47/11; [2011] VSC 634

SUPREME COURT OF VICTORIA

DC CONSOLIDATED INVESTMENTS PTY LTD v MAROONDAH CITY COUNCIL

Osborn J

5, 8 December 2011

TOWN PLANNING – POISONING OF NATIVE TREES IN CONTRAVENTION OF STATUTORY PLANNING CONTROLS – WHETHER *MENS REA* AN ELEMENT OF THE OFFENCE – CONSTRUCTION OF STATUTORY OFFENCE – WHETHER PENALTY MANIFESTLY EXCESSIVE – APPEAL DISMISSED: *PLANNING AND ENVIRONMENT ACT* 1987 (VIC), S126(2).

DC was the owner of land on which 33 native trees were poisoned contrary to two sets of provisions contained in a Planning Scheme relating to protection of native vegetation generally and specifically. After a charge was laid against DC alleging a breach of s126 of the *Planning and Environment Act* 1987 ('Act'), the Magistrate rejected submissions that the prosecution was required to prove that DC committed a positive act in breach of the planning scheme or that the breach occurred with the knowledge of DC. The Magistrate convicted DC and imposed an aggregate penalty of $40,000. Upon appeal—

HELD: Appeal dismissed. The Magistrate was correct to reject both submissions.
1. The Magistrate was correct to conclude that it was not necessary for the prosecution to establish either that the owner caused the poisoning to occur, or that it knew of the behaviour breaching the scheme.

2. The language and statutory context of the section supported this view; there was an absence of language in s126 suggesting the contrary; the subject matter of the statute was the regulation of land use in the public interest, including the conservation of native vegetation and the maintenance of ecological processes and genetic diversity; that subject matter was properly characterisable as regulatory and involving matters of public interest of a kind in which statutory offences have been recognised which did not require proof of *mens rea*; the imposition of liability without proof of *mens rea* would directly respond to difficulties of proof otherwise inherent in effective enforcement of the planning scheme, would impose a burden upon owners in circumstances where owners ordinarily have a capacity to manage what occurs on their land, and would have a general deterrent effect; and, lastly, neither the gravity of the offence, nor the penalty applicable, supported the view that Parliament intended *mens rea* be a necessary element of the offence.
***He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, discussed.**

3. In relation to the submission that the penalty imposed was excessive, the Magistrate took into account the factors emphasised by CD but was entitled to reach the conclusion by having regard among other things to the need for general deterrence, the maximum penalty applicable of $130,000, the value of the trees destroyed (over $146,000) and the nature of the offender.

OSBORN J:

Introduction

1. This is an appeal on questions of law arising out of the conviction and sentence of DC Consolidated Investments Pty Ltd ('DC') in respect of the poisoning of 33 native trees on land owned by DC and located in Dorset Road, Bayswater. The poisoning and killing of the trees was contrary to two sets of provisions contained in the Maroondah Planning Scheme relating, first, to the protection of native vegetation generally (cl 52.17) and, secondly, to the protection of native vegetation at particular locations by way of a Vegetation Protection Overlay (cl 42.02).

2. The objects of the P*lanning and Environment Act* 1987 ('P&E Act') include, by s4(1)(b):

> to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity.

3. In turn, by s6(1), a planning scheme must seek to further the objectives of planning

in Victoria and may make any provision which relates to the use, development, protection or conservation of any land in the area it regulates.

4. Clause 52.17 of the planning scheme has as its purpose:

> To protect and conserve native vegetation to reduce the impact of land and water degradation and provide habitat for plants and animals.

5. Under that clause, a permit is required to remove or destroy native vegetation, subject to a series of exemptions not presently relevant. There is no dispute that the trees upon DC's land were poisoned in breach of this provision and in breach of cl 42.02 of the Vegetation Protection Overlay.

6. Part 6 of the P&E Act provides for enforcement of the Act and planning schemes. It provides, amongst other things, for a series of remedies against the owners of land upon which contravention of a planning scheme occurs.

7. Thus, s114 provides for enforcement orders against the owners of land, the occupiers of land, any other person who has an interest in the land and any other person by whom or on whose behalf the relevant use or development is being carried out in contravention of a planning scheme. Sections115 to 125 then provide a detailed scheme for the making of, and enforcement of, enforcement orders.

8. Division 2 of the P&E Act, in which s126 is located, provides for offences and penalties. Section 126 states:

> **126 Offence to contravene scheme, permit or agreement**
> (1) Any person who uses or develops land in contravention of or fails to comply with a planning scheme, or a permit, or an agreement under section 173 is guilty of an offence.
>
> (2) The owner of any land is guilty of an offence if—
> (a) the land is used or developed in contravention of a planning scheme, a permit or an agreement under section 173; or
> (b) there is any failure to comply with any planning scheme, permit or agreement under section 173 applying to the land.
>
> (3) The occupier of any land, is guilty of an offence if—
> (a) the land is used or developed in contravention of a planning scheme, a permit or an agreement under section 173; or
> (b) there is any failure to comply with any planning scheme, permit or agreement under section 173 applying to the land.
>
> (4) This section does not apply to the owner of Crown land.

9. 'Owner' is given an extended meaning by s3 of the P&E Act and s139, in turn, provides for documentary evidence of ownership.

10. In the present case, the council could not prove beyond reasonable doubt who had poisoned the 33 trees upon DC's land and DC has sought to maintain, both before the Magistrate and, in turn, upon appeal to this Court, that, in these circumstances, it cannot be held liable for breach of s126. Alternatively, DC maintains that the sentence imposed upon it, namely a fine of $40,000 by way of aggregate penalty, was manifestly excessive.

11. DC submitted to the Magistrate that, on its proper construction, s126(2) requires that the owner be proven to have committed a positive act in breach of the planning scheme.

12. Alternatively, it submitted that the prosecution must prove that the breach of the planning scheme occurred with the knowledge of the owner.

13. Both issues are raised by the notice of appeal before me, although only the second contention was pressed in argument.

14. In my opinion, the Magistrate was correct to reject both submissions. The Act is to be

construed in accordance with the principles stated by the High Court in the case of *He Kaw Teh v R*.[1] That case concerned the grave criminal offence of the unlawful importation of a substantial quantity of heroin. The majority of the High Court held that proof of *mens rea* was required. Gibbs CJ, with whom Mason J agreed, affirmed the common law principle that there is a presumption that *mens rea*, being an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every criminal offence. As Gibbs CJ noted, however, the expression *mens rea* is ambiguous and imprecise. It may mean knowledge by the accused that all of the facts constituting the ingredients necessary to make an act criminal were involved in the accused's actions.[2] It follows that the application of the presumption to a particular statute may raise questions not only as to the applicability of the presumption, but also as to its content. Moreover, the presumption is liable to be displaced, either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered. The majority judges identified the following factors to which regard must be had in considering whether, and in what sense, *mens rea* is an element of a statutory offence:

> (a) the words of the statute creating the offence;[3]
>
> (b) the subject matter of the statute;[4]
>
> (c) whether subjecting the defendant to strict or absolute liability will assist in promoting the objectives of the statute;[5] and
>
> (d) the nature of the penalty.[6]

15. In the present case, applying these principles, the following considerations are relevant.

The words of the statute

16. First, the language, structure and context of s126 as a whole support the opposite conclusion to that for which the appellant contends. Section 126(2) imposes liability upon an owner by reference to the status of owner, in contrast to s126(1), which requires proof of offending behaviour and s126(3), which proceeds by reference to another category of status, namely occupation of the land. It is necessary neither that the owner be the occupier of the land, nor that he or she cause the breach. When the section is read as a whole, ownership of the land upon which a breach of the planning scheme occurs is sufficient.

17. Further, as the Magistrate observed, s126(1) uses the active tense to describe the offending 'use or development' of land in breach of the scheme, whereas ss126(2) and (3) simply require that the land 'is used or developed' in contravention of the scheme and that the offender be either the owner or the occupier of the land.

18. Secondly, the phrase 'there is any failure to comply' in s126(2)(b) does not assist the owner. It again uses the passive tense and is to be compared with the words 'fails to comply' in s126(1). The phrase 'is used or developed' in s126(2)(a) does not imply a state of mind on the part of the owner. To the contrary, the use of the passive tense suggests otherwise.

19. Thirdly, s126 does not use the words 'knowingly', 'wilfully' or 'without reasonable excuse' in terms of the owner's state of mind, whereas other provisions of the P&E Act do (see ss48(2), 97MZA(2), 97MZB(2), and 137). In order to have the effect for which DC contends, it would be necessary to imply a composite phrase such as 'is used or developed with the permission or knowledge of the owner'.

20. The provisions of s126 sit immediately after the provisions of s114 and following, which are also unambiguously directed to the possibility that a planning scheme may be enforced against an owner of land, whether or not he or she causes a breach of that scheme.

The subject matter of the statute

21. The purpose of the empowering legislation and of the native vegetation controls is one of the public interest and social seriousness.[7] In *Director General of Department of Land and Water Conservation v Greentree*,[8] the New South Wales Court of Appeal stated of broadly analogous provisions:

> The focus of these objects is the protection, maintenance and enhancement of native vegetation. The Act is intended to prevent activities that destroy or harm native vegetation and to promote activities that enhance it. Such objects suggest that sections like section 21(2) which are included to achieve those objects should be read, in the absence of language to contrary effect, as imposing strict liability.[9]

22. In that case, the Court of Appeal held that *mens rea* was not an element of the offence charged under s21(2) of the *Native Vegetation Conservation Act* 1997 (NSW), which was expressed in the following terms:

> A person must not clear native vegetation on any land except in accordance with:
> (a) a development consent that is in force; or
>
> (b) a native vegetation code of practice.

23. Section 126 itself raises broader issues of proper and orderly planning than provisions solely concerned with native vegetation. It relates to the enforcement of the P&E Act as a whole and of the planning scheme as a whole. Nevertheless, the native vegetation controls exemplify controls which are of value to the community as a whole and go beyond seeking to preserve and enhance the value of a particular site for its own sake.

24. Conversely, s126 is not concerned with offences of a gravely criminal kind, in respect of which it might be expected that Parliament intended *mens rea* to be an element.[10]

25. Further, legislation of the type in issue is properly to be regarded as regulatory in nature. As the Magistrate observed, when offences are created to regulate social or industrial conditions, planning, the environment, or public safety, they are more easily regarded as imposing strict or absolute liability.[11]

The utility of displacing the presumption of *mens rea*

26. First, land use legislation governing environmental protection and conservation of natural resources, in particular, has been held to impose situational liability in a number of other instances, including the New South Wales cases cited by the Magistrate.[12] The utility of this approach has been widely accepted.

27. Secondly, whereas the identity of those involved in the act of poisoning trees may be difficult to prove, its effects will not be. Many other potential breaches of the planning scheme, such as the demolition of protected buildings, removal of top soil and the carrying out of earthworks, may involve similar practical realities. There is a plain and obvious utility in making such provisions enforceable against the owner of land, who will normally have a degree of ongoing control over his or her land and the activity which occurs upon it. Conversely, if the section were to be read as regulating only acts in breach of the scheme which could be positively proven to have been undertaken by a particular individual or individuals, its utility would be materially impaired.[13]

28. Her Honour did not err in holding as part of her reasons that owners of land are in a position to take steps to improve the control which they exercise over the activity that occurs on their land (when a statutory control such as that which is in issue is implemented). This is the ordinary corollary of ownership.

29. The current provisions of the P&E Act were preceded by s49(1) of the *Town and Country Planning Act* 1961, which provided:

> Any person who contravenes or fails to comply with any provision of this Act or of any interim development order or planning scheme or any condition of a permit under such an order or scheme and the owner of any land in relation to which any such contravention or failure occurs shall, without prejudice to any other consequences which arise under this Act by reason of such contravention or failure, be guilty of an offence against this Act and severally liable to a penalty of not more than One hundred pounds and, where the contravention or failure is of a continuing nature, to a further penalty of not more than Ten pounds for every day during which the contravention or failure continues after conviction.

This provision was the basis of the prosecution against the owner forming part of the subject matter of *Davey v Britelite Nominees Pty Ltd.*[14] It has been a longstanding legislative policy to

impose liability for compliance with planning legislation upon landowners.

30. In turn, the general deterrent effect of s126 will be materially enhanced if it is given the construction for which the council contends.

The nature of the penalty

31. The fact that the legislation provides for penalty by way of fine only, and not by imprisonment, also tends to support the conclusion that Parliament intended s126(2) to impose strict or absolute liability upon an owner by way of a status offence. Conversely, where an offence provides for imprisonment, that will tend to favour the contrary conclusion.

32. The submissions made on behalf of DC by reference to *He Kew Teh* are misconceived. The effect of the scheme of the section is not necessarily draconian. If the owner establishes by positive evidence on the balance of probabilities that he or she had no knowledge of the offending conduct, then that fact will go strongly to penalty. In other words, the fact that the prosecution need not prove knowledge on the part of the owner to establish the offence does not mean that positive proof of absence of knowledge will not bear on the outcome, including the question whether a conviction should be recorded.

Conclusion as to *mens rea*

33. For the above reasons, the Magistrate was correct to conclude that it was not necessary for the prosecution to establish either that the owner caused the poisoning to occur, or that it knew of the behaviour breaching the scheme.

34. In summary, the language and statutory context of the section support this view; there is an absence of language in s126 suggesting the contrary; the subject matter of the statute is the regulation of land use in the public interest, including the conservation of native vegetation and the maintenance of ecological processes and genetic diversity; that subject matter is properly characterisable as regulatory and involving matters of public interest of a kind in which statutory offences have been recognised which do not require proof of *mens rea*; the imposition of liability without proof of *mens rea* will directly respond to difficulties of proof otherwise inherent in effective enforcement of the planning scheme, will impose a burden upon owners in circumstances where owners ordinarily have a capacity to manage what occurs on their land, and will have a general deterrent effect; and, lastly, neither the gravity of the offence, nor the penalty applicable, support the view that Parliament intended *mens rea* be a necessary element of the offence.

Manifest excess

35. The appeal on the question of manifest excess must also fail. I have recently explained in *Patrick Stevedoring Pty Ltd v Chasser*[15] the difficulties confronting an appellant in raising this ground upon an appeal on questions of law. I will not repeat that analysis.

36. In *Hanks v R*,[16] Bongiorno JA stated:

> The term 'manifest excess' is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood and unmistakable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.[17]

37. In the present case, it is sufficient to say that:

> (a) Although DC denied knowledge of how the trees were poisoned (and it could not be proved beyond reasonable doubt that its officers had such knowledge), the evidence did not, conversely, positively establish lack of such knowledge as a factor favourable to DC upon sentence. No officer of DC was called to give evidence. Accordingly, the Magistrate was bound to sentence on the basis that whilst the prosecution could not prove beyond reasonable doubt that DC had such knowledge, it had not been proved on the balance of probabilities that it did not have such knowledge.[18]
>
> (b) Thirty-three substantial and healthy trees with an estimated life expectancy of 50 years or more were poisoned by deliberate boring and application of poison to them.
>
> (c) Evidence showed that the trees had a value of over $146,000.

(d) The statement of significance for the area in question contained in the planning scheme stated: Remnant indigenous vegetation communities in Maroondah now account for only three per cent of the municipality. This vegetation is significant for its biological diversity, habitat and floristic value. The vegetation contains species and communities that are significant at a local, municipal, regional, state and national level.

The retention and enhancement of the remnant vegetation is critical to maintaining and increasing biological diversity in Maroondah. Remnant vegetation provides the basis for the development of wildlife corridors for native flora and fauna.

Indigenous vegetation contributes to the maintenance of the natural systems of Maroondah.

In addition the attractiveness of many areas of Maroondah is created by the presence of remnant indigenous vegetation.

(e) The agreed statement of facts before the Magistrate indicated that the site in question was of at least regional significance in terms of the pre-existing native vegetation.

(f) DC was a company engaged in property development and proposed to undertake a substantial commercial development upon the site in question.

38. DC was fined $40,000 by way of an aggregate fine in respect of the two clauses under the planning scheme which were breached, the breaches being constituted by the same circumstances.

39. In my view, the penalty could not be said to be manifestly excessive in the relevant sense, if the view of the facts most adverse to the appellant is taken.[19]

40. The Magistrate took into account the factors emphasised on behalf of the appellant before her, but was entitled to reach the conclusion she did having regard among other things to the need for general deterrence, the maximum penalty applicable of $130,000, the value of the trees destroyed, and the nature of the offender.

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[1] [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[2] Ibid, 531.
[3] See Gibbs CJ, 529; Brennan J, 567; Dawson J, 594.
[4] See Gibbs CJ, 529; Dawson J, 594.
[5] See Gibbs CJ, 530; Brennan J, 567.
[6] See Brennan J, 567; Dawson J, 595.
[7] Cf *Allen v United Carpet Mills Pty Ltd* [1989] VicRp 27; [1989] VR 323, per Nathan J; and *Wilson v Gahan* [1999] VSC 72 per Warren J, as she then was.
[8] (2003) 148 Crim R 25.
[9] Ibid, 38 [74].
[10] Cf *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523 per Gibbs CJ, 535; (1985) 60 ALR 449; (1985) 59. ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[11] See also *Wilson v Gahan* [1999] VSC 72, [9], [22].
[12] *Environment Protection Authority v Werris Creek Coal Pty Ltd; Environment Protection Authority v Holley* [2009] NSWLEC 124; *Barbara Filipowski v Vopak Terminals Sydney Pty Ltd* [2006] NSWLEC 104.
[13] Cf the observations of Viscount Dilhorne in *Alphacell v Woodward* [1972] UKHL 4; (1972) AC 824, 839; [1972] 2 All ER 475; [1972] 2 WLR 1320 (a case of industrial pollution of a river).
[14] [1984] VicRp 76; [1984] VR 957; (1984) 56 LGRA 274.
[15] [2011] VSC 597.
[16] [2011] VSCA 7.
[17] Ibid, [22].
[18] *R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270, 281; (1999) 166 ALR 330; (1999) 73 ALJR 1550; (1999) 108 A Crim R 464; (1999) 18 Leg Rep C7.
[19] *ISPT Pty Ltd v Melbourne City Council* [2008] VSCA 180; (2008) 20 VR 447, 465 [69]; (2008) 162 LGERA 59; *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1; (1972) 30 LGRA 19; *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301.

APPEARANCES: For the appellant DC Consolidated Investments Pty Ltd: Mr J Pennell, counsel. Mahons with Yuncken & Yuncken, solicitors. For the respondent Maroondah City Council: Mr J Pizer, counsel. Maddocks, solicitors.
