01/85

SUPREME COURT OF VICTORIA

READINGS PTY LTD v SAMMUT and ANOR

Murray J

11 February 1985

LABOUR AND INDUSTRY – ILLEGAL WEEKEND TRADING – SELLING GRAMOPHONE RECORDS AND PRE-RECORDED CASSETTE TAPES – WHETHER "WORKS OF ART OR HANDICRAFT": *LABOUR AND INDUSTRY ACT* 1958, S80, FIFTH SCHEDULE.

Whilst the composition and performance of music may fall within the term "art", gramophone records and pre-recorded cassettes of such works of art are not works of art in their own right. Accordingly, a shop selling such records and cassettes is not a shop for the sale of "works of art".

MURRAY J: [1] This is the return of two orders nisi to review the decisions of the Magistrate sitting at Carlton whereby the Magistrate convicted the applicant on two charges laid by the informants under s80(1) of the *Labour and Industry Act* 1958. By one information the applicant was charged with failing to keep its shop at 366 Lygon Street, Carlton closed on the afternoon of Saturday, 19th November 1983 and under the other information the applicant was charged with failing to keep the same shop closed during Sunday 27th November 1983.

The informations were heard on 4th September 1984 and after hearing the evidence and the submissions the Magistrate adjourned the proceedings until 14th of September 1984 when he recorded convictions under each information and handed down written reasons for his decision. There appears to have been no conflict in relation to the facts of each case. The premises in question are **[2]** a shop selling gramophone records and pre-recorded cassette tapes. In addition some blank tapes and T-shirts apparently connected with various artists were on display for sale but the evidence indicated that the sale of records and pre-recorded cassette tapes constituted at least 96 per cent of the business of the company at the premises in question.

Section 80(1) *Labour and Industry Act* provides as follows:

> "80(1) Save as otherwise expressly provided in this Act all shops (except shops of the classes or kinds mentioned in the Fifth Schedule and petrol shops) shall be closed and kept closed—
> (a) on Sundays, for the whole of the day;
>
> (b) on Saturday, from the hour of one o'clock."

The Fifth Schedule contains a list of the kinds of shops which are excepted from the operation of the sub-section. The point and the only point in issue in the prosecutions was whether a shop selling records and pre-recorded cassette tapes was a shop for the sale of works of art or handicraft within the meaning of that category in the Fifth Schedule. The Magistrate held that the shop did not fall within that description and consequently convicted the applicant. Following upon this decision the applicant obtained two orders nisi to review each of which relied upon the same grounds but it is not in my opinion necessary to set out the grounds relied upon because in each case the sole question to be determined is whether a record or pre-recorded cassette tape can be called a work of art. It was not submitted before me that either could come within the term handicraft. Mr Graham QC who, with Mr Shavin, appeared for the applicant submitted that the composition and performance **[3]** of music was an art and that a work of art was not limited to a painting or sculpture. He submitted that as s80 of the Act is dealing with shops as the vendors of articles, the exception relating to works of art should be held to apply to cassettes and records which are the only vendable commodity in respect of the art both of the composition of music and its performance.

The argument before me was both interesting and wide ranging but as I have reached a clear conclusion on a fairly narrow basis, I do not think it useful to set out the various submissions made by Mr Graham or by Mr Smith who appeared for the respondents. In *Tucker v Penhalluriack* a judgment of Tadgell J (unreported, delivered 3rd April 1984) His Honour observed:

> ... whether a particular shop is or is not one of a class or kind described in the Fifth Schedule will always fall to be determined as a matter of fact by the tribunal that has to decide it. The facts proved have to be measured against the descriptive words in the Schedule as they are understood in common language."

The Magistrate cited this passage and expressed his respectful agreement with it as do I. There was considerable discussion as to whether the Magistrate was correct in holding that the amendment of the Act effected by Act No. 9951 whereby the category in the Fifth Schedule was altered from "Shops for the sale of works of art and handicraft" to "Shops for the sale of works of art or handicraft" did not rob that category of a genus which could be spelt out by the inclusion of works of art and handicraft in the one heading. Although I am inclined to agree with the Magistrate that the genus was not destroyed by the amendment, I nevertheless find it unnecessary to base my decision upon a genus common to both terms. In my opinion the central and crucial question which **[4]** falls to be determined is whether a recorded cassette or a record can fairly be described as a work of art within the ordinary meaning of that term. Mr Graham referred to the processes involved in engraving and lithographing to suggest that the products of engraving and lithographing were nevertheless works of art, notwithstanding that they might be turned out in considerable numbers. Whether that submission is correct or not may fall to be determined on another occasion.

There may well be distinctions to be drawn between the products of an engraver's plate and the mass production of records and tapes. There is no doubt in my opinion that both the composition and performance of music may fall within the term "art". Indeed the Court of Appeal in the *Royal College of Music v The Vestry of St Margaret's and St John's Westminster* [1898] 1 QB 304 was prepared to regard music both in its teaching and its performance as a fine art whatever may he the distinction between that term and the term art. There is no doubt in my view that the works of Beethoven and even the works of the Beatles may be termed works of art and, when skilfully played, the performance of them may itself be a work of art. However, there is all the world of difference between the composition and performance of music on the one hand and the mechanical reproduction of it on records and tapes on the other. In the same way it is obvious that the painting Mona Lisa is undoubtedly a work of art yet postcards of that painting mechanically printed in large numbers would not fall within **[5]** that description. They are pictures of a work of art and not works of art in themselves. Records and cassettes may be, in my opinion, records of a work of art both in its composition and its performance but they are records and not works of art in their own right, notwithstanding the fact that great skill may have been employed in manufacturing the matrix or master tape. The Magistrate in a very closely reasoned and careful decision considered the arguments advanced and as I read his decision, arrived at a similar conclusion although he was clearly affected to some extent by his view that the word "art" in the schedule as amended was nevertheless still coloured by its association with the word handicraft.

Mr Graham directed my attention towards the classes of shops specified in the Fifth Schedule and submitted that the list disclosed an intention of the Legislature to specify shops which might be described as specialist shops outside the main stream of retailing. See *Clisby Pty Ltd v Tucker*, a decision of the Industrial Relations Commission unreported, delivered the 23rd December 1983. An examination of the list of shops in the Fifth Schedule might well support this submission in the sense that one might think that if the attention of the Legislature had been drawn to the existence of shops selling records and pre-recorded tapes the Legislature might well have included such shops in the list in the Fifth Schedule. But that consideration does not justify a finding that a shop selling records and cassettes is a shop for the sale of works of art whatever **[6]** the Legislature might have done if its attention had been drawn to the problem. For the above reasons, in my opinion, the decision of the Magistrate was correct and accordingly the orders nisi will be discharged with costs. It is therefore not necessary for me to reach any conclusion on the question whether the fact that blank tapes and T-shirts were also displayed for sale at the time in question necessarily involved the commission of offences by the applicant by reason of the provisions of s91 of the Act. I express no opinion on Mr Smith's contentions on this aspect of the cases.