board or a person authorized in that behalf by the Board; or

(b) by a producer who has the permission of the Board pursuant to subs(4) of s41C of this Act — shall be liable to a penalty of not more than \$200."

The information followed the terms of the sub-section, and alleged that on 15 March 1971 at premises at Kew the defendant did sell eggs by retail contrary to the provisions of the *Marketing of Primary Products Act 1958*, in that at the said premises on the said day he did sell by retail to one Harvie a quantity of eggs which had not been graded and tested for quality and standard and marked or stamped in accordance with the said Act and the Regulations made thereunder.

The defendant did not appear at the Magistrates' Court, and no evidence was called on his behalf. For the informant evidence was given of a sale by retail by the defendant of a dozen eggs at his greengrocer's shop in High Street, Kew, and that those eggs were not marked or stamped in any way. A report of a decision of Gillard J in the case of *Colbert v Gomesis*, given on 2 April 1971, was tendered to the magistrate. In that case the learned judge held that no offence against s41D(1) of the Act is established unless it is proved by the prosecution, first that the eggs the subject of the sale have not been graded and tested for quality and standard, and, secondly, that

the eggs have not been marked or stamped in accordance with the Act and the Regulations made thereunder.

In dismissing the information in the present case the magistrate said that he was satisfied that all the requirements of s41D had been established by the evidence save that he was not satisfied that the eggs had not been graded or tested for quality or standard. Accordingly, following the decision of Gillard J he said that the information would be dismissed with no order as to costs.

The Order nisi was granted on two grounds: –

"1. That the magistrate was incorrect in holding that the informant in order to establish that an offence against the provisions of s41D(1) of the *Marketing of Primary Products Act 1958* had been committed was required to prove that the eggs sold by retail were not marked or stamped in accordance with the said Act and the Regulations and also prove that the said eggs had not been graded and tested for quality and standard.

"2. That upon the evidence before him, the magistrate ought to have held that the defendant had committed an offence against the provisions of s41D(1) of the *Marketing of Primary Products Act 1958*."

Mr Harris, who, with Mr Larkins, appeared for the applicant, has submitted that the construction placed upon s41D(1) by Gillard J was wrong, and that it was sufficient to establish the offence if it was proved that the eggs, the subject of the sale, had not been marked or stamped. He accordingly contended that the decision of the magistrate was wrong. In our opinion, the *prima facie* meaning of the language of s41D(1) is that it specifies as elements of the offence, first a sale, second a sale by retail, and third a sale of eggs which would satisfy a prescribed description, that description being that they have not been graded and tested for quality and standard and marked or stamped in accordance with the Act and the Regulations.

That description is, we think, satisfied if either the eggs have not been graded and tested for quality and standard or have not been marked or stamped. We see nothing in the context in the Act, or in the purpose of s41D(1) as disclosed by the language used, to displace that *prima facie* meaning. We think that construction is supported by the language used by McTiernan and Owen JJ in *Harper v State of Victoria* [1966] HCA 26; (1966) 114 CLR 361; [1966] ALR 731, to which we were referred by Mr Harris.

Although the issue for determination by us did not arise in that case, the language used therein shows the *prima facie* meaning that their Honours placed on the section. At p376 McTiernan J said: "He contends in the first place that s41D which prohibits the retail sale in Victoria of any ungraded, untested or unmarked eggs is contrary to s92 of the *Constitution*...". At p381, Owen J said:

"It thus appears that eggs produced in another State and imported into Victoria the property in which has not vested in the Board under the Principal Act cannot, if the amending Act be given its *prima facie* meaning, be sold by retail in Victoria unless they have been graded and tested for quality and standard and marked or stamped in accordance with the Act and Regulations...".

Mr Harris, who also appeared before Gillard J in the case of *Colbert v Gomesis*, informed us that the learned judge did not have the benefit of being referred to those passages in *Harper v State of Victoria*. Gillard J obtained some assistance for the construction he placed on s41D(1) from the language used in s41C(1), but we do not find upon analysis of the terms of that section sufficient to displace the *prima facie* meaning we think the language of s41D(1) bears.

For these reasons, we are of the opinion that the decision of the magistrate was wrong and that the order nisi should be made absolute. The order nisi is, accordingly, made absolute, the order of the Magistrates' Court is set aside and the information is remitted to the Magistrates' Court at Kew for further hearing in accordance with the terms of this judgment. In all the circumstances of the case, we do not think that any order for costs should be made against the respondent. An indemnity certificate is granted pursuant to s14A of the *Appeal Costs Fund Act 1964* to the applicant.

APPEARANCES: For the applicant/informant Colbert: Mr WO Harris QC with Mr JG Larkins, counsel. John Downey, Crown Solicitor.