56/79

SUPREME COURT OF VICTORIA

JANSZ v GMB IMPORTS PTY LTD

Anderson J

8 June 1979 — [1979] VicRp 59; [1979] VR 581 [Special Leave refused by High Court – see [1979] VR 591 (note)]

CRIMINAL LAW – DEFENDANT CHARGED WITH SELLING TOBACCO AND ACTING AS A TOBACCO WHOLESALER WHEN NOT LICENSED – MEANING OF "SALE" – APPLICABILITY OF *GOODS ACT* TO TRANSACTION – UNASCERTAINED GOODS – BURDEN OF PROOF OF "ASCERTAINMENT": *BUSINESS FRANCHISE (TOBACCO) ACT* 1974.

The defendant was charged with selling tobacco and acting as a tobacco wholesaler when not licensed to do so. His current licence expired on 31st May 1976 and was not renewed. On that date he entered into contracts with (a) a purchaser (Permewans) and (b) a supplier (Withers) for the sale of a large quantity of tobacco to be delivered during the ensuing 12 months. The point in issue was whether the tobacco was "sold" (for the purposes of the *Business Franchise (Tobacco) Act*), at the time the contract was entered into, or later when tobacco was selected and delivered (the defendant at that stage being unlicensed).

HELD: The provisions of the *Goods Act* (as to the sale of unascertained goods) applied to the various transactions and that, accordingly, the tobacco was not "sold" until the particular items had been selected and identified as the subject-matter of the contract, at which time the property in the goods would pass.

ANDERSON J: *[The following are excerpts from the Judgment:] ...* "The magistrate did not make any formal findings of fact, but it is evident from the comments he made during counsel's submissions that he was inclined to the view that the sale had taken place on 31st May 1976 but that in any event he was not satisfied beyond reasonable doubt that the sale had taken place after that date. At one stage he said, "If my position is that I cannot make certain findings of fact, then it does not matter what the law is in relation to the difference between sale and agreement to sell." Further remarks by him were to the effect that "I should not be restricted by rules of contractual law in defining what was correct, the true relationship between the parties" and that "I think the court in dealing with a criminal charge is entitled and must indeed look at all the facts and circumstances and not be restricted by commercial and contractual principles in determining what was the relationship between the parties."

The failure of the magistrate to make findings of fact makes it necessary to examine the evidence before him in the light most favourable to the defendant, and then to consider the application thereto of the relevant law. The relevant facts have already been indicated, and I shall shortly deal with the legal implications arising therefrom. It should be remarked at this stage that the relevant law, contrary to what the magistrate has stated, is, in my opinion, "commercial and contractual principles for the very transaction which is the subject of the information was a commercial transaction, and it arose out of contract."

[After referring to sections of the Goods Act, and a number of decided cases (particularly Mischeff v Springett *(1942) 2 KB 331), His Honour continued]: ...* "In the present case, it is obvious from the evidence — or lack of it — that the goods the subject of the transaction with Withers were unascertained goods. Section 21 of the *Goods Act* provides that "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained." Jagoda's evidence was that he had been told by Withers that the "stock", meaning $5,000,000 worth of tobacco, had been allocated to the defendant (not, be it noted, to Permewan) and that it would be available to the defendant on three days' notice. This was evidence by Jagoda of what Withers had told him, but was not evidence of the fact that Withers had made by allocation; thus, as no one was called from Withers to give evidence to that effect, there was no evidence of an appropriation by Withers of any tobacco at that time. Even assuming that there was acceptable evidence that, as a fact, Withers had "allocated" $5,000,000 worth of tobacco, that still would not have been sufficient.

> "A mere setting apart or selection of the seller of goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of goods to the contract the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods, so that those goods and no others are the subject of the sale and become the property of the buyer". (Per Pearson J in *Carlos Federspiel & Co v Twigg* (1957) 1 Lloyds Rep 240, at p255).

The only issue being whether a sale, acknowledged to have occurred, had occurred before or after 31st May 1976 and there being no evidence that anything had occurred whereby goods had become ascertained and appropriated by Withers to the contract on or before 31st May 1976 a sale could not have taken place on or before that date. See s6(3) and (4) of the *Goods Act*. Section 21 is in absolute terms: the words "unless and until" stress that, whatever the parties may purport to agree upon, as a matter of law where unascertained goods are concerned no property in the goods can be transferred to the buyer unless and until the goods are ascertained.

In the circumstances of the present case, the burden of proving that unascertained goods had become ascertained and that the property in them had passed by or on 31st May 1976 was on the respondent. (See *Lord Aldenham v Mansell* (1928) Tas LR 27). There being no evidence that such a development had taken place by that date, but it being conceded that a sale had taken place, the sale must have occurred thereafter. It is not, of course, a sale by Withers to the defendant that is complained of, but, if, as a matter of law, there had been no sale of tobacco by Withers to the defendant on 31st May 1976 then *a fortiori* there could not have been any sale of any of that tobacco by the defendant to Permewan on that date.

As the cases show, neither Rule 5 of s23 of the *Goods Act*, to which reference was made, nor s61 of that Act, can operate, nor were they intended to operate, to pass the property in unascertained or future goods before they were ascertained. Nor can the agreement between the parties have an effect contrary to ss6 and 21. Whatever business efficacy the parties between themselves may choose to give to the agreements of 31st May 1976 as a matter of law there could be no sale until the conditions of those sections had been fulfilled.

In the present case what is under consideration is the word "sell" in a modern Act of Parliament not dealing with tolls at country markets or fairs but with transactions by men of commerce, and there is no justification for setting at naught the whole of the commercial law in relation to the sale of goods, and to conclude that "sell" in the section under consideration does not have its true legal meaning.
