

33/69

SUPREME COURT OF VICTORIA

ARMOUR & CO PTY LTD v KIRCHNER

Newton J

18-19 August, 2 December 1969

[1970] VicRp 54; [1970] VR 419; (1969) 23 LGRA 128

PUBLIC HEALTH – SALE OF ADULTERATED SAUSAGES BY FOODSHOP OWNER – SAUSAGES BROUGHT FROM A SUPPLIER WITH A WARRANTY – SAUSAGES FOUND TO HAVE EXCESSIVE LEVELS OF SULPHUR DIOXIDE – WHEN NOTIFIED OF THE ADULTERATION SHOPOWNER LODGED A DEFENCE AND NOTIFIED THE HEALTH INSPECTOR OF THE WARRANTY HE RECEIVED FROM THE SUPPLIER – SHOPOWNER FAILED TO SEND A COPY OF THE WARRANTY TO THE HEALTH INSPECTOR – SHOPOWNER AND SUPPLIER CHARGED WITH AN OFFENCE – SHOPOWNER DISCHARGED FROM LIABILITY – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, SS300(2), 301, 426.

HELD: Order nisi discharged.

1. The requirements of s301(1) of the *Health Act* 1958 as to the defendant shopowner, within seven days after service of the summons, sending a copy of the warranty to the informant with a written notice as therein provided, were procedural requirements only, which may have been waived by the informant expressly or by conduct. In the present case in so far as those requirements were not fulfilled by the shopowner they were waived by the informant by his counsel's conduct of the case.

2. The circumstance that the solicitor for the supplier (Armours) sought to rely on the shopowner's alleged failure to comply with s301(1) in relation to sending a copy of the warranty to the informant was irrelevant, because if any such failure was waived by the informant then it was not open to Armours to seek to rely on it. Armours had been sent a notice of the shopowner's intention to rely on the warranty, and this was the only requirement of s301(1) which concerned Armours.

3. It was in any event open to the Magistrate upon the evidence which was before him to conclude that the shopowner had purchased the sausages from Armours with a written warranty that the sausages complied with such requirements of Pt XIV of the *Health Act* 1958 as were applicable thereto. It was open to the Magistrate to infer from the evidence, including the terms of the warranty docket, that the sausages were bought by the shopowner from Armours by cash and that the warranty docket was delivered to him together with the sausages at the time of the sale.

NEWTON J: This is the return of an order nisi to review a decision of the Court of Petty Sessions at Moonee Ponds given on 30 April 1969, whereby the respondent, Raymond John Kirchner (whom I shall call "Kirchner"), was discharged from the prosecution pursuant to s300(2) of the *Health Act* 1958 and an order for analysis was made under s300(4).

The applicant in relation to this order nisi is Armour and Co Pty Ltd (which I shall call "Armours"). Armours had appeared at the hearing in the Court of Petty Sessions pursuant to s301(2) of the *Health Act* 1958.

The actual proceedings in the Court of Petty Sessions were the hearing of an information and summons dated 31 March 1969 whereby Kirchner was charged with having on 4 February 1969 at 3 Military Road, Avondale Heights, in the City of Keilor, sold adulterated food contrary to s238 of the *Health Act*, namely, thin sausages containing an excessive amount of sulphur dioxide. The informant was one William Rutledge Anderson, who is described in the information as "Health Inspector, City of Keilor". The order nisi was not directed to be served upon the informant, and he did not appear and was not represented at the hearing before me.

At the hearing in the Court of Petty Sessions the informant and Kirchner were each represented by counsel and Armours was represented by a solicitor.

The only oral evidence called on behalf of the informant was given by one Richard Banks, who is also a health inspector appointed by the City of Keilor. Banks said, *inter alia*, that on 4 February 1969 he bought a pound of uncooked sausages from Kirchner at his shop premises, and that he divided the sausages into three parts and put each part into a clean sealed jar marked No. 159 City of Keilor, and that he handed one jar to Kirchner and sent another to an analyst and retained the third jar. The analyst's certificate was put in evidence and it showed that the sausages in question were thin sausages, which contained an amount of sulphur dioxide exceeding the maximum allowed under the relevant regulations (which were themselves tendered in evidence). A *prima facie* case against Kirchner was thus established: see s304(f) of the *Health Act* 1958, and *McLennon v McBroom* [1969] VicRp 70; [1969] VR 566; see also s238, s240 and s289 of the *Health Act* 1958.

Kirchner in fact relied for his defence solely upon s300 of the *Health Act* 1958. It is convenient at this point to set out s300, and also s301. They are as follows:—

"300(1)(a) Any person who purchases any food drug or substance for resale may demand from the vendor a warranty in writing that the food drug or substance so purchased complies with such requirements of this Part as are applicable thereto.

(b) Any such vendor who refuses to furnish such purchaser with such a warranty shall be guilty of an offence against this Part.

"(2) If the defendant in any proceedings under this Part proves to the satisfaction of the court—

(a) that he purchased the food drug or substance in question with a written warranty as aforesaid; and

(b) that he sold the food drug or substance in the same state as when he purchased it—
he shall be discharged from the prosecution.

"(3) Where the defendant has been discharged from a prosecution under the last preceding sub-section then notwithstanding anything in s29 of this Act a prosecution may within twenty-eight days after the discharge of the defendant be instituted against the person from whom the defendant purchased the food drug or substance in question (and for the purposes of that prosecution such person shall be deemed to have sold such food drug or substance).

"(4) Where the defendant has been discharged from a prosecution under subs(2) of this section, the Court may direct that samples of the food drug or substance concerned be analyzed with a view to the results of such analysis being used in evidence by either the prosecution or the defence in any case proposed to be brought against the person who issued the warranty; and where any such order is made a certificate by the analyst of such analysis shall be submitted to the person proposed to be charged and shall subject to this Part be sufficient evidence of the facts stated therein in the proposed prosecution without any requirement to produce or analyze any further sample.

"(301)(1) A warranty shall not be available as a defence to any proceeding under this Part unless the defendant has within seven days after service of the summons sent to the informant a copy of such warranty with a written notice stating that he intends to rely on the warranty and specifying the name and address of the person from whom he received it and has also sent a like notice of his intention to such person.

"(2) The person by whom such a warranty is alleged to have been given shall be entitled to appear at the hearing and to give evidence; and the court may if it thinks fit adjourn the hearing to enable him to do so.

"(3) A warranty given by a person resident out of Victoria shall not be available as a defence to any proceeding under this Part unless the defendant proves that he had taken reasonable steps to ascertain and did in fact believe in the accuracy of the statement contained in such warranty."

Kirchner himself gave evidence. Apart from Banks he was the only other witness at the hearing in the Court of Petty Sessions.

Kirchner said, *inter alia*, that he and his mother and father ran the retail food business in question in partnership, he having a one-third interest and being also the manager of the business. He said that the sausages in question had been bought by him from Armours on Friday, 31 January 1969, the purchase by Banks from Kirchner having taken place on the following

Tuesday. Kirchner produced a docket (which I shall call "the warranty docket") relating to the purchase, which was tendered in evidence. The warranty docket is headed Armour and Co. Pty Ltd and has the serial number 79011. The warranty docket states, *inter alia*, that on 31 January 1969 there was supplied to Kirchner for cash 8 pounds of thin Epping sausages at a price of 30 cents per pound, i.e. \$2.40 in all. At the foot of the warranty docket the following words appear: "Goods warranted to comply with Pt XIV of *Health Act* as applicable." (Pt XIV of the *Health Act* 1958 is the presently relevant part of the Act, and includes s238, s240, s289, s300 and s301.)

Kirchner said that between his purchase of the sausages on 31 January 1969 and his sale to Banks on 4 February 1969 he had kept the sausages in a refrigerated cabinet, and that the sausages which he sold to Banks were in the same state as when he bought them. He also said that he had been purchasing smallgoods from Armours for the past six years, and had dealt with no other firm.

As to the requirements imposed by s301(1) of the *Health Act* 1958, the following matters appear to have been established by uncontradicted evidence in the Court of Petty Sessions:—

"(1) The information and summons were served on Kirchner on 31 March 1969.

"(2) On 26 March 1969 (i.e. before the service of the summons) Kirchner showed to Banks the warranty docket, and also handed to him a notice signed by himself, which was in the following terms:—"I intend to use following warranty as my defence. Copy of Warranty dated 31/1/69. Goods warranted to comply with Pt XIV of *Health Act* as applicable, which I received from

Armour and Co. Pty Ltd 378 Queens Parade, Clifton Hill 3068
[Signed] CP Kirchner 3 Military Road, Avondale Heights. 3034"

At the foot of this notice there appears in different handwriting, which I would assume is Banks's handwriting, the following note:—

"Letter Received on 26/3/69 RB Armour's Docket 79011 — 31/1/69"

"(3) On 2 April 1969 Kirchner sent to the informant a notice signed by him, which was in the following form:—

"To William Rutledge Anderson, Health Inspector, Town Hall Keilor.

I, Raymond John Kirchner, wish to inform you, I intend to use the warranty given to me by Armours Pty Ltd 378 Queen's Parade Clifton Hill as my defence to the summons to court on 30th April at Moonee Ponds [Signed] RJ Kirchner."

At the foot of this notice there appears in different handwriting, which I would assume is the informant Anderson's handwriting, the following note:—"Received 3/4/69 WRA."

There were no enclosures with this notice, or annexures thereto. In particular, no copy of the warranty docket was enclosed therewith.

"(4) On 2 April 1969 Kirchner sent to Armours a notice signed by him which was in the following form:—

"To Armour and Co. 378 Queen's Pde. Clifton Hill.

I intend to use the warranty given to me, by you, for sausages in the prosecution taken against me by Keilor Health Inspector, Mr WR. Anderson if you wish any more information ring 317-8498 or contact me personally.

RJ Kirchner 3 Military Rd. Avondale Heights.
Court Case Moonee Ponds 10 a.m. 30th April, 1969.

"(5) On about 3 April 1969 Banks interviewed Kirchner again, and Kirchner on that occasion also handed to him the warranty docket.

No evidence was called on behalf of Armours in the Court of Petty Sessions.

At the conclusion of the evidence, submissions were made to the Stipendiary Magistrate by the legal representatives of Armours, Kirchner and the informant respectively. These submissions all proceeded upon the basis that the sausages in question had been purchased by Kirchner from Armours with a written warranty that they complied with such requirements of Pt XIV of the *Health Act* 1958 as were applicable thereto and that Kirchner sold the sausages to Banks in the same condition as when he purchased them. No suggestion to the contrary was made to the Stipendiary Magistrate by anybody.

So far as presently material, the only matter which was debated before the Stipendiary Magistrate was whether Kirchner had failed to comply with s301(1) of the *Health Act* 1958, and if so whether he was precluded from relying for his defence on s300. It was submitted by the solicitor for Armours that Kirchner has not complied with s301(1) in that he had not within seven days after service of the summons sent to the informant a copy of the warranty. It was not, and could not have been, suggested that Kirchner had not sent a notice of intention to Armours as required by s301(1). Counsel for Kirchner submitted that Armours was not prejudiced by Kirchner's failure to send to the informant a copy of the warranty, and he argued that s426 of the *Health Act* 1958 applied to the matter. Counsel for the informant abstained from arguing the question whether Kirchner had established a good defence on the ground of a written warranty.

Section 426 of the *Health Act* 1958 is as follows:—

"426(1) In all proceedings in which any notice order or other document has to be proved—

(a) the defendant shall be deemed to have received notice to produce it; and

(b) until the contrary is shown the same and its due service may be sufficiently proved by or on behalf of the complainant or informant by the production of what purports to be a copy bearing what purports to be a certificate under the hand of the officer authorised to issue the original or of the secretary of the Commission or the municipal clerk (as the case may be) that the copy is a true copy of the original and that the original was served on the date specified in the certificate.

"(2) The validity of any notice order or other document or of the service thereof shall not be affected by any error misdescription or irregularity which in the opinion of the court is not likely to mislead or which in fact does not mislead."

After hearing the submissions of the legal representatives of the parties, the Stipendiary Magistrate discharged Kirchner from the prosecution pursuant to s300(2) of the *Health Act* 1958. His reasons are stated in para.16 of the affidavit of Morven Bond sworn on 21 May 1969, in support of the order nisi, to have been as follows:

"In relation to the submissions on the defence of warranty he stated that in his view s426(2) of the *Health Act* did not apply to cure the failure of the defendant to send to the Informant a copy of the warranty, but that, notwithstanding the mandatory terms of s301(1) of the *Health Act*, he was of opinion that the failure of the defendant to send a copy of the warranty to the informant was not fatal to the defence of the defendant, that it was still a matter for the court. He said, 'I find that the defendant has discharged his responsibility pursuant to s300(2) and is discharged. No order as to costs. The defendant is discharged from the prosecution pursuant to s300(2) of the *Health Act*.'"

The grounds of the order nisi are as follows:—

"1. That the Stipendiary Magistrate was in error in holding that the defendant had complied with the provisions of s301(1) of the *Health Act* 1958.

"2. That the Stipendiary Magistrate was in error in discharging the defendant from the said prosecution pursuant to s300 of the *Health Act* 1958.

"3. That the Stipendiary Magistrate was in error in holding that the defendant purchased the food the subject of the said information with a written warranty within the meaning of s300(2) of the *Health Act* 1958."

In my opinion, the order nisi ought to be discharged.

I consider that the requirements of s301(1) of the *Health Act* 1958 as to the defendant, within seven days after service of the summons, sending a copy of the warranty to the informant with a written notice as therein provided, are procedural requirements only, which may be waived by the informant expressly or by conduct. And I consider that in the present case in so far as those requirements were not fulfilled by Kirchner they were waived by the informant by his counsel's conduct of the case.

The purpose of s301(1), putting aside for the moment the last part thereof – "and has also sent a like notice of his intention to such person" – is, in my opinion, to give to the informant full opportunity to make an examination of the warranty which is intended to be relied upon as a defence: cf *Retail Dairy Co Ltd v Clarke* [1912] 2 KB 388, at p392 (*arguendo*). It is a procedural provision for the protection or benefit of the informant only: cf *Farthing v Parkinson* (1904) 90 LT 783, at p785 (col. 1) per Lord Alverstone CJ. Compliance with the provision by the defendant may, therefore, be waived by the informant expressly or by conduct: cf *Grimble and Co v Preston* [1914] 1 KB 270; *Holloway v Cooke Pty Ltd* [1963] VicRp 36; [1963] VR 229, esp. at pp230, 231; and *Warner v Sunnybrook Ice Cream Pty Ltd* [1968] VicRp 11; [1968] VR 102, at pp106, 107: cf also *Australian Iron and Steel Ltd v Hoogland* [1962] HCA 13; (1962) 108 CLR 471, at pp488, 489, per Windeyer J; [1962] ALR 842; 35 ALJR 489, and *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423; (1966) 40 ALJR 102, at p109, per Windeyer J; [1966] ALR 705.

In the present case counsel for the informant neither objected to Kirchner giving evidence in support of the defence of written warranty provided for by s300(2), nor made any submission to the Stipendiary Magistrate that Kirchner was precluded by any failure to comply with s301(1) from relying on that defence. Counsel for the informant thereby, in my view, waived any failure on Kirchner's part to comply with s301(1): cf. *Grimble and Co v Preston*, *supra*, and *Holloway v Cooke Pty Ltd*, *supra*. I should, I think, add that, in my opinion, neither the informant nor his counsel are by any means open to criticism in this regard. As appears from my earlier recital of the relevant facts, it may readily be inferred that before the expiration of seven days from the service of the summons, the informant was well aware of the terms of the warranty and of Kirchner's intention to rely upon it.

The circumstance that the solicitor for Armours sought to rely on Kirchner's alleged failure to comply with s301(1) in relation to sending a copy of the warranty to the informant is, in my view, irrelevant, because if any such failure was waived by the informant then it was not open to Armours to seek to rely on it. As earlier observed, Armours had been sent a notice of Kirchner's intention to rely on the warranty, and this was the only requirement of s301(1) which concerned Armours.

I thus consider that ground 1 of the order nisi is irrelevant and fails, and that in so far as ground 2 is based on any failure by Kirchner to comply with s301(1), it fails also.

If the conclusions which I have so far expressed were incorrect, the following further questions would require consideration:–

(a) Whether Kirchner in fact complied with all the requirements of s301, having regard in particular to the circumstance that on 26 March 1969 (i.e. five days before the service of the summons on Kirchner) Kirchner showed to Banks the warranty docket and gave him a notice setting out the warranty itself and stating Kirchner's intention to rely on it. The proper inference may be that Banks should be treated for present purposes as the informant's agent, he being the person who bought the sausages and the only witness for the informant, and both Banks and the informant being health inspectors of the city of Keilor. And the words in s301(1) "within seven days after service of the summons" may mean "before the expiry of seven days after service of the summons": cf *Earl of Morton's Trustees v Macdougall* [1944] SC 410.

(b) If (a) be answered in the negative:–

(i) Whether it is open to Armours in this order to review to rely on Kirchner's failure to send a copy of the warranty to the informant within seven days after service of the summons. As earlier indicated, in my view, the requirement of s301(1) as to sending a copy of the warranty to the informant is a procedural requirement for the benefit of the informant only.

(ii) Whether in any event Kirchner's non-compliance with s301(1) in failing to send a copy of the warranty to the informant within seven days after service of the summons, was an "irregularity" in the service thereof, which should, or could, have been disregarded by the Stipendiary Magistrate pursuant to s426, having regard especially to the circumstances that Kirchner had on 26 March 1969 shown the warranty docket to Banks and given to him a notice setting out a copy of the warranty and stating Kirchner's intention to rely on it: cf *Davies v R Bolton and Co* [1894] 3 Ch 678; *Sutherland v Thomson* (1902) 4 SC 957 (affirmed (1904) 8 SC (HL) 1), and *Omega Estates Pty Ltd v Ganke* (1963) 80 WN (NSW) 1218; [1963] NSWLR 1416 (a decision upon s366 of the *Companies Act* 1961).

But I find it unnecessary to express any conclusion upon any of these questions. I may, however, remark that, as at present advised, I am unable to accept the expansive view, which appears to have commended itself to the Stipendiary Magistrate, that whenever a defendant who seeks to rely upon the defence of written warranty under s300(2) has failed to comply with s301(1), he may nevertheless in the discretion of the court be allowed to rely on the defence, it being, according to the Stipendiary Magistrate, "still a matter for the court".

I now turn to ground 3 of the order nisi. By this ground it is in substance contended that the evidence did not establish that Kirchner "purchased" the sausages from Armours "with a written warranty" that the sausages complied with such requirements of Pt XIV of the *Health Act* 1958 as were applicable thereto: see s300(2)(a).

In my view, a sufficient reason for rejecting this ground (and also ground 2 in so far as it covers the same point) is that the point was never taken before the Stipendiary Magistrate either by the informant or by Armours, whether by way of cross-examination of Kirchner or by way of submissions. This was a criminal prosecution: see s238 and s292. All parties (including Armours) chose to conduct the proceedings before the Stipendiary Magistrate on the assumption that Kirchner had purchased the sausages from Armours "with a written warranty" within the meaning of s300(2)(a), and I do not think that Armours ought now to be allowed to challenge this assumption on review.

Further, if the point had been taken by Armours in its solicitor's submissions before the Stipendiary Magistrate, it is possible that counsel for Kirchner would have sought, and obtained, leave to call further evidence upon the matter, and it is possible that such further evidence would clearly have established that Kirchner had purchased the sausages from Armours "with a written warranty" within the meaning of s300(2)(a). Reference may be made to *Saffron v Societe Miniere Cafrika* [1958] HCA 50; (1958) 100 CLR 231, esp. at p240; 32 ALJR 286; *George Hudson Ltd v Australian Timber Workers' Union* [1923] HCA 38; (1923) 32 CLR 413, esp. at p426, per Isaacs, J; 30 ALR 13; *Murphy v Shiells* [1908] VicLawRp 71; [1908] VLR 513, esp. at p517; 14 ALR 410; *Cameron v Moore* [1894] VicLawRp 18; (1894) 20 VLR 66; (1894) 15 ALT 232, at p233; *Kates v Jeffery* [1914] 3 KB 160, and *London County Council v Farren* [1956] 3 All ER 401; [1956] 1 WLR 1297.

But I should, I think, add that, in my opinion, it was in any event open to the Stipendiary Magistrate upon the evidence which was before him to conclude that Kirchner had purchased the sausages from Armours with a written warranty that the sausages complied with such requirements of Pt XIV of the *Health Act* 1958 as were applicable thereto, I consider that it was open to the Stipendiary Magistrate to infer from the evidence, including the terms of the warranty docket, that the sausages were bought by Kirchner from Armours by a cash and that the warranty docket was delivered to Kirchner together with the sausages at the time of the sale. On this view of the facts, the legal situation would, in my opinion, have been one of the following:

- (a) the words on the warranty docket "goods warranted to comply with Pt XIV of *Health Act* as applicable" were themselves a term of the contract of sale; or
- (b) (which is much the same thing) the subject-matter of Kirchner's purchase included Armours' promise embodied in this written warranty as well as the sausages themselves; or
- (c) the written warranty represented the contemporaneous reduction to writing of part of the terms which were implied into the contract of sale by s19(a) or s19(b) of the *Goods Act* 1958.

Whichever of these three views were right, the result, in my opinion, would be that Kirchner "purchased" the sausages from Armours "with a written warranty" within the meaning of s300(2) (a): see *Lewis v Weatheritt* (1909) 100 LT 367; *Wilson v Wiles* [1921] NZLR 798; *Rider v Crofts* [1914] VicLawRp 2; [1914] VLR 4; 19 ALR 559, and *Grattidge v Liuzzi* [1969] VicRp 32; [1969] VR 260, at p263, where McInerney J said:

"It is sufficient if the warranty is in writing and that the contract for the purchase of the food imports or includes that warranty."

The order nisi will be discharged with costs. If the parties agree, I shall fix the respondent's costs at \$120.

Solicitors for the applicant: Ronald Stewart, McIntosh and Co.

Solicitor for the respondent: RH Dunn.
