

11/71

## SUPREME COURT OF VICTORIA

**D'ONOFRIO v GOLDWATER**

Gillard J

1 April 1971

**DISTILLATION APPARATUS – DEFENDANT CHARGED WITH POSSESSION OF A STILL WITHOUT PERMISSION – NO ADMISSIONS MADE BY DEFENDANT – PIECE OF EQUIPMENT SEIZED WAS A HOUSEHOLD COPPER WITH A LID WHICH CONTAINED A NOZZLE IN A HOLE – DEFINITION OF "STILL" – WHETHER EQUIPMENT A STILL AND CAPABLE OF DISTILLING SPIRITS – CHARGE FOUND PROVED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *DISTILLATION ACT* 1901-1968, SS6, 73A(1).**

**HELD: Order nisi absolute.**

1. 'Still' means any apparatus for distilling spirits and any part thereof. This required proof that the apparatus was used for or capable of distilling spirits. If the apparatus consisted of a number of independent pieces of equipment, each of the independent pieces of equipment was not a part of the apparatus until it was brought with others together and integrated into such apparatus. Until it was integrated in the apparatus it was an independent article.

2. If a household copper was taken from the domestic laundry and by the skill of an artisan converted into a boiler or heater of a still, and other various items of equipment were brought together to constitute a still, as soon as all the pieces of equipment were joined together it might be said, quite correctly, that the new aggregate of equipment was "a still" within the definition because at that stage it would be capable of distilling spirits.

3. *A fortiori*, it was "a still" after it was used as an apparatus for distilling spirits. But until the aggregation of the various pieces of equipment and their integration into one piece of apparatus for distilling was effected each of the constituent parts remained independent, even though they were capable of being used for apparatus for distilling.

4. The prosecution view upon which the Magistrate acted was erroneous, when it suggested that it was merely sufficient to show that the piece of equipment seized was capable of being integrated into a piece of apparatus which was capable of distilling spirits. In this case there was no proof whatever that the copper lid and nozzle were ever an integral part of such apparatus. In the absence of such proof, it could not be legitimately found that they were a part of an apparatus for or capable of distilling spirits.

5. Since there was this gap in proof the prosecution failed. The Magistrate misdirected himself in his interpretation of the definition of "still" in the *Distillation Act*, and secondly, even if he had not misdirected himself there was no evidence to justify a finding that the equipment seized formed any part of an apparatus for or capable of distilling spirits.

**GILLARD J:** On the 14 July last year several officers of the Customs Department attended 19 Rowans Road, Highett, where Pasquale D'Onofrio resided, and there discovered in his garage a piece of equipment being an ordinary household copper with a specially constructed lid having a deep flange to insert inside the copper, a flange of some 2½ to 3 inches, and a dome top to the cover, at the centre of which was bored a hole and in the hole was inserted a nozzle.

The customs officers in their experience formed the opinion that this was a piece of equipment that could be put into and used in an apparatus for distilling spirits. Pasquale D'Onofrio conceded that he was in possession of this equipment, and accordingly on 14 October 1970 an information was laid against him that he did contrary to s73A(1) *Distillation Act* 1901-1968 not being a distiller or vigneron without permission had a still in his possession.

Such information came on for hearing on 30 September 1970 at the Magistrates' Court at Cheltenham, when D'Onofrio was convicted. The customs officers gave evidence before the Magistrate of their finding of the piece of equipment and of conversations they had had with

D'Onofrio. It is sufficient to say that no admissions were made by D'Onofrio and it was conceded that the equipment in itself was not capable of distilling spirits; it required a condenser or some other attachment. It was said by the witnesses that if a condenser had been attached, then it would be capable of distilling spirits.

After the prosecution closed its case counsel on behalf of D'Onofrio submitted that the piece of equipment produced and exhibited in Court did not fall within the definition of 'still' contained in s6 *Distillation Act*. Reference was made to a recent decision of my brother Menhennitt in *Goldwater v DiGioacchino* [1968] VicRp 5; [1968] VR 40; 12 FLR 122.

The informant, on the other hand, through his legal representative, argued that the word 'part' in the definition section of 'still' in s6 meant any part capable of being a part of any apparatus capable of distilling spirits. The Magistrate retired to consider the submissions and returned into Court and upon being asked by counsel for D'Onofrio whether he was refusing to follow the interpretation of 'part' adopted in *DiGioacchino's Case*, the Magistrate stated that he did not consider that that case was helpful as it was concerned only with the question of *mens rea*.

Counsel for D'Onofrio then asked the Magistrate to give a ruling on the meaning of the word 'part' and the Magistrate stated: "Still does not require proof to me of the existence of a complete still."

In my view this was an erroneous interpretation of the definition. In s6 it is provided:

"Still' means any apparatus for or capable of distilling spirits and any part thereof and any apparatus connected or used in connection therewith."

The offence constituted under s73 is that of a person not being a distiller or vigneron having any still in his possession or custody or under his control. It is therefore necessary to consider whether by the definition of 'still' D'Onofrio can be said to be in possession or custody of any still.

It was conceded by the prosecution, as I have already pointed out, that the copper and lid as contrived was not an apparatus whereby spirit could be distilled. It was submitted, however, that the only purpose of such an apparatus with the form of the lid and the nozzle at the top was to form part of a still. Therefore, it is said, it is a still within the meaning of the section. But, as I have just indicated 'still' means any apparatus for distilling spirits and any part thereof. This requires proof that the apparatus was used for or capable of distilling spirits. If the apparatus consisted of a number of independent pieces of equipment, each of the independent pieces of equipment is not a part of the apparatus until it is brought with others together and integrated into such apparatus. Until it is integrated in the apparatus it is an independent article.

For example, if a copper receptacle similar to what was seized here was found in a domestic laundry it would be absurd to say that that copper receptacle was a part of an apparatus for or capable of distilling spirits. It never formed part of such an apparatus. It was an independent piece of domestic equipment. If, on the other hand, that same copper was taken from the domestic laundry and by the skill of an artisan converted into a boiler or heater of a still, and other various items of equipment were brought together to constitute a still, as soon as all the pieces of equipment were joined together it might be said, quite correctly, that the new aggregate of equipment was "a still" within the definition because at that stage it would be capable of distilling spirits.

*A fortiori*, it was "a still" after it was used as an apparatus for distilling spirits. But until the aggregation of the various pieces of equipment and their integration into one piece of apparatus for distilling was effected each of the constituent parts remained independent, even though they were capable of being used for apparatus for distilling.

If at such integration the apparatus were broken up, then and only then, the domestic copper as adapted would be aptly described as part of "apparatus for or capable of distilling spirits". But until it was integrated into such apparatus, it did not constitute part of any apparatus for or capable of distilling. It was only after integration, that it could be said the copper formed part of the apparatus.

In my view, therefore, the prosecution view upon which the Magistrate acted was erroneous, when it suggested that it was merely sufficient to show that the piece of equipment seized was capable of being integrated into a piece of apparatus which was capable of distilling spirits. In this case there was no proof whatever that the copper lid and nozzle were ever an integral part of such apparatus. In the absence of such proof, in my view, it could not be legitimately found that they were a part of an apparatus for or capable of distilling spirits. Since there is this gap in proof it seems to me the prosecution must fail. I repeat, I believe the Magistrate misdirected himself in his interpretation of the definition of "still" in the *Distillation Act*, and secondly, even if he had not misdirected himself (and I have placed an erroneous interpretation on the words he used as set out above and disclosed in the affidavit) it seems to me that there is no evidence to justify a finding that the equipment seized formed any part of an apparatus for or capable of distilling spirits.

In coming to this conclusion I should point out that in the Court below despite the fact that averment was made under s144 *Excise Act* 1901-1968 no reliance was placed upon the averment. As I understand from counsel the averment would constitute *prima facie* proof of the matters averred. If reliance had been placed upon this averment in the Court below I would have referred the matter back for retrial with an indication to the Magistrate as to my view of the proper interpretation of 'still'. But since the averment was not relied upon I think I should hold that the Magistrate here found for the prosecution in the way he did on the basis of the interpretation of s73A(1) and s6 of the *Distillation Act* 1901-1968 as submitted by the prosecution.

Having regard to these views, in my opinion the information should have been dismissed and accordingly I will order that the order of the Court below be quashed and in lieu thereof the information be dismissed. The order nisi will be made absolute with costs to be taxed.

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