30/81

HIGH COURT OF AUSTRALIA

SMITH v CAPEWELL

Barwick CJ, Gibbs, Stephen, Mason, Murphy and Aickin JJ

24 April, 4 October 1979

[1979] HCA 48; (1979) 142 CLR 509; 26 ALR 507; 53 ALJR 725

CONSTITUTIONAL LAW (CTH) – FREEDOM OF INTERSTATE TRADE, COMMERCE AND INTERCOURSE – SALE OF GOODS GOODS IMPORTED FROM ONE STATE TO ANOTHER – CONTRACT OF SALE MADE IN STATE OF DELIVERY – SOURCE NOT STIPULATED – GOODS BROUGHT FROM OTHER STATE TO FULFIL CONTRACT – WHETHER INTERSTATE TRADE – STATUTORY CONTROL OF SKIN DEALERS – PROHIBITION OF CARRYING ON BUSINESS OF SKIN DEALER WITHOUT LICENCE – CARRYING ON BUSINESS: *THE CONSTITUTION* (63 & 54 VICT. C12), S92; *NATIONAL PARKS AND WILDLIFE ACT* 1974 (NSW), S105(A).

HELD: by Barwick CJ, Gibbs and Aickin JJ (Stephen, Mason and Murphy JJ *contra*), that the transaction charged was part of the interstate trade in skins; hence the sale was protected by s92 of the *Constitution* and the dealer could not be convicted in respect of it of carrying on the business of a skin dealer in New South Wales.

BARWICK CJ: The respondent is a dealer in, amongst other things, kangaroo skins. His place of business is in Charleville, Queensland. He obtains such skins in Queensland, having authority under the legislation of that State to be in possession of them. He obtains from time to time authority under that legislation to sell them to purchasers, including purchasers in other States. The respondent sold certain kangaroo skins which he had procured in Queensland to a purchaser in New South Wales. He delivered them from Queensland to the buyer in New South Wales. However, the purchaser rejected the skins for disconformity with the contract of sale. The respondent thereupon sold these skins (the rejected skins) to another purchaser in New South Wales.

The respondent also sold to the same purchaser other kangaroo skins which he brought from Qld and delivered in NSW in satisfaction of the purchase. This transaction I will refer to as the "other sale". But in neither contract of sale was there a stipulation that the skins be delivered from Qld into NSW. The export of all these skins from Qld into NSW was covered by an authority under the legislation of that State. The respondent was charged with a breach of s105(a) of the *National Parks and Wildlife Act* 1974 (NSW), as amended ('the Act'), which sub-section I set out in full:

> "A person shall not—
> (a) exercise or carry on; ...
>
> the business of a skin dealer, unless he does so under and in accordance with the authority conferred
>
> (d) by a skin dealer's licence under section 125; or
>
> (e) in so far as the act constituting the offence forms part of the business of a fauna dealer— by a fauna dealer's licence under section 124."

The respondent had no such licence under the Act. It is quite clear from the provisions of s125 of the Act that such a licence is not obtainable as of right. Its grant lies in the discretion of a government official. There was some confusion in the court papers as to the sale which was the subject of that charge.

The magistrate before whom the respondent was charged, appears to have treated the sale of the rejected skins as the subject matter of the charge. But, from a comparison of dates, it

would appear that the other sale to the same purchaser was that subject matter. The magistrate found that the respondent had carried on in NSW the business of a skin dealer as charged but dismissed the information on the ground that the relevant section of the Act did not validly apply to the transaction, ie the sale of the rejected skins, upon which he thought the prosecution had relied to establish the charge because that sub-section transgressed s92 of the *Constitution*.

This appeal is brought by the prosecution by the special leave of this Court. The first question is whether s105(a) infringes the freedom of interstate trade guaranteed by s92. The sub-section does not expressly limit its prohibition to the carrying on of business as a skin dealer in NSW. But s14A(1) of the *Interpretation Act* 1897 (NSW), as amended, would effect such a limitation. Of course, some part of an interstate trade in animal skins, as indeed of all interstate trade in goods, must take place within each of the States between which the interstate trade takes place. If the evidence of the interstate trade be established by proof of the transport of the goods from one State to another, only the actual transit over the border itself will not take place in one State or the other.

If the existence of the trade is to be made out by proof of contractual arrangements, probably, though perhaps not necessarily, some part of the steps to form the contract would have taken place in each State. But to establish the existence of the trade merely by the existence of a contract, the transport of the subject matter from one State to another must necessarily occur if the contract is to be duly performed. Thus, in general, the evidence of the interstate trade by means only of a contract will only be possible if delivery from one State to another is a term of the contract, express or implied. Of course, if a contract of sale so stipulates, the contract itself is part of interstate trade and commerce.

But it would seem such a trade may be established where it is implicit in the nature of the transaction relied upon to establish such trade or by a course of dealing, that it was the common contemplation of the parties that the subject matter of their agreement would be transported interstate. *R v Wilkinson; Ex parte Brazell, Garlick & Co* [1952] HCA 6; (1952) 85 CLR 467; [1952] ALR 117 is, in my opinion, an illustration of such an occasion. It was established in that case that the vendor only sold to the purchaser because the purchaser assured him that he was "buying for interstate". There was no written contract and, in my opinion, the evidence did not go so far as to establish a contractual obligation on the part of the purchaser to transport the potatoes interstate. In fact, he did so: and, clearly, it was in mutual contemplation that he would do so. But as a generalisation it can, in my opinion, be said that only a contract which stipulates for interstate movement or delivery will itself form part of interstate trade. It may also establish the existence of such a trade.

But it is proper to observe that that instance of a transaction given in *W & A McArthur Ltd v Queensland* [1920] HCA 77; (1920) 28 CLR 530 at p540; 27 ALR 130 does not purport to exhaust the way in which interstate trade in goods may take place. The instances given in *McArthur's Case* were peculiarly relevant to the facts of that case. Transport over the border for sale, whether or not in pursuance of a contract of sale requiring such transport, is clearly part of interstate trade and commerce. To prevent the sale of the delivery on importation of the imported goods must necessarily offend s92. Here, no doubt, an interstate trade could not be established in relation to the subject skins merely by the terms of a contract of sale. In the present instance, on the facts to which I have referred, the respondent was undoubtedly engaged in transporting skins from Qld to NSW for sale in NSW, or in performance of a contract of sale, i.e. one which did not stipulate for interstate delivery. He had imported the rejected skins, for delivery to a purchaser and he had imported the skins the subject of the other sale for delivery to a purchaser.

The sub-section of the Act deals with the carrying on of the business of a skin dealer, without a licence under the Act. Part of the respondent's business in selling skins and transporting them from one State to another for delivery to a buyer in the second State must inevitably take place in NSW. If no other part, at least the act of delivery itself; but also the solicitation of business and the negotiation of terms of sale. It is convenient to recall the width of the concept of interstate trade in *McArthur's Case*. Therefore, if the sub-section, properly read, would prevent the sale or delivery upon importation of the skins in the course of the business of a skin dealer, it would, in my opinion, be *pro tanto* inoperative.

I have elsewhere indicated that sale in the second State of goods brought in the course of business into that State for sale forms part of the interstate trade in the subject matter of the transportation. To forbid the trader who has so imported for sale from selling or delivering the imported article in the second State is, in my opinion, in clear conflict with s92. If carrying on business within the meaning and operation of the sub-section embraces the sale upon importation of a commodity brought interstate for sale, it is, in my opinion, inoperative.

To relate these propositions to the instant case, it is apparent that the skins the subject of the other sale were imported into NSW by the respondent for delivery there to the purchaser. Although the sale of the rejected skins was not the subject of the charge, I would reiterate that they were imported from Qld into NSW for sale there. The sale of those skins, made subsequent to their rejection, was a sale made immediately upon importation. The intervening delivery to and rejection by the original purchaser does not preclude that conclusion. On their rejection the skins did not cease to be skins imported for sale and as yet unsold. The abortive transaction did not act as a mediating circumstance precluding the subsequent sale being a sale immediately on importation; in other words, a first sale on importation for sale. Thus, if entering into and completing the transaction with the other skins would constitute carrying on business within the terms of s105(a) of the Act, the section would be inoperative to render the respondent liable under the section because of s92. The operation must be confined to purely intrastate activities.

There is a second approach to this charge which in some sense is but a reflection of what I have already said, namely, one of fact. Did the respondent carry on business as a skin dealer in NSW within the meaning of the sub-section? The expression "carry on business" would in general refer to some repetitive act in a trade and only rarely be satisfied by the proof of only one transaction. Further, as it appears in the subsection, the expression necessarily refers to carrying on a business at a place in NSW. By this I do not mean that in order to satisfy the sub-section there must be use of business premises: it would suffice if the facts constituting the carrying on of a business occurred in a street without the panoply of an office or shop. But at least the business must be carried on in NSW. The fact that the respondent had his place of business in the sense of his office, shop, or headquarters in Qld does not deny the possibility of concluding that, in relation to some specific period of time, he carried on business in NSW. But, allowing that proof of a single transaction may establish the carrying on of a business within the intention of the sub-section, the circumstances under which a single transaction takes place must be considered Also, the interstate nature of the respondent's operation cannot be left out of consideration when determining whether a particular transaction amounts to carrying on a business in NSW.

Here, if it be thought that the sale in the rejected skins, either alone or in conjunction with the sale of the skins the subject of the other sale, assisted to support a conclusion that a business was being carried on in NSW, it should be pointed out that we know the circumstances in which the transaction in the rejected skins took place and it was, as I have indicated, a transaction in the course of interstate trade. The sale to the purchaser who rejected the goods could not possibly be held, in my opinion, for the reasons I have given to be a carrying on or to form part of carrying on of the business in contravention of the sub-section. Both the concluded sales occurred in the "business" of importing goods into the State for sale or for delivery there. If the other sale of skins is relied upon to establish the carrying on of a business, what I have already said equally applies. I would not find that in either case the single sale in the circumstances of this case amounted itself to the carrying on of a business as a skin dealer within the operation of the sub-section; nor would I find that a combination of all the sales warranted that conclusion though they were business transactions entered into by the respondent as a skin dealer, and though the selling took place in NSW.

Thus, in my opinion, whilst I think he was in error in finding that the respondent relevantly carried on business as a skin dealer in NSW, the magistrate was correct in dismissing the information. I would dismiss the appeal.

GIBBS J: The respondent was charged in the Central Court of Petty Sessions, Sydney, on the information of the appellant that between 1st April 1976 and 10th April 1976 at Botany in the State of NSW he did carry on the business of a skin dealer, otherwise than under and in accordance with the authority conferred by a licence issued under s124 or s125 of the *National Parks and Wildlife Act* 1974 (NSW), as amended ("the Act"). The magistrate who heard the proceedings

appears to have accepted, or assumed, that the respondent did carry on the business of a skin dealer at Botany, for he said that the only question was whether the respondent was required to hold a licence under the Act or whether he was exempted from that requirement because of the interstate nature of the transaction. He answered that question favourably to the respondent and dismissed the information.

The evidence was not altogether clear, but there now seems to be no dispute that the following facts were established by the evidence. The respondent carried on business at Charleville in Qld, as a fauna dealer, and was registered under the relevant Qld legislation. However, he did not hold a licence under s124 or s125 of the Act. In March 1976 the respondent agreed to sell some skins to Furedy and Co, of Botany, but after he had brought the skins to NSW he found that the prices offered by that company had dropped and instead sold the skins to Gee Bros Pty Ltd, also of Botany. This transaction was completed before 1st April 1976, the former of the dates mentioned in the information, but, in any case, no reliance is placed on it by the appellant, apparently because it is considered to have been of an interstate character.

Early in April 1976 the respondent called at the premises of Gee Bros Pty Ltd at Botany, and spoke to Mr Gee, a director of that company, about the earlier transaction. During the discussion, Mr Gee "negotiated a further order". The evidence did not disclose the precise nature of this further order, but pursuant to it the respondent delivered a quantity of kangaroo skins to Mr Gee on about 9th April 1976 at Botany, where the skins were off-loaded from the respondent's truck on to one of Mr Gee's trucks. The skins were obtained in Qld, and the respondent was granted a permit under the Qld legislation to remove them from Charleville to Wallangarra, on the border between Qld and NSW. Each skin bore a numbered plastic tag issued by a department of the Qld Government. Mr Gee knew that the respondent carried on business in Qld, and it can be inferred that when he placed the order he believed that the skins would be brought from Qld, and since the skins were tagged he must have known that they had come from Qld. However, there was no evidence that it was an express stipulation of the contract that the skins would be brought from Qld.

To determine whether the respondent was within the protection of s92 of the *Constitution*, it is necessary to ascertain with precision what were the acts and events which, in the absence of that constitutional guarantee, would render him liable to be convicted of the offence with which he was charged, The section of the Act which created that offence was s105, which provides, *inter alia*, as follows:

> "A person shall not—
> (a) exercise or carry on; ...
>
> the business of a skin dealer, unless he does so under and in accordance with the authority conferred—
>
> (d) by a skin dealer's licence under section 125; or
>
> (e) in so far as the act constituting the offence forms part of the business of a fauna dealer — by a fauna dealer's licence under section 124."

By s125(1) an authorized officer may issue a licence, referred to as a skin dealer's licence, authorizing a person to buy or sell skins as a skin dealer, and otherwise to exercise or carry on the business of a skin dealer. The expression "skin dealer" is defined in s5 as follows:

> "'Skin dealer' means a person who exercises or carries on—
>
> (a) the business of dealing in the skins of protected fauna, whether by buying or selling or by buying, and selling, and whether or not he deals in other things; or
>
> (b) the business of tanning the skins of protected fauna, whether or not he tans other skins, or both, and whether on his own behalf or on behalf of any other person, and whether or not he exercises or carries on any other business."

"Sell" is defined by the same section to include offer for sale. The expression "carry on" is not anywhere defined. Kangaroos are protected fauna, see s5 ("protected fauna"') and sch 11. In my opinion, an isolated sale of kangaroo skins, not made in the course of carrying on a wider business

of selling such skins, would not be an offence against s105(a) of the Act. The expression "carry on business" in its ordinary meaning, signifies a course of conduct involving the performance of a succession of acts, and not simply the effecting of one solitary transaction. In *Smith v Anderson* [1874-1880] All ER 1121; (1880) 15 Ch D 247, where the Court of Appeal considered the effect of s4 of the *Companies Act* 1862 (UK) which spoke of an "association ... formed ... for the purpose of carrying on any ... business", Brett LJ said (1880) 15 Ch D at pp277-278;

> "The expression 'carrying on' implies a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated."

In *Kirkwood v Gadd* (1910) AC 422 at p423, Lord Loreburn LC said "What is carrying on business? It imports a series or repetition of acts." In the same case Lord Atkinson referred with apparent approval to the statement of Brett LJ in *Smith v Anderson* [1874-1880] All ER 1121; (1880) 15 Ch D 247 at pp277-278. Similarly, in *Premier Automatic Ticket Issuers Ltd v Federal Commissioner of Taxation* [1933] HCA 51; (1933) 50 CLR 268 at p298; [1934] ALR 109; 2 ATD 383, Dixon J, in a passage frequently quoted, said that "the carrying on or carrying out of any profit-making undertaking or scheme" in a taxation statute, "appears to cover, on the one hand, the habitual pursuit of a course of conduct, and, on the other, the carrying into execution of a plan or venture which does not involve repetition or system..."

The decision in *Cornelius v Phillips* (1918) AC 199 is not authority for any different view of the meaning of the expression. It was there held that a money-lender had carried on the business of money-lending at an hotel which was not his registered address although he had effected only one transaction at the hotel. In that case, which was recently discussed and distinguished in *Yango Pastoral Co Pty Ltd v First Chicago Aust Ltd* [1978] HCA 42; (1978) 139 CLR 410; 21 ALR 585; (1978) 53 ALJR 1, the single transaction which fell within the statutory prohibition was conducted by a person who was, on any view, carrying on a money-lending business. Similarly, in *Lowe v Cant* (1961) SASR 333, it was held that a milk vendor who had been allotted a zone under regulations governing the supply of milk and who, on one occasion, delivered milk to a householder in another zone, had carried on business as a retail vendor of milk within a zone other than that allotted to him.

Again, there was no doubt that the milk vendor was carrying on business as such or that the isolated transaction which occurred outside his allotted zone was done in the course of carrying on that business. In these cases, although the defendant engaged in only one transaction of the kind proscribed, that transaction was done in the course of carrying on a business. A single transaction may amount to the carrying on of a business, although no other transaction has so far been effected, if it is proved that there was an intention to carry on a business and that the transaction was undertaken in pursuance of that intention: *Fairway Estates Pty Ltd v FCT* [1970] HCA 29; (1970) 123 CLR 153 at pp164-165; 1 ATR 726; 44 ALJR 306. It seems clear that a solitary transaction of sale or purchase of skins in NSW will only constitute an offence against s105(a) of the Act, if the sale of purchase has been made by the defendant with the intention that it shall be the first of several transactions in a business which he thereby commences to carry on, or if it has been made in the course of a business which the defendant is carrying on elsewhere.

The Act contains in s101 a provision which makes it unlawful to sell kangaroo skins unless the case falls with one of the exceptions provided by that section. Section 101 in terms refers, *inter alia*, to the buying or selling of any protected faunae but, by s5, 'fauna' is defined to include any mammal and "mammal" is defined to include the skin of a mammal. The fact that s101 prohibits a sale of kangaroo skins supports the conclusion that s105(a) does not simply duplicate the prohibition, but applies to the case of an individual sale of such skins only if it was effected in the course of carrying on a business. The question whether s105(a) would infringe s92 of the *Constitution* in its application to the present case depends on whether the respondent, in the course of carrying on the business of a skin dealer, engaged in acts of interstate trade and commerce. If he did, the section, if it applied, would directly and immediately restrict or burden that interstate trade, for it would prohibit the respondent from carrying on the trade, and although the prohibition would be relaxed if the respondent were licensed, a licence was not obtainable either as of right or, if definite and reasonable conditions were satisfied – the grant of the licences was purely discretionary.

There is no doubt that the agreement made early in April between the respondent and Mr Gee, considered alone, was an intrastate transaction which the law might validly prohibit. That agreement contained no express stipulation that the skins would be supplied from Queensland, and it was not suggested that there was any necessary implication to that effect. In those circumstances the agreement is indistinguishable from the first and third of the methods discussed in *W & A McArthur Ltd v Qld* [1920] HCA 77; (1920) 28 CLR 530 at 540, 559-560; 27 ALR 130, and on the authority of that case, which on this point has often been followed, the agreement, considered in isolation, was not of an interstate character.

Moreover, the fact that the respondent carried on business in Qld as well as in NSW did not necessarily mean that he engaged in acts of interstate trade, for "it is very clear that a person may carry on business in every State of the Commonwealth and yet never engage in an act of interstate commerce": *Hospital Provident Fund Pty Ltd v Victoria* [1953] HCA 8; (1953) 87 CLR 1 at p38; [1953] ALR 258. However, the respondent did in fact engage in acts of interstate trade in carrying on the business. The carriage of the skins from Qld to NSW was beyond doubt an act of interstate trade. The respondent carried the skins in the course of, and for the purpose of, his business as a skin dealer, and completed the carriage by delivering the skins to Mr Gee. The carrying on by the respondent of his business in NSW consisted of one inseverable transaction – he brought the skins across the border and delivered them in pursuance of the order previously placed by Mr Gee.

I cannot distinguish the present case from *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* [1975] HCA 45; (1975) 134 CLR 559; (1975) 7 ALR 433; 50 ALJR 121. In that case, the owner of goods took them over the border for the purpose of selling them, and it was held that s92 protected the sale as well as the carriage. The case was not one in which goods were sold within a State by a person who had bought them from an interstate seller; the person making the first sale within the State had himself brought the goods across the border – he was what Jacobs J called an "exporter-importer" (1975) 134 CLR at p629. My reason for holding that s92 applied was that the sale, although in itself of an intrastate character, was "an inseparable concomitant or consequence" of an interstate transaction (1975) 134 CLR at p599. In the present case also the respondent is an "exporter-importer''.

It is true that in *Northern Eastern Dairy Co. Ltd v Dairy Industry Authority of NSW* the contract of sale was made after the goods had crossed the border, whereas in the present case the contract of sale may have already been made – at least an order had been placed – before the goods were brought from Qld to NSW. With all respect to those who take a different view, that difference does not seem to be material. In each case the actual carriage of the goods across the border was an act of interstate trade, and the delivery of the skins for the purpose of satisfying an anterior contract or order is just as inseparable from that carriage as was the subsequent sale from the carriage in the *North Eastern Dairy Case*.

Indeed, the argument for regarding the sale and delivery in the present case as inseparable from the interstate carriage is in one respect stronger than that which prevailed in the *North Eastern Dairy Case*. The sale and delivery to Mr Gee only came within s105(a) if it occurred in the course of carrying on a business. The circumstances which show that this single transaction was done in the course of carrying on a business also show that an integral part of the transaction was the carriage of the skins by the respondent from Qld to NSW. It was not contended in the present case that s105(a) could be upheld as a regulatory measure for the protection of native fauna – no doubt the decision in *Fergusson v Stevenson* [1951] HCA 49; (1951) 84 CLR 421; [1951] ALR 831 inhibited the appellant from advancing any such argument.

For these reasons, in my opinion, the provisions of s105(a) of the Act could not validly apply to the acts with which the respondent was charged. I therefore consider that the magistrate correctly dismissed the information and that this appeal should be dismissed.

AICKIN J: I have had the advantage of reading the reasons for judgment prepared by the Chief Justice with which I am in full agreement. I agree that the joint judgment of Knox CJ, Isaacs and Starke JJ in *W & A McArthur Ltd v Qld* [1920] HCA 77; (1920) 28 CLR 530; 27 ALR 130 appears sometimes to be regarded (wrongly in my opinion) as dealing exhaustively with the content of interstate trade for the purposes of s92. That judgment examined the four modes of trading

engaged in by the plaintiff in that case as set out at p540. The case decided, rightly in my respectful opinion, that of those modes only the fourth constituted interstate trade. There is however nothing in that judgment to suggest that the fourth mode constitutes an exclusive statement of what comprises interstate trade: nor an exclusive statement of the manner in which interstate trade in goods may occur. That case did not involve any question of the freedom of physical movement of goods or vehicles nor did it deal with the situation of transport of goods across a State border for the purpose of sale in the State of destination by the owner who had arranged such transport. It appears to me that the joint judgment contains nothing which is inconsistent with *Hughes & Vale Pty Ltd v NSW* [1954] UKPCHCA 5; (1954) 93 CLR 1; [1954] ALR 1069; (1955) AC 241 nor with the decision in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* [1975] HCA 45; (1975) 134 CLR 559; (1975) 7 ALR 433; 50 ALJR 121.

Appeal dismissed with costs.
