43/80

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v WATTLE GULLY GOLD MINES NL

Young CJ, Kaye and Murphy JJ

21 May 1980 — [1980] VicRp 57; [1980] VR 622; (1980) 4 ACLR 959

COMPANIES – SENTENCE – CORPORATE RESPONSIBILITY: *SECURITIES INDUSTRIES ACT* 1975, S110.

The defendant Company was convicted of the offence of disseminating with fraudulent intent misleading information which was likely to have the effect of raising the market price of shares. A director, Kennedy Maxwell Wright was also convicted of an offence arising from the same circumstances). In the County Court, the defendant company was fined $20,000. Upon appeal—

HELD: The sentence was excessive and inappropriate having regard to all the circumstances. Sentence reduced to a fine of $500.

YOUNG CJ, KAYE and MURPHY JJ: The considerations which may affect the penalty to be imposed upon a person and a company charged with the same offence such as an offence under s110 may differ markedly. Whereas the opportunity of personal gain may be present in the case of a director of a company, there may be no such opportunity in the case of the company. In the present case there was nothing to suggest that there was an opportunity for gain available to the company. No advantage or benefit was likely to be derived by the company from the price of its shares increasing without the company possessing assets or prospects to justify this increase. The success of the company's searches for uranium did not depend upon the market value of its shares. Any publicity likely to be attracted by movement in the price of its shares would not enhance the company's financial standing. On the other hand a fine imposed on the company being a loss sustained by it, would be a detriment to those shareholders who either did not sell their shares or who purchased shares after being induced to do so by the misleading information. Any detriment flowing from the imposition of the fine might therefore be borne by innocent persons, while some of those who sold may have gained by the company's fraudulent conduct.

Considerations similar to these are the subject of discussion by Professor Glanville Williams in his work *Criminal Law* 2nd ed. pp862-865 para. 283, a section dealing with the *Social Policy of Corporate Responsibility*. After doubting the justification of the common practice of imposing a heavy fine on a corporation for the commission of a criminal offence, the learned author continues:

> If the directors of corporations were the sole shareholders, a fine levied on the corporation could be justified as an indirect way of fining the directors for their own offences. But then, this end could be achieved with greater precision by fining the directors, who by hypothesis would be men of substance because they would possess the shares. In most large concerns directors are not the sole shareholders, and a fine imposed on the corporation is in reality aimed against shareholders who are not directors or responsible for the crime, i.e., is aimed against innocent persons. The theory that shareholders whose purses are thus lightened will be moved to dismiss the directors is unrealistic, because it is now a commonplace that shareholders in large public companies have practically no control over the management.
>
> In any event it is curious reasoning that an innocent person may properly be punished in order to compel him to do something that the law could, if it wished, do directly. There is one argument for fining corporations in respect of offences which has nothing to do with the traditional theory of the criminal law. It may be said that the inarticulate purpose of fining a corporation is not punishment but a means of exacting the payment of compensation to society for a quasi-tort or for unjust enrichment (s186); and, so regarded, justice obviously requires the fine to be borne by the same persons as those who received the fruits of the illegitimate enterprise. In a rough practical way (and ignoring the possibility that shares may have changed hands in the meantime) this may be achieved by fining the corporation. But even if a justification along those lines is accepted in theory (and serious objections have already been pointed out), it means that the fine must not be greater than the damage done to society by the crime, or alternatively, that it must not be greater than the profit made out of the crime by the offender."

Professor Glanville Williams concludes his discussion with the following observations:

> "There are occasions when a corporation may legitimately be fined, but no valid argument exists for imposing on a large corporation the sort of swingeing fine that would be thought appropriate to an errant millionaire, treating the corporation as though it were a human being. For the punishment does not fall upon those who are really responsible. The danger in the practice of penalising corporations is that they offer too obvious and easy a target. As always with strict and vicarious responsibility in crime, proceedings directed against the innocent tend to miss the guilty. American official experience is of interest here: it is that 'Criminal prosecution of a corporation is rather ineffective unless one or more of the individual officers is also proceeded against'. This seems to indicate that the punishment of corporations is of small relevance to the purposes of the criminal law."

Without attempting to lay down a rule of general application, we think that the matters referred to by the learned author are apposite in this particular case. The learned Judge observed that the amount of the fine might put on notice those having the management and control of a company who might feel disposed to engage in fraudulent deception of the investing public by disseminating misleading information that their shareholders as well as the active participants could experience the consequences of their doing so. But it was necessary for the sentencing Judge to be mindful of those on whom the incidence of the fine would be likely to fall and that those persons would include innocent ones.
