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SUPREME COURT OF SOUTH AUSTRALIA

BIRKS v CAFCAKIS

Cox J

20 March 1984 — [1984] 13 A Crim R 340

SENTENCING – OFFENCES AGAINST THE QUARANTINE AND CUSTOMS ACTS – IMPORTING PROHIBITED PLANTS AND MAKING A FALSE STATEMENT TO A CUSTOMS OFFICER – PENALTIES TO BE IMPOSED BY MAGISTRATES AT A REALISTIC LEVEL.

The Crown appealed against the penalty imposed on C. for importing plants contrary to Statute. C. was charged on informations that he imported 8 orange tree cuttings and 10 grapevine cuttings and also that he made a false statement to a Customs officer. C. pleaded guilty to the charges; he was a market gardener aged 61 and had no previous convictions. The Magistrate fined C. $90 on each quarantine count and $75 on the customs count. On appeal by the Crown against sentence—

HELD: Appeal allowed in part. Penalties increased.

COX J: [343] The respondent is a man who has kept out of trouble for his 61 years, a fair proportion of them in this country, and that was a relevant matter for the learned special magistrate to take into account. However, experience shows that that happens also to be the typical background of people who offend under these laws. These are not laws that are broken by hardened criminals. The records which have been proved in other cases indicate that the typical offender is a person who is returning from abroad, very often from a Mediterranean country, and who, for sentimental reasons probably, wants to bring back plants or seeds in order to get them to grow in this country.

With that in mind as the typical offender, in the case of an offence that appears to be fairly prevalent, the fact that a particular defendant has a good record becomes a consideration of somewhat less force than it would generally be. The principles upon which penalties should be assessed for breaches of these Acts have been the subject of discussion in a number of recent decisions in this Court. I am spared the embarrassment to having to rely upon my own decisions in the cases of *Lanham v Zagari* and *Lanham v Brake* (1983) 34 SASR 578; (1984) 52 ALR 351; (1983) 74 FLR 284; [1983] 13 A Crim R 293 by the circumstances that two other members of the court have also dealt with penalty appeals of a like kind in the past month or so and have given clear guidance to summary courts on the proper level of penalties.

A point that was made by Zelling J in *Gallego v Holmden* [1984] 35 SASR 198 relates to the kind of evidence upon which the prosecution might seek to rely in cases of this sort. I do not want to reiterate all that has been said in the decisions to which I have just referred. I do repeat however, that where the Crown wants to show any risk, attendant upon a particular importation, which carries the matter beyond the kind of risk which would be evident to any ordinary Australian and is said to make the prosecution in question a more serious one than that evident risk and the obvious policy of the legislation would suggest, then it is necessary for the prosecution to assert, and if need be prove, those special additional circumstances.

Mr O'Halloran, who appears on the appeal for the Crown, tendered an affidavit which, as I understand it, was designed to present additional facts for the purposes of these appeals that would have taken the case into that special category. I declined to receive that affidavit on the principle that such evidence, if the Crown wanted to rely on it, should have been led before the special magistrate and not kept for an appeal. There was, in my opinion, nothing novel in this respect about the decisions which I gave in December, in the case of *Lanham v Brake*, and which Zelling J gave on this question in January in the case of *Gallego v Holmden*, so as to entitle the prosecution, on the ground of surprise, to supplement its evidence at the appeal stage.

While, therefore, I consider that the appeals should be allowed, I do not **[344]** accede to

the request of the Crown that the matters should be remitted to the special magistrate so that he may receive this additional evidence and then assess the penalties again. Mr Roberts did not join in that submission and, as I have said, the application of basic principles denies the correctness of that course. I think it proper to deal with the matters finally in this Court. I have already indicated that the offences were, in my opinion, serious offences of their type. That did not receive adequate reflection in the penalties imposed by the learned special magistrate. Counsel this morning have referred to the penalties imposed in the other cases to which I have referred. Of course those cases were all different, in one way or another, from the present appeals.

I would just say that I see little about the present offences which could be regarded as palliating the respondent's serious and deliberate breaches of these two Acts in any way at all. In each case, the appeal will be allowed. So far as the offences under the *Quarantine Act* are concerned, there will be a fine of $400 in each case, but in other respects the orders of the learned special magistrate will be affirmed. In the case of the false statement under the *Customs Act*, the fine will be set aside and be replaced by a fine of $200 but, again, in other respects the conviction and orders will be affirmed. I allow six months to pay. This is the latest of a series of Crown penalty appeals on the grounds of inadequacy with respect to prosecutions under the *Quarantine Act* and the *Customs Act*. I express the hope that it is the last of them. It should be plain to all concerned now, from the recent judgments of a number of judges of this Court, that penalties for breaches of this legislation have to be imposed by magistrates at a realistic level.
