**39/85**

## SUPREME COURT OF SOUTH AUSTRALIA

# *LANHAM v BRAKE*

**Cox J**

**22 December 1983**

**(1983) 34 SASR 578; (1984) 52 ALR 351; (1983) 74 FLR 284; (1983) 13 A Crim R 293**

**SENTENCING – OFFENCES AGAINST THE QUARANTINE AND CUSTOMS ACTS – IMPORTATION OF FRUIT (THREE APPLES) AS PROHIBITED – FAILURE TO DECLARE THE FRUIT IN THE STATEMENT SUBMITTED TO CUSTOMS – QUARANTINE ACT CHARGE FOUND PROVED BUT CHARGE DISMISSED AND ON THE FALSE STATEMENT CHARGE DEFENDANT RELEASED ON A BOND FOR NINE MONTHS – WHETHER SENTENCING ADEQUATE.**

An appeal against the adequacy of a sentence in respect of the undeclared importation of vegetable matter was hard before Cox J. B. was a 56-year old solicitor who had retired from practice in New Zealand because of ill-health. He travelled to Australia, carrying in his hand luggage, 3 apples which he intended to eat on the journey. He filled out the Customs form during the early part of the flight, declaring that he had no plants in his possession. During the flight, B. felt generally off-colour and did not turn his mind to the apples in his possession until later when the Customs officer was opening one of B's suitcases. Subsequently, B. was charged with producing the Customs document containing an untrue statement and importing fruit or plants contrary to statute. B. pleaded guilty to both charges and the prosecutor asserted that the importation of the fruit was regarded by the Crown as serious because of the risk of causing the introduction of fireblight. The Magistrate applied the provisions of s19B of the *Crimes Act* (Cwth). In respect of the illegal importation he found the charge proved but dismissed it under s19B(1)(c), and in respect of the false statement, without convicting, he released B. on a $50 bond to be of good behaviour for 9 months. On appeal by the Crown—

**HELD: Appeal allowed. Orders set aside. The defendant fined $100 on the illegal importation charge and $50 on the false statement charge.**

**COX J:** "... **[299 A Crim R]** The temptation is obviously strong for overseas travellers to take, and act on, the view that these quarantine restrictions, while possibly necessary for commercial importers, cannot really have any sensible application to a handful of fruit or nuts or vegetable seeds and may therefore be in good conscience ignored. What harm could three apples do? But the information given to the special magistrate by the prosecuting counsel showed very strikingly that enormous and permanent damage to an important primary industry can result from the introduction of the kind of disease that can be carried in a handful of apparently healthy apples.

None of this would surprise a reasonably well-informed Australian who is well used to hearing of the ravages caused since the earliest settlements from a large variety of introduced stock and cereal and fruit and vegetable pests. I should be surprised if things are much different in New Zealand but, at any rate, the respondent must have been given an impressive indication of the seriousness with which these things are regarded in Australia when, as I have no doubt happened, the interior of his plane was solemnly sprayed with insecticide, at its first port of arrival in Australia, before any passengers were allowed to leave it.

The penalties provided for a breach of s67 of the *Quarantine Act*, even upon summary prosecution, are severe and necessarily so. They are also designed, of course, to deter much more dangerous offenders, than the respondent, but the typical small scale offender, who prefers to substitute his own judgment about the risks involved for that of an expertly advised Parliament, is still committing a serious offence. It is important that summary courts give expression to the legislative policy indicated by the statutory penalty range.

This is an area, in **[300]** my view, in which considerations of deterrence must predominate. That does not mean that matters personal to a particular offender should not be taken into account, but it does mean that the fact that only a small quantity of a prohibited import was involved is

unlikely to make the breach of the law unimportant, and a defendant's ignorance of the way in which his particular offence could put a primary industry at risk will usually be of little moment.

I realise that, if there is a reasonable basis for the exercise of the kind of discretion that is conferred by s19B of the *Crimes Act*, it is not for an appellate court to substitute its own view of the way in which the discretion should have been exercised for that taken by the court of first instance. However, I am satisfied here that the learned special magistrate did take irrelevant matters into account in deciding not to convict the respondent. Besides, the exercise of a s19B discretion requires more than the mere establishment of one of the par (b) conditions. "Its, or their, existence must, it seems to me, reasonably support the exercise of the discretion the statute give. They are not mere pegs on which to hang leniency dictated by some extraneous and idiosyncratic consideration": *Cobiac v Liddy* [1969] HCA 26; [1969] 119 CLR 257 per Windeyer J at 276; [1969] ALR 637; (1969) 43 ALJR 257. See also *Nitschke v Halliday* [1982] 30 SASR 119 at 122-123. In *Kowald v Hoile (No. 2)* [1976] 14 SASR 314 at 319-320 Zelling J dealt with the question a special magistrate must ask himself when considering whether this kind of power to mitigate should be used. See also *Lower v Norton* [1972] 4 SASR 162 at 179-181 and *Scott v Langley* [1980] 23 SASR 278.

In the case of these quarantine offences, the relevant considerations will include the seriousness of the offence, its prevalence, the obvious difficulty of detecting breaches under disembarking conditions in which it is quite impracticable to examine the luggage of every passenger, and the consequent need to impose penalties for typical breaches that will make people think twice before trying to slip their small packages of fruit or cooked meat or vegetable seeds through the random Customs check. It is also an important consideration that these offences are commonly committed by persons who are of generally good character.

In the light of all those matters viewed against the disastrous consequences to the community that could result from a breach of these laws, any application by a defendant that the charge against him should be dismissed under s19B of the *Crimes Act* should, in my view, be regarded by the court with great circumspection. That does not mean that occasions for the exercise of these mitigatory powers will never occur. No doubt they will, but I should expect that appropriate instances will be uncommon. There are two other matters that I should mention. The learned special magistrate also took into account, in resolving not to proceed to a conviction, the possibility that the respondent might seek at some future time to practise his profession in this country. He considered that it would be out of proportion to the offence to record a conviction against the respondent. It will always be a relevant consideration that a man of good character will understandably wish to avoid the stigma of any conviction being recorded against him.

That is something that the special magistrate was entitled to put into the scales in this case, although the weight to be given to such a consideration will be less in the case of regulatory offences such as these than in the case, say, of a common law crime that contains overtones of considerable moral turpitude. However, I do not think that the possibility of the respondent applying for admission to practise as a solicitor in Australia **[301]** takes the matter such further. No doubt the fact that a court had dealt with a charge pursuant to s19B of the *Crimes Act* would give the admitting authority a useful indication of the view that the court took of the offence and the offender, but the fact that the respondent had been found guilty of an offence, whether convicted or not, would be enough to oblige him to make a full disclosure of the circumstances in the event of his applying to be admitted to practise in this State and, I have little doubt, in any other State.

Secondly, Mr Whitington put to me that the information about fireblight that was given the learned special magistrate did not include any assertion about the actual degree of risk that would be created by three apples intended for more or less immediate consumption. There is a limit to the kind and extent of the background submissions that can practicably be made in these cases, but I am satisfied that what prosecuting counsel said in this case implied that the risk involved in the importation of even three apples was not trifling. Furthermore, the seriousness of the respondent's offences is not to be measured solely by reference to the actual risk created in his particular case. It should be obvious to any traveller that these quarantine type restrictions are important and ought, as a matter of course, to be obeyed. No doubt an offence will be all the more serious where the risk of a disease thereby being introduced is demonstrably high, but it does not follow that offences of a less spectacular or less certain kind are not still serious. Two things about this kind of pest control are self-evident – that the nature and extent of modern

travel and transport must make this country's continued isolation from the ravages of a great many of the world's stock and vegetable diseases quite precarious and, secondly, that the only hope of maintaining any sort of barrier against the introduction of such diseases rests upon an absolute prohibition against the importation of uninspected carrying agents, no matter how small the quantities. It seems to me that what prosecuting counsel said in this case was enough to demonstrate the seriousness of the respondent's offences in these respects.

*[His Honour imposed a fine of $100 on the illegal importation charge and $50 on the false statement charge]*

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