05/73

SUPREME COURT OF VICTORIA

CAHILL v SUNICRUST BAKERIES PTY LTD

McInerney J

19 March 1973

HEALTH – MANUFACTURE OF BREAD FOR HUMAN CONSUMPTION – BREAD SOLD TO PERSON WHO DISCOVERED A FLY IN THE CRUST – MATTER REPORTED TO HEALTH AUTHORITY – MANUFACTURER FOUND NOT TO BE REGISTERED AT TIME OF BREAD MAKING – PREMISES NOT FLY-PROOF – MANUFACTURER CHARGED WITH SEVERAL OFFENCES – CHARGES DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, SS231, 291(2).

HELD: Order nisi absolute. Dismissals set aside. Remitted to the Magistrates' Court for hearing and determination by another Magistrate.
1. The effect of s291(2) of the *Health Act* 1958 ('Act") is that in the case of food manufactured by the defendant seller it is necessary for the defendant to show as part of his reasonable precautions that he carried out analysis or other adequate tests, that is, such analysis and such tests as were adequate having regard to the circumstances.

2. As the Magistrate had not considered in relation to the question of reasonable precautions what tests were made, and it being impossible to determine from his reasons for judgment what findings he did make on that matter it followed that he failed to take into account a matter which s291(2) of the Act required him to consider.

3. Accordingly, the misdirected himself in not considering the requirements of s291(2) of the Act, in finding as he did, that the defendant had taken reasonable precautions as required by s291 of the Act had been made out.

McINERNEY J: This is the return of two orders nisi to review granted on 10 May 1972 to review orders made by the Magistrates' Court at Melbourne dismissing two informations laid by the informant, James Arthur Cahill, against the defendant Sunicrust Bakeries Pty Ltd.

The information in order to review 6824 charged the defendant with having, on 21 October 1971, at Melbourne, sold food, to wit bread, which was adulterated contrary to the provisions of s231 of the *Health Act* 1958. The information in order to review 6825 charged the defendant with having, on 21 October 1971, at Melbourne, sold to the prejudice of the purchaser food, to wit bread, which was not of the substance demanded by the purchaser contrary to the provisions of s231 of the *Health Act* 1958.

In addition to those two informations, two other informations had been laid under s231 charging the defendant with having to the prejudice of the purchaser, food which was not of the nature demanded by the purchaser, and not of the quality demanded of the purchaser.

Each of the orders to review, 6824 and 6825, were granted on the same five grounds. In each case the solicitors for the defendant had, by notice dated 4 February 1972, requested further particulars of the information and those further particulars had been furnished by letter dated 7 February 1972 from the Chief By-Laws and Prosecutions Officer of the City of Melbourne, save as to one matter which was raised at the hearing by Mr Nicholson, counsel for the defendant who complained that the prosecution had not stated what was the substance in respect of which the adulteration was said to have occurred. Thereupon the prosecuting officer told the Magistrate that the evidence would indicate that the foreign substance was a fly.

The defendant's solicitors had, by notices dated 3 February 1972, given notice of the intention of the defendant to rely on the provisions of s291(1) of the *Health Act* 1958. At the hearing it was admitted on behalf of the prosecution that the notice of reasonable precautions under s291 of the *Health Act* had been properly given. It was, in turn, admitted by counsel for

the defendant that the offence took place in the City of Melbourne, that the defendant company was an incorporated company and that on 21 October 1971, one Derek Mattingly was Secretary of the defendant company. At the hearing evidence was adduced which in these proceedings was not challenged, that on 21 October 1971, the defendant company through its bread salesman, one William Edward Roach, had sold a loaf of Sunicrust White Cafe Bread Sliced to a Mrs Lillian White who was the proprietor of a kiosk at Christey's Motor Auctions premises at Franklin Street, Melbourne, and that from that loaf a sandwich had been made which was sold by an employee of Mrs White at that kiosk to one Geoff Pascoe, who having, while the sandwich was in the course of preparation, observed some dark substance in the bread, made, after leaving the kiosk, a close inspection of the sandwich and noticed a black object embedded in the crust which he observed to be a fly. He then reported that discovery to one Maher, a Health Inspector on the staff of the Health Department of the Melbourne City Council.

On the following day — again this evidence was not challenged before me — the informant together with Maher and one Murton Roberts, a Health Inspector of the Oakleigh City Council, went to the premises of the defendant company at 37 Whiteside Road, Clayton, where they interviewed a Mr Hansen and a Mr O'Toole. After that interview the informant and his companions, (in the company of Mr O'Toole and Mr Hanson) made an inspection of the premises. The time at which the inspection occurred was about 9.30 in the morning, and on the evidence it would appear that no manufacturing processes were being undertaken at the time.

The informant testified that at the time of the inspection, he observed a number of flies in the preparation and manufacturing areas; he observed that the doors and window openings were not adequately fly-proofed; he observed that some doors were not provided with self-closers, that fly-wire was not provided around the ventilating openings. The affidavit proceeds: "This fly-wire in some positions was defective". I am not able to determine what "fly-wire" is referred to in the last sentence. The ventilation openings were described in these terms: "There is a ventilating ridge roughly in the centre of the manufacturing area which is raised six inches or nine inches above the roof. A space is left between the ridge in the roof which is not fly-screened."

The witness also said that the windows were a "push-out" type of window — a proposition which was denied in the evidence given by the defendant. The informant's evidence on this matter was corroborated by the evidence given by Health Inspector Murton Roberts. Unfortunately, Mr Deveney's affidavit refers to that evidence only in the most general of terms, saying "he then gave evidence similar to the evidence of the observations made by the applicant in relation to the inspection which took place on that date, but his evidence gave much more detail than did the applicant's evidence on this point". According to Mr Deveney's affidavit the witness Roberts further testified that "the premises at Whiteside Road, Clayton, were on 21 October 1971 not registered under the *Health Act* with the Oakleigh City Council", and he further testified, seemingly without objection, that one of the reasons that the premises were not registered was that he "was not satisfied with the fly-proofing which had been provided to windows and doors" and accordingly would not accept registration until the factory met the standards required by the *Health Act* and the Regulations.

The account thus given in some instances supplemented, and in others contradicted, by the account given in the affidavit of Mr Spears sworn 12 December 1972.

The evidence of the witness Roberts as to the non-registration of the premises is obviously referable to the provisions of s227 of the *Health Act* 1958, which it should be added is part of Division 6 of Part XII of the *Health Act* and does not form part of Part IIV. The Regulations which have been made pursuant s227 of the *Health Act* were not, however, tendered in evidence before the Magistrate although it is apparent from the terms of such of them as were read to me by Mr Bennett in support of his application for leave to tender those regulations before me, that some of those regulations might have served to explain why registration was refused. But the informant did, in the Court below, tender, through the prosecuting officer the *Food and Drug Standards Regulations* 1966 apparently in the belief (mistaken) that there was something in those regulations which was of relevance to the proceedings before the Magistrate. It appearing that those regulations were not tendered under the erroneous impression that they were the *Food Premises Regulations*, it does not seem to me that this was a proper case for admitting, on review, evidence of the regulations not tendered before the Magistrate. It is clear, of course, that by operating the premises when no

registration had been obtained with the Oakleigh City Council, the defendant was committing an offence against s227(3) of the Act and that offence would have been punishable under s422 thereof but it would not have been a contravention of Part XIV of the *Health Act*.

At the conclusion of the evidence for the prosecution, a submission was made on behalf of the defence that there was no case to answer; the basis of this submission being that the evidence did not show how or where the fly became embedded in the bread. The Magistrate rejected this submission, taking the view on the evidence, and substantially on the appearance of the sandwich, that the probabilities were that the fly became embedded in the bread while it was in the manufacturing premises of the defendant.

The defendant thereupon entered into its defence which, substantially, was a defence of the taking of reasonable precautions pursuant to s291 of the *Health Act*, and in support of that defence, called evidence of one Batten, the Production Manager of the defendant company, and of one Packham, the Group Production Manager of the defendant company.

In the course of that evidence a great deal of attention was directed to the question of fly-proofing of the premises. Again, the state of the affidavits as to this evidence is very unsatisfactory and indeed much of the evidence which is now before me, as to what was said by the witnesses for the defendant, is contained in affidavits which were not sworn until 15 December 1972, after the matter had been before me for the first time on 14 December; and these affidavits were sworn some ten months after the hearing and some seven months after the date of the order nisi.

It may be said that, substantially, the evidence as to material presented on behalf of the defence, as it emerges from the affidavit of Mr Deveney, is evidence directed to the question of fly-proofing and Mr Deveney's affidavit gives little or no account of the material tendered by the defendant in support of the defence of reasonable precautions other than what was done in relation to fly-proofing. When the material did finally emerge in the affidavits of Mr Batten and Mr Packham, it gave a great deal of detail which is nowhere hinted at in the affidavit of Mr Deveney. In some instances, that additional material is controverted most strongly by the informant and Mr Deveney. In their answering affidavits, they assert, point blank, that certain things which Mr Packham alleges he said were not said at all.

I do not consider that it is possible to resolve the conflict between those affidavits otherwise than by assuming that the material set out in the affidavits of Batten and Packham is additional to what is said with respect to their evidence in the affidavit of Mr Deveney. Insofar as there is a controversy as to whether or not Packham said certain things as to inspections and sampling, I think that the conflict can only be resolved by me on the footing of accepting Mr Packham's affidavit, since it tends to support the decision of the Magistrate.

It is, no doubt, suspect evidence in that it emerges only for the first time after an opportunity had been given by me in December to the defendant to file answering affidavits which ought to have been filed many months before. It is also unsatisfactory evidence in that the conflict arising from those additional affidavits cannot be satisfactorily resolved by me but in the view I take, I have not thought that it is desirable to stand the proceedings further over to enable enquiries to be made of the Magistrate as to which of the two versions is correct.

My reasons for taking that view may now be stated. Section 291(1) provides that "every person who sells, prepares for sale, manufactures, applies a description to, or sells under any description anything contrary to the provisions of thus part, shall be guilty of an offence against this part, unless he proves:

> "(a) that having taken all reasonable precautions against committing an offence, he had, at the time of the alleged offence, no reason to suspect that there was in regard to the same, any contravention of the provisions of this part;
>
> (b) that on demand by any officer he gave all the information in his power with respect to the person from whom he obtained the same; and
>
> (c) that otherwise he acted innocently;
> and has, not less than two days before the hearing of the prosecution notified the informant in writing

> that he intends to avail himself of the protection of this section, giving details of the reasonable precautions that he claims he has taken."

Subsection (2) of s291, provides that "In any case of manufacture or applying of description or of the sale of milk, reasonable precautions shall include analysis or other adequate test."

In the case of *Davies v Armour & Co Pty Ltd* [1958] VicRp 24; [1958] VR 122; [1958] ALR 489; (1957) 3 LGRA 139, Herring CJ decided that where the adulterated food sold had been manufactured by the seller, sub-section (2) of s291 was applicable, and that it was necessary for the seller, in those circumstances to prove the "reasonable precautions" which he alleged he had taken included "analysis or other adequate test". That decision was expressly approved by the Full Court of this State in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at p355; (1961) 19 LGRA 232. The defendant company must therefore show that the "reasonable precautions" which it alleged it took included "analysis or other adequate test". In *Brown v GJ Coles & Co Ltd* [1970] VicRp 108; (1970) VR 867, Smith J said at p871 that the word "test" referred to some operation performed for the purpose of ascertaining the composition or quality of an article or substance", and at p872 of the same report the two other members of the Court, Adam and Little JJ expressed their concurrence with his reasoning and presumably, therefore with what he said on the point I have mentioned.

What tests or analyses may be regarded as adequate must be determined in the light of all the circumstances including the precautions taken and whether those precautions have in the past been successful. (See *Brown v Coles* (*supra*) at 871.)

There is no evidence of any analysis having been made by or on behalf of the defendant, or of the result of any analysis.

In the affidavit sworn by Mr Deveney, on which the order nisi to review was obtained, there is no reference to any evidence of any kind of tests. Although the defendant's notice of reasonable precautions mentions inspections in para (E) of the notice, it contains no reference to any tests. The first affidavit filed on behalf of the defendant, namely that of Mr Spears, sworn 12 December 1972, makes only one reference to inspections and that is in relation to the evidence of Mr Batten, who, according to Mr Spears said that "the bread produced was subject to rigid quality controls including inspections".

Mr Packham gave evidence of instructions having been given by him to employees that they were to take bread at random from the slicing and wrapping machine and to test this bread by opening it and sampling it. He also said that he gave instructions that samples of bread were to be collected at regular intervals for submission to the Bread Research Institute for tests as to the composition, weight, texture and the like. Mr Packham also said that he believed from his visits and supervision that these instructions were followed and observed when he visited the Bakery. He also said at page 2 of his affidavit that loaves were inspected prior to packing. At p3 of his affidavit he deposed that he had given evidence as follows:

> "I visited the Clayton Bakery twice a week to ensure adherence to the conditions and discuss such matters with the Production Manager. In the course of my inspection I was in the habit of breaking open sealed packages of sliced bread and testing the same by eating the portion."

Evidence was also given that this factory had been in production since June, the first bread being baked on 22 June 1971, that the daily output was some 55,000 loaves, and that for some time prior to 21 October 1971, defects in fly-proofing had been brought to the attention of the defendant company, that steps had been taken by Batten to refer those defects to the builders for attention, that some of these defects existed in fact for periods of up to some weeks, and that "no temporary precautions were taken in regard to fly-proofing where defects occurred pending the builder's attention."

Evidence was also given that where flies were detected they were sprayed. There was evidence that the defendant company had, after the date of the offence, namely in December 1971, decided to instal air curtains and that at the date of the hearing, those air curtains were in course of installation.

The relevance of that evidence, of course — in accordance with settled principles — is simply that it shows that this was the sort of precaution which it was practicable to take at the date of the offence. The fact that this additional precaution was taken after the offence is now, however, that it was negligence on the part of the defendant not to have taken it at the time of the offence. See *Hart v Lancashire and Yorkshire Railway Company* (1869) 21 LT 261, cited in *Phipson on Evidence*, 10th edn 362.

The Magistrate's reasons for judgment deal at length with question of fly-proofing. He took as his starting point the proposition that it was reasonable to start production before registration, that in a new building it was reasonable to expect some kind of teething troubles and to give time to the defendant to iron out those troubles. The proposition that it was reasonable to start before registration and at a time when registration had been refused because in the view of the Health Inspector fly-proofing was not satisfactory is a somewhat startling one. Having regard to the fact that there was evidence that it was possible for flies to enter the premises, that defective fly screens and fly wire had been observed before the offence, had been referred to the builder for attention and that no action had, in some cases, been taken by the builders for weeks, the importance of analysis or other adequate tests becomes even greater than it might have been had it been shown that the premises were adequately fly-proofed. All that the Magistrate says on the question of analysis or other adequate tests is:

> "Re: Regular Inspection. Inspection must be limited to sampling,. No reason to suspect that any contravention of the *Health Act* took place."

He makes no finding as to how far he accepted the evidence of Packham, nor whether he would have regarded that evidence as constituting evidence of the making of adequate tests. Batten had given evidence that checks of the quality of bread produced by comparison with that manufactured by other companies in the Melbourne area were made but no details had been given of what this involved nor how the checks were made, and the Magistrate has not, as I follow it, made any finding as to whether the instructions given by Packham as to sampling were carried out nor has he made any finding as to whether he accepted Packham's evidence as to the tests that he himself made. But even if he did accept Packham's evidence having regard to the fact that Packham was at the premises only twice a week, and that the daily output was some 55,000 loaves, the evidence of sampling by Packham could not on any view be regarded as constituting adequate tests in the circumstances.

The effect of s291(2) is that "In the case of food manufactured by the defendant seller it is necessary for the defendant to show as part of his reasonable precautions that he carried out analysis or other adequate tests, that is, such analysis and such tests as were adequate having regard to the circumstances." Here the circumstances included the fact that the Health Inspector of the City of Oakleigh had refused registration of the premises; that the defendant had commenced baking though no registration had been granted; that there were for several months doors which did not seal completely, at least to the extent of a three quarter inch gap; that some fly wire was damaged; that defects in the fly wire and fly-proofing had been evident for some weeks, and that it was known during the period from June to October that flies did from time to time enter the premises.

It not appearing that the Magistrate had considered at all in relation to the question of reasonable precautions what tests were made, and it being impossible to determine from his reasons for judgment what findings he has made on this matter it appears to me to follow that he has failed to take into account a matter which s291(2) required him to consider. I have applied in this regard the test laid down by Sholl J in *Yendall v Smith Mitchell & Co Ltd* [1953] VicLawRp 53; (1953) VLR 369 at pp378-379; [1953] ALR 724. I therefore, come to the conclusion that Ground 3 of the order nisi to review, namely that the Stipendiary Magistrate misdirected himself in not considering the requirements of s291(2) of the *Health Act*, in finding as he did, that the defendant had taken reasonable precautions as required by s291 of the *Health Act* 1958 has been made out.

Ground 3 having been made out, it becomes necessary in my view to set aside the orders of the Magistrate and to remit the information for rehearing in accordance with law. [Discussion ensued]. The order nisi shall be made absolute on Ground 3 in each case. Each information is remitted to the Magistrates' Court at Melbourne to be reheard by another Magistrate. ... The informant's costs including reserved costs to be paid by the defendant up to an amount of $200.