05/00; [2000] VSC 151

SUPREME COURT OF VICTORIA

THU TRONG DINH v CEO of CUSTOMS

Hedigan J

7 April 2000

SENTENCING – OFFENCES AGAINST *CUSTOMS* AND *QUARANTINE ACTS* (CWTH) – CONVICTIONS IMPOSED – REFERENCE BY MAGISTRATE TO DECISION OF SOUTH AUSTRALIAN SUPREME COURT – WHETHER DECISION BINDING ON MAGISTRATE – WHETHER MAGISTRATE CONSIDERED HE WAS BOUND TO FOLLOW DECISION – WHETHER APPROPRIATE TO RECORD A CONVICTION – WHETHER SENTENCING DISCRETION MISCARRIED.

T., a fifth-year medical student, was charged with two offences under the *Customs Act* and one offence under the *Quarantine Act*. The charges related to a number of undeclared prohibited imports which were found in T's baggage at Tullamarine Airport. At the hearing, there was evidence as to T's good character and lack of previous convictions. The magistrate was asked not to impose a conviction. Discussion took place between the magistrate and T's counsel about the decision of Mr Justice Cox of the Supreme Court of South Australia in *Lanham v Brake* (1983) 34 SASR 578; 52 ALR 351; (1983) 74 FLR 284; [1984] 13 A Crim R 293. In that case, Cox J addressed the legislation, sentencing features and general sentencing principles, including the sentencing discretion. The magistrate convicted and fined T. Upon appeal—

HELD: Appeal dismissed.

1. There is no doubt that in terms of hierarchical application of binding authority, *Lanham v Brake* does not bind Victorian courts. However, *Lanham v Brake* is no more than an application by a court of fundamental principles of sentencing, having regard to those principles at common law and as affected by the provisions of the *Crimes Act* (Cwth) and the context of the particular charges. The magistrate was not bound to record a conviction because Cox J in *Lanham v Brake* stated that although a conviction might generally be imposed, there remained, as always, the residual discretion to be governed and driven by the facts of the case.

2. Whilst it might have been open to the magistrate to take a lenient view and not record a conviction, the magistrate in the exercise of his discretion was entitled to take into account the same sort of matters referred to by Cox J in *Lanham v Brake*. These included the issue of general deterrence, the possible consequences and seriousness of the offences, the consistency of approach to sentencing in such matters and close consideration of the circumstances having regard to the difficulty of detecting breaches. In the circumstances, it could not be said that the magistrate's sentencing discretion miscarried in any way.

HEDIGAN J:

1. The appellant Thu Trong Dinh has appealed from orders of the Magistrates' Court of Victoria made on 13 December last year. The background to the charges — which I will shortly address — was that the appellant who was at the time a fifth year medical student studying in this State had gone to visit family and relatives in Vietnam, was returning to Australia by air and was obliged thereby to pass through Tullamarine Airport. In accordance with Customs requirements, he had filled out the customary card or cards required to be completed to make statements as to what was being imported and should be disclosed.

2. Without going into too much detail about it, his baggage was searched and revealed, wrapped-up in paper, what were prohibited imports. At the time of being interrogated by the Customs officers at the airport he was questioned concerning the relationship, as it were, between his answer, "No" to the questions on the card and the presence in his baggage of what in fact were undeclared — at least in part — prohibited imports. The appellant admitted that it was his card, that he understood the questions, they were his answers, that was his baggage, that he was aware of the contents of the bags, and that the bags and the contents belonged to him.

3. A search revealed quantities of dried beef, bread and other dried foodstuffs and a quantity of tea, coffee and corals. The appellant said when questioned about them that they were food and

corals, and he forgot to declare the corals. There was a taped record of interview which indicated that he had said to the Customs officers that he packed the food and corals into his bag, and they were presents from friends in Vietnam to go to friends, and he had not declared them because he wanted to get out of the airport quickly.

4. The importation of dried beef was prohibited by s39 of the *Quarantine Proclamation Act* unless a permit is held, and no such permit was held. The appellant was charged with six offences, three of which were withdrawn and he pleaded guilty to the three remaining. Firstly, to two offences under s234(1)(d)(i) of the *Customs Act* of recklessly making a false statement, that is, that related to the card statement and a more serious offence under s61 of the *Quarantine Act* of knowingly bringing into Australia goods subject to quarantine, which in this case was specified to be a kilogram of dried beef.

5. The maximum penalty for "recklessly making a false statement" is $5000, and with respect to the s67 offence ten years' imprisonment or $50,000 or both in the case of an individual, although it is my impression that the term of imprisonment is two years if the offence is dealt with summarily. The plea by the appellant of guilty to these offences necessarily carries with it an admission of all the necessary elements of the offence.

6. In respect of the *Quarantine Act* offence there was an averment setting out the seriousness of, and the risks posed to primary industry in effect in Australia by this type of offence and breach, which the plea accepted, and which from the record of the proceedings and the agreed statement of facts does not appear to be in doubt.

7. The magistrate convicted the appellant of all of the offences and imposed fines in addition to the convictions. No term of imprisonment was imposed. At the Magistrates' Court counsel for the then defendant had accepted and agreed to a statement of facts relied on by the representative of the Chief Executive Officer at Customs who was prosecuting the matter, and counsel for the then defendant made a plea in which he stated clearly enough within the accepted authority and responsibility of counsel, certainly facts concerning the background to the offences.

8. He also put in evidence persuasive and authoritative character testaments from academics who had connection with him in the course of his studies. He had no previous convictions, and it would be beyond doubt that but for these offences the court, or anyone, would conclude that Mr Dinh was a person of good character. There was some explanation of his time in Vietnam, some illness there and the claim that the family provided him with the wrapped packages, and he was not aware of the contents of the prohibited material brought into Australia. That was to some extent at odds with the agreed statement of facts, and more particularly with what he had said to the Customs officer at the time.

9. There was some reference at the Magistrates' Court to this tension between the submissions and the evidence, which was never explained, substantially, as I would deem it, because the then defendant, now appellant, did not give any evidence at all before the magistrate.

10. I will briefly refer to the magistrate's reasons which, in the way of magistrates, are laconic. Nevertheless it is not difficult in my judgment to construe what the magistrate had in mind and what he intended. The magistrate did not deal in detail with the matters as they have been dealt with here; that is perfectly common. But it is apparent from the transcript that counsel, who was the same counsel appearing for the appellant in this appeal, dealt with all of the matters which have led to the appeal.

11. However, it must be said that it was open for the magistrate not to accept the version put forward as part of the plea in relation to the state of mind and belief of Mr Dinh. He did not specifically reject or address this aspect, although I note that he made a comment about claims frequently being made by persons charged with these sort of offences that they had not been the person responsible for the introduction into the baggage of the prohibited imports.

12. I think it is not necessary for me to address in detail the matters that were raised by Mr Risstrom before the magistrate concerning the good character, absence of convictions and some of the matters that related to the conduct of Mr Dinh. They were not under challenge there, other

than the issue of what he knew, and were accepted as being a matter that might be taken into account by the magistrate.

13. In the wide ranging plea that took place at the Magistrates' Court, some focus was placed upon the decision of the Supreme Court of South Australia in *Lanham v Brake* (1983) 34 SASR 578; (1984) 52 ALR 351; (1983) 74 FLR 284; (1983) 13 A Crim R 293. *Lanham v Brake* was a case involving a prohibited import in a quarantine case, in which a solicitor brought into Australia fruit from New Zealand. This led the South Australian Court to address the legislation, sentencing features in conjunction with the Act and general sentencing principles, including sentencing discretion. It should be said that *Lanham v Brake* has been an authority cited again and again, not only in quarantine or prohibited import charges, but in a range of other spheres. Without attempting to comprehensively summarise the views expressed by Mr Justice Cox, who was asked not to impose a conviction but imposed one, emphasis was placed by him upon—

> (i) the necessity when dealing with offences of this kind to particularly give consideration to general deterrence,
>
> (ii) the reduced impact upon the sentencing discretion of good character, (since the majority of persons charged with these offences have no previous criminal convictions) and
>
> (iii) generally the necessity for some consistency in sentencing, taking a not over-lenient line in respect of what are offences that prevail through all States, as Commonwealth offences.

14. He particularly identified also the disastrous consequences that might prevail in the community, with the introduction of small packages of food, meats, vegetables or seeds that might be brought in. He specifically stated that with respect to charges under these Acts, that the powers conferred under s19B of the *Crimes Act*, including the power of dismissal, should be approached with caution. Notwithstanding that, he specifically stated that that did not mean that occasional exercise of the power of mitigation could not occur, but that the appropriate instances were likely to be uncommon.

15. A fair reading of *Lanham v Brake* would make it clear that there still remains, when applying the law as pronounced in that case, the power for the sentencing court to exercise its discretion, including lenience on common law considerations, or to apply the statutory sentencing moderation that the Act provides.

16. What had happened in the Magistrates' Court in this case was that discussion took place between counsel and the magistrate as to the applicability of *Lanham v Brake*. This was because counsel intended to and did ask the magistrate not to record a conviction, notwithstanding the plea of guilty to the specified charges. I have little doubt that the reason for this was concern that the appellant might have difficulty in obtaining registration as a medical practitioner upon his hoped-for passing of the relevant requirements for obtaining of the medical degrees.

17. The view was taken, and has been pressed here, that the magistrate regarded himself as bound by *Lanham v Brake*. It was argued that he was not bound by *Lanham v Brake* and that, had he not mistakenly thought he was, he would have exercised his discretion not to record a conviction. On this submission, the question of law was as to whether the magistrate erred in his undue confining of his discretion as to whether or not a conviction should be made and recorded.

18. It should be recalled that on these orders being obtained and the question formulated, the opposite party was not present. The phrase "undue confinement" was doubtless suggested to the learned judge. In one way it contains within its language the very matter that is the subject of *Lanham v Brake*. However, I treat the question as raising the matter to which I previously referred as to whether the magistrate regarded his discretion as having been fettered by that authority.

19. The appeal is then fundamentally built on the proposition that the magistrate's sentencing discretion miscarried because he wrongly believed that he was bound to follow the decision of the Supreme Court of South Australia in *Lanham v Brake*, and thereby incorrectly confined the exercise of his discretion, because he felt bound to record a conviction.

20. Mr Risstrom argued strongly here, as he did before the magistrate, that *Lanham v Brake* was

not binding. There is no doubt that in terms of the hierarchical application of binding authority, *Lanham v Brake* does not bind Victorian courts. Notwithstanding the language from time to time used by the magistrate that appeared to indicate (unless the matter was read as a whole) that he was bound to follow the decision in *Lanham v Brake*, I am by no means persuaded that the magistrate was using that language in the sense of "had no option" other than to follow it.

21. I find it impossible to think that a magistrate of 16 years' experience, in a context where counsel was telling him that *Lanham v Brake* was distinguishable, believed that he was bound to follow it. The matter was being heard in the Mention Court, and perhaps was approached without more carefully chosen language which the magistrate might otherwise have used, had he been in a position to give further time to it. It was done in the Mention Court, as I assume, because at all times counsel for the then defendant knew he was not going to call his client and expected to get through the matter promptly. It did nevertheless stall, because of the debate about this matter.

22. But in one way this is irrelevant. Even if I am incorrect in thinking that the magistrate was not stating that he was bound in the strict legal sense to follow *Lanham*, which was after all a decision emanating from another jurisdiction, not compelling any decision in this State, but that he was merely regarding it as strongly persuasive, it matters not. *Lanham v Brake* was really no more than an application by a court of fundamental principles of sentencing, having regard to those principles at common law and as affected by the provisions of the Commonwealth *Crimes Act*, and the context of the particular charges.

23. If the magistrate, as has been pressed upon me, did regard himself as being bound by *Lanham v Brake*, it did not bind him to record a conviction, because the statements of Mr Justice Cox in the case were, that although that might generally be the case, there remained, as there always remains, the residual discretion to be governed and driven by the facts of the case.

24. If the magistrate did not regard himself as bound by *Lanham v Brake*, but merely chose to in the exercise of his discretion to regard it as a persuasive authority, an apposite example to be applied on the facts of this case, that decision, in my judgment, on the facts of this case was open to him. He was entitled to take the view that the case was one in which a conviction should be recorded. A similar submission had been made in *Lanham v Brake*.

25. There is no doubt, I daresay, that it might have been open to the magistrate to take a lenient view and not to record a conviction, or to have discharged the appellant on conditions, with or without other penalty. But in my judgment in the exercise of his discretion the magistrate was entitled to take into account the same sort of matters as Mr Justice Cox took into account, although he did not articulate them clearly. From some of his remarks, he had regard to the issue of general deterrence, to the fact that claims were frequently made by persons (and as I would interpret him, not always easy to accept) that they had lessened moral culpability because they had not introduced the offending material into their baggage, or other circumstances that might be taken into account, which would moderate the seriousness of the offence.

26. Against that, he had to consider the possible consequences, the seriousness of the offence and the fact that it is desirable, save in cases in which the facts were such as to regard them as exceptional, that there should be a consistency of approach to sentencing in circumstances where these offences occur. After all, they involve issues of concealed baggage, not always opened and with respect to which the persons themselves have to fill in the card, know they have a responsibility in respect of it and, certainly in the majority of cases, are persons without any criminal convictions.

27. Also, there has to be, having regard to the difficulty of detecting breaches because of the necessary initial concealment within baggage, close consideration of the circumstances. Although the magistrate does not refer to them, I have little doubt that he approached *Lanham v Brake* as applying the appropriate principles which gave a guide to him, and he was not mistaken in so doing. See the comprehensive list of authorities set out on p9, paragraph 17 of the respondent's submission, and the extract from Judge Mullaly's *Principles of Sentencing*.

28. In terms of the application of principle, the *Lanham* case has not been doubted as correctly articulating the principles to be considered, including not excluding the power to exercise one's discretion to the contrary of recording a conviction in the appropriate cases. As I indicated to

counsel, there have been some further decisions in the last couple of years in other statutory contexts. See *Jones v McDonald* (1998) 38 ATR 105.

29. Mr Risstrom pressed strongly that the magistrate had been in error and that had he not mistakenly viewed himself to be bound by *Lanham v Brake*, he would have reached a different conclusion in terms of the sentence. I have already dealt with some aspects of that. It is in some respects an inconsistent argument, as it involves ignoring those parts of *Lanham v Brake* that empowered the magistrate to exercise his discretion in the way which counsel pressed him to exercise it at the lower court.

30. In my view the magistrate had grasped that *Lanham v Brake* did articulate well-recognised sentencing principles. He then applied them, having regard to his view of the facts, as he thought they should be applied in this case. That seems beyond doubt, as in the final part of his reasons (when he made a reference to *Lanham v Brake*) he went on to say, (shortly after hearing the submission that no conviction should be recorded) that he was intending to record convictions. He went ahead and did so.

31. In my view the magistrate appears to have taken into account all of the matters raised in mitigation that were addressed to him and also addressed in the written submissions of Mr Risstrom to me, and for that matter, in the written submissions of the respondent. The submissions made by counsel for the prosecuting authority in the lower court specifically referred to those matters, but pressed that it was a case in which convictions should be recorded.

32. It is by no means manifest to me that a heavy sentence was imposed. The magistrate rightly did not regard the matter as being at the really serious end of the sentencing spectrum. There was never a suggestion at any stage that a sentence of imprisonment was going to be imposed. In my judgment he viewed it, and rightly viewed it, as a case in which the imposition of a recorded conviction for each offence could not be regarded as harsh, and that it was appropriate to be imposed.

33. The magistrate at some stages appears to have been concerned, I hesitate to say obsessed with, the fact there was no decision of the Supreme Court of Victoria dealing with the specifics of this matter. That really matters not. There were many other decisions. There has been no suggestion that *Lanham v Brake* was wrongly decided. He apparently acted on the basis it was correctly decided and in terms of principle it was correctly decided. It is, I think, necessary to emphasise, at least for the purpose of the record, that unless there has been error manifest in the sentencing process, this court has no basis to interfere with the exercise of the sentencing discretion by substituting its own sentence.

34. Even if I had thought the magistrate wrongly believed, contrary to his inclination, that he was bound to record a conviction (and I do not think he was so mistaken) I would have formed no different view in the circumstances of this case.

35. As I have stated, laudable concern by the appellant's legal advisers has been generated by the fear that the recording of convictions would inevitably have to be disclosed to the Medical Practice Board, perhaps imperilling the appellant's prospects of becoming a medical practitioner. This is surely a misconception. Whilst neither I nor the magistrate have had any expert evidence to indicate the Board's requirements on admission, it is commonplace, as I said in the course of debate with counsel, in professional admitting board's requirements that those seeking registration are obliged to disclose matters germane to be known. It is not a situation of having only to disclose convictions I have little doubt that ultimately, when Mr Dinh obtains his degree, he will be obliged to disclose the fact that the charges were laid and that he pleaded guilty to them. He will then have the opportunity to put forward to the Medical Practice Board matters in diminution, that will perhaps be much more appropriate to be acted on by a Board than a court obliged to apply the law of the Commonwealth as it applies throughout the whole of Australia.

36. For these reasons in my view, it has not been demonstrated the sentencing discretion miscarried in any way and the appeal must be dismissed. I will order that the appellant pay the respondent's costs including reserved costs of the appeal, stay three months.

APPEARANCES: For the appellant Thu Trong Dinh: Mr D Risstrom, counsel. Victoria Legal Aid. For the respondent: Mr M Rozenes QC with Mr G Livermore, counsel. Australian Government Solicitor.