50/84

SUPREME COURT OF VICTORIA — FULL COURT

TUCKER v DUTYTOWN PTY LTD and WOLSTENHOLME

Starke, Crockett and Beach JJ

7, 10-13, 28 September 1984 — [1985] VicRp 54; [1985] VR 541

LABOUR AND INDUSTRY – ILLEGAL WEEKEND TRADING – RETAIL HARDWARE SHOP SELLING A WIDE RANGE OF PRODUCTS – WHETHER WITHIN ANY EXEMPTED CATEGORY – DEEMING PROVISION – WHETHER ASSISTS DEFENDANT – METHOD OF CLASSIFYING A SHOP: *LABOUR AND INDUSTRY ACT* 1958, SS80, 82, 91, 192, FIFTH AND SIXTH SCHEDULES.

D P/L and W. were convicted of illegal weekend trading between July and October 1982. At the hearing, evidence was given that on the days in question, a wide range of products were sold or displayed of a hardware nature. However, it was submitted that in addition to being hardware shops, the defendants' shops were also petrol shops and shops of one or more of the classes or kind mentioned in the Fifth Schedule, and as such, entitled to engage in weekend trading. The Magistrate rejected this submission. Upon orders nisi to review—

HELD: Orders nisi discharged.
(1) *Obiter*: Section 192(1)(p) of the *Labour and Industry Act* 1958 deals essentially with a procedural matter designed to assist the Informant in the proof of his case. A defendant cannot call this sub-section in aid to construct a defence.
***Tucker v Penhalluriack*, MC 8/1984; and**
***Tucker v Watkins*, MC 22A/1981, not followed.**

(2) Assuming that s192(1)(p) of the Act was capable of deeming that the class of trade carried on in some exempt shops was carried on in the defendant's shops, the evidence before the Magistrate related to sales which occurred at periods ranging from 3 to 9 months later than the relevant times, and accordingly was too long a period to enable any inference of fact favourable to the defendants to be drawn.

(3) Per Crockett and Beach JJ: For the purposes of the *Labour and Industry Act* 1958, a shop is classified by reference to the goods in which it deals or trades. Accordingly, a shop may be capable of designation as any one or more of the exempt shops if, in the course of his business, the shopkeeper habitually or usually sells a reasonable number of items that are usually sold in exempt shops.
***Slattery v Bishop* [1919] HCA 58; [1919] 27 CLR 105, applied.**

STARKE J: (with whom Beach J agreed) *[after setting out the facts and relevant provisions of the* Labour and Industry Act *1958, His Honour continued]:* … **[3]** The applicants firstly submitted that leaving aside s91 there was nothing in the Act which prevented a shop which was conducted in one premises being categorized as more than one kind of shop. It was submitted in these cases that the shops as well as being hardware shops were petrol shops, motor car accessory shops, caravan accessory shops, nursery shops and chemists shops. It was however conceded that if this argument was made out the effect of s91 had nevertheless to be overcome. S91 provides (*inter alia*):

> "(1) If in any shop any trade is carried on or any goods are dealt in of such descriptions or kinds as would be or under this Act necessitate such shop being closed during **[4]** certain hours then such shop shall be closed for all purposes during such hours. …
>
> (3) Notwithstanding anything to the contrary in the foregoing provisions of this section goods of any of the kinds or descriptions mentioned in the Sixth Schedule to this Act may be sold from any shop of any class or kind mentioned in the Sixth Schedule to this Act at all times when a shop of that class or kind is not required to be closed without regard to the times at which other shops in which any such goods are sold are required to be closed and any shop of any such class or kind shall not cease to be a shop of that class or kind by reason only of the sale therefrom of any of the said kinds or descriptions of goods."

The Sixth Schedule lists nearly 100 goods the majority of which are foodstuffs. The applicants seek to solve this dilemma by recourse to s192(1)(p) of the Act which provides:

> "It shall be deemed that a particular class of trade is carried on in a shop if it is proved that any article was sold therein which is usually sold in shops where such a class of trade is carried out."

The applicants' argument proceeds on the basis that a shop is categorized by reference to its class of trade. They seek to take advantage of s192(1)(p) in two ways. Firstly e.g. if a shopkeeper sells one item contained in the definition of "petrol shop" he is deemed to be conducting a petrol shop. Secondly e.g. if a shopkeeper conducting a petrol shop sells goods which are not within the definition of "petrol shop" but establishes that these goods are usually sold in "petrol shops" the operation of s191(1)(p) deems that he is trading in these goods as part of the trade of a petrol shop and s91 does not operate. Similarly with Fifth Schedule shops. Thus it is said that if it can be proved in this case that the applicants sold a **[5]** reasonable or small quantity of goods sold in petrol shops and/or Fifth Schedule shops their shops are for the purposes of the Act petrol shops and/or Fifth Schedule shops. See *Slattery v Bishop* [1919] HCA 58; [1919] 27 CLR 105. Their shops can then sell

(a) items within s82(2)(b) (petrol shop definition section)

(b) what Fifth Schedule shops sell as Fifth Schedule shops

(c) any item in the Sixth Schedule pursuant to s91(3)

(d) any item usually sold by petrol shops or Fifth Schedule shops pursuant to s192(1)(p).

And in these circumstances it is said s91 does not apply. It will be observed that in order to make out this defence the applicants must establish by evidence (1) that they sell a reasonable or small quantity of goods sold by petrol shops or Fifth Schedule shops and (2) by evidence of what shops of this kind usually sell. The relevant time is of course at or about the time that these offences were alleged to have been committed viz. 25th July 1982 - 3rd October 1982. It was conceded that the burden of proving these matters to bring themselves within the operation of s192(1)(p) lay on the applicants on the balance of probabilities. They may of course discharge this burden by pointing to evidence adduced by either themselves or the informant.

The foregoing summary does scant justice to the careful, painstaking and lengthy argument of Mr Patkin who appeared before us for the applicants. However, it is sufficient I think to deal only with the issues which I **[6]** think are central to the determination of these applications. In developing his argument Mr Patkin raised a number of difficult questions of law and attacked the reasons of the learned Magistrate and the judgment of Tadgell J in *Tucker v Penhalluriack* (unreported, delivered 3rd April 1984), a case in which the same question arose, in various ways. I do not think it is necessary or profitable to deal with most of these matters. These cases stripped of intricacies depend for their determination on the sufficiency of the evidence in support of the applicants' case and the proper construction of s192(1)(p). Mr Hedigan QC, who appeared with Mr Ritter for the respondent submitted primarily that at or about the time of the alleged offences there was no or no sufficient evidence to support the defence raised. It is trite law that he may seek to uphold the conviction on any ground open whether or not embraced by the grounds of the order nisi. This argument falls naturally into two parts. Firstly I am of opinion that there is a *prima facie* case to establish that at or about the time that the alleged offences were committed both shops were petrol shops, retail plant nurseries, shops for the sale of spare parts or accessories for boats and caravans and chemists shops (the latter three being Fifth Schedule shops). See evidence of the applicant Wolstenholme (transcript pp83-5, 86, 93, 94-5, 97-8, 113-4, 116-7).

However I can find no evidence of articles which were usually sold in such shops at the relevant time. The date of the hearing was 17th May 1983. The offences occurred on and between 25th July 1982 and 3rd October 1982 – **[7]** a period of about six to eight months before the hearing. The applicant Wolstenholme visited a number of petrol shops and Fifth Schedule shops for the purpose of observing the goods being sold prior to the hearing of the information. Where identified these visits ranged from two - three months prior to the hearing until the night before. Other visits were described but without references to the approximate date. This evidence cannot avail the applicants having regard to the onus of proof. Sharon Dickman, a Senior Lecturer in Marketing and Tourism at Footscray Institute of Technology, gave evidence that during the week before the hearing she visited petrol shops, caravan parks, caravan accessory places, nursery places etc. and listed the goods on sale. It was suggested that by recourse to the presumption

of continuance in reverse an inference may be drawn that the goods observed were on sale on or about the relevant dates. Even if this exercise is permissible the period involved (three - five months) is in my opinion far too long. The presumption in any event is a weak one. This finding destroys the substratum of fact essential to establish the defences raised and it is accordingly technically unnecessary to deal with the construction of s192(1)(p). However in my opinion for several reasons it is desirable to deal with the constructional point especially if I am wrong in the conclusion I have come to on the evidence.

The matter was fully argued and it would I think be helpful for this Court to express its view in the event of a similar defence being raised in the future on sufficient evidence. Furthermore I have a feeling that if the facts had been fully canvassed evidence may have been available. Mr Patkin submitted that **[8]** if Mr Hedigan's argument was made out the matter should be sent back to the Magistrate. In any event in my opinion it is very doubtful if this procedure would be appropriate. But if the applicants cannot rely on s192(1)(p) such a procedure would obviously be pointless. In *Tipple v Bongiorno* [1921] VicLawRp 93; [1921] VLR 523; 27 ALR 309; 43 ALT 67, Schutt J held that the sale of one packet of cigarettes was not sufficient to establish that anything in the nature of a tobacconist's business was being carried on at the premises. It is indisputable that s192(1)(p) was introduced into the Act in 1922 to overcome this decision and to meet the difficulty confronting an informant of having to prove more than one sale.

A consideration of the whole of s192 indicates in my opinion very clearly that it deals essentially with procedural matters designed to assist the informant in the proof on his case. There are a number of deeming clauses including sub-section (1)(p) and as to numerous technical matters the onus of proof is shifted to the defendant. Nowhere in the section can be found any provision which even remotely can be said to be designed to assist a defendant or to provide him with a defence which otherwise is denied him. In these circumstances I find it impossible to construe s192(1)(p) other than as a procedural provision designed to assist the informant and only the informant in the proof of his case.

I am accordingly unable to agree with the views of Tadgell J in *Tucker v Penhalluriack* (*supra*) and of His Honour Judge Leckie in the Industrial Appeals Court in *Tucker v Watkins* delivered 15th December 1980 that the defendant may call this sub-section in aid to construct a defence. This construction of the sub-section is also in **[9]** my opinion fatal to the applicants' argument. For the sake of completeness I should add that by Act 9951 of 1983 s192(1)(p) was in effect taken out of that section and became sub-section (1A) of s91. This amendment is of course irrelevant as far as these cases are concerned. But it does not appear to me to assist in the construction of s192(1)(p) as it then was.

CROCKETT J: (with whom Beach J agreed) *[after setting out relevant provisions of the Act and dealing with the inadequacy of the evidence critical for the success of the defence, His Honour continued]:* … **[9]** The first question concerns the means by which a shop is to be classified for the purposes of the *Labour and Industry Act* 1958. That classification, I should have thought, must be determined by a characterisation of its trade. That is **[10]** to say it is to be classified by reference to the goods in which it deals or trades. There must be some criterion to determine that question. All would agree (again for the purpose of dealing with this particular submission putting aside the possible effect of s192(1)(p)) that sale of goods of a certain kind or description in such small quantities that the trade can be described as no more than token is insufficient to meet the test.

The competing formulae are, on the one hand that for which the applicants contend and, on the other, that which was adopted by Tadgell J in *Tucker v Penhalluriack*, *supra*, a decision from which leave to appeal was refused by the High Court. The former, to which reference has already been made, decrees that a shop be classified by a consideration of whether the shopkeeper sells or trades usually or habitually in which in all the circumstances can be described as a reasonable quantity of goods of a particular kind or description. This obviously means that a shop as such may meet more than one description – a consideration that s91(1) contemplates. The latter test has been described as the "reasonable man" test. By it the question is to be determined by regard to the description the ordinary person would be expected to give as that applicable to the shop's trade. Tadgell J appears to have imported this notion into his judgment when he said:

"Resolution of this question will depend on matters of degree and, to some extent, of impression.

> The fact that a shop does habitually sell items of the kind referred in the definition (i.e. of a 'petrol shop') cannot be irrelevant in determining whether, as a matter of categorisation, the shop answers the description of 'a shop for the sale of' those items or some of them. The fact cannot, however, be determinative of the question ..."

Particularly as a little earlier in his reasons this passage is to be found:

> **[11]** "The expression 'shop for the sale of' means 'shop for the selling of' and connotes a sense of purpose and design: cf. *A-G v Sillem* 33 LJ (Ex) 209, 213 per Lord Westbury LC. Actual selling is not the selected criterion. Although a shop 'for the sale of' the specified items would no doubt normally make sales of them, the mere fact that sales of that kind are made in a shop is in my opinion insufficient to make it a petrol shop according to the Act. The definition of a petrol shop connotes premises that are dedicated or devoted, although not necessarily exclusively, to the sale of the specified goods."

The applicants' contention would not take issue with any of this secondly-quoted passage save the last sentence and even the proposition to be there found is not necessarily in conflict with the test propounded by the applicants. But if that proposition is intended to suggest that a shop is "dedicated" or "devoted" to the sale of a certain class or kind of goods only if it can be said (by a reasonable man) that the sale of that class or kind of goods is "fundamental" to that shop's trade or is its "raison d'être" or is its "dominant commercial characteristic" then the applicants' argument would involve rejection of the proposition. And in my view any such extreme criteria should be rejected.

There appears to me to be no justification in the legislation for their adoption. It is clear, as Tadgell J remarked – and as section 91 recognises – that a shop may be concerned with (or dedicated or devoted to) the sale of goods of more than one descriptive class. Immediately this proposition is accepted, *ex hypothesi* its classification cannot be determined by resort to any of what I have called the extreme criteria. The Act is not, and therefore the Court ought not to be, concerned with an enquiry as to whether a shop is "fundamentally" one class of shop or another nor as to what its "dominant commercial characteristic" **[12]** may be.

Should such an enquiry be made it might lead to real difficulty in the sensible application of the provisions of the Act. "Mixed businesses", "milk bars" and small "convenience" stores are well known terms and describe shops the nature of the trade in which they deal it may be supposed would be readily enough understood. Yet none of these descriptions is to be found in the Fifth Schedule. But it is, I venture to think, notorious that these shops are open in week-ends despite an inability to classify the goods in which they trade as being predominantly of one kind or another. For example a milk bar may, and probably does, sell bread, confectionery, fruit and vegetables and books and newspapers. All are sold in substantial quantities relative to the quantum of the total trade of the shop. But not one class of goods is predominant over the other. Week-end trading is permitted, and properly permitted, because the shop is capable of designation as any one or more of the Fifth Schedule shops simply because in the course of his business the shopkeeper habitually or usually sells a reasonable number of items that are usually sold by bread-shop proprietors, confectioners, greengrocers and newsagents.

Then again, is the bread shop which because of its status as such lawfully can and does sell in substantial quantities a wide range of Sixth Schedule items to cease on that account to be permitted to trade at week-ends because a reasonable man would then describe the shop as that of a mixed business or a milk bar because the sale of bread was no longer the "predominant" characteristic of the shop's trade? **[13]** The applicants' argument does not appear to me to involve an appeal to syllogistic reasoning, false or otherwise, as is suggested in some judgments, but engages upon no more than what is essentially a question of statutory construction.

Although in the case with which Tadgell J was concerned he felt able to distinguish on its facts that case from *Slattery v Bishop* [1919] HCA 58; [1919] 27 CLR 105, I am of opinion that observations to be found in the majority joint judgment strongly support the correctness of the test for which the applicants contend – a test the correctness of which, in any event, I did not understand the respondent's counsel, despite the decision in *Penhalluriack's Case*, seriously to contest. It is true that the High Court was not concerned with whether the shop in that case was a "grocer shop" but only with the question whether the defendant conducted the business of a grocer. This distinction would, however, appear to have no relevance having regard to the

decision in *Billingham v Gaff* [1907] VicLawRp 117; [1907] VLR 691; 13 ALR 474; 29 ALT 159 in which Hodges J held that the display in a tobacconist's shop of goods usually sold in a fancy goods shop was sufficient to render the shop a fancy goods shop for the purposes of the Act. In *Slattery's Case* the defendant's shop was a mixed shop where ham and beef, dairy produce and "a few groceries" were sold and the stock of groceries was "a very small one". The Court said, p109:

> "The real question which arose for decision was whether the shopkeeper who habitually sells groceries (i.e. goods commonly sold by grocers) in the course of his business, notwithstanding the fact that his business includes the sale of other articles not usually sold by grocers, carries on the business of a 'grocer'. In our opinion, where the evidence establishes to the satisfaction of the primary tribunal that a shopkeeper habitually in the course of his business sells a number of articles that are usually sold by grocers, it is not reasonably open to that tribunal to decide that he is not a grocer."

[14] The Magistrate did not address the characterisation of the applicants' shop by the application of any such test. Accordingly, if this were the only question to be resolved in order to determine the outcome of the prosecutions the matters would require remittal for further consideration. No such course need be adopted as (apart from the fact that for the reasons already given I consider that the orders nisi should be discharged) I am of opinion that, even if the applicants' shops were found to be in some respects to be a petrol shop or a Fifth Schedule shop, section 192(1)(p) cannot be employed in the manner suggested by the applicants in order to prevent the operation of section 91(1).

In the case of *Tipple v Bongiorno* [1921] VicLaw Rp 93; [1921] VLR 523; 27 ALR 309; 43 ALT 67 the defendant conducted a fruit and confectionery shop and opened legally during week-end trading hours. However, tobacconists could not carry on a trade during the week-end. The defendant was charged with trading illegally by selling at a prohibited time a single packet of cigarettes. Schutt J held that the primary court was correct in holding that the sale of a single item did not establish that a trade as tobacconist was being carried on. It was in order to overcome what was thought was constituted by this case to be a difficulty of proof in prosecutions of this nature that sub-section (1)(p) was introduced into the Act in 1922 by Act 3252. The provision is, and was clearly intended to be, and in my opinion is no more than, an aid to proof in prosecutions for offences under the Act. Sub-section (1)(a) stipulates the period within which prosecutions under the Act are to he instituted. Each of the remaining provisions of the sub-section ((b) to (o) inclusive) **[15]** relates specifically to a form of aid in proof of an alleged offence. In the context provided by these provisions it is impossible to regard sub-section (1)(p) as other than a mere deeming provision designed to assist in the proof of an offence and as no more than that.

Doubtless words of limitation are not to be read into a statute if it can be avoided. Similarly a meaning or scope other than the literal or usual meaning will not ordinarily be given the words of a statute. However, in some cases it will be appropriate to place a limitation on the construction of the seemingly wide terms of a statute. As Lord Herschell said in *Cox v Hakes* [1890] 15 AC 506 at 529:

> "It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look, not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation."

See, too, *Maxwell on Interpretation of Statutes*, 12th Ed, p86 *et seq*.

To give the provisions under construction an interpretation so as to allow what counsel for the applicants described as a "reverse operation" is to invest the provision with an amplitude of operation so contrary to the intended meaning that I consider it would be a distortion of statutory construction to permit the words to bear the extended meaning for which the applicants contend. This is the view which, despite *Tucker v Watkins*, the Magistrate took in *Pennhalluriack's Case*. However, Tadgell J said:

> "Although I am unable to agree with the magistrate that s192(1)(p) is necessarily inapplicable to assist a shop to be classified as a petrol shop, I do not consider that the applicant is ultimately assisted by s192(1)(p) or by the decision in *Tucker v Watkins*."

[16] If His Honour was intending to convey that s192(1)(p) was capable of having a

'substantive' as distinct from a mere 'procedural' effect, I am, with respect, unable to agree. The result is that I am of the view that, even if the evidentiary foundation for the applicants' submissions existed, the applicants would fail in the second step of the two-stage argument whereby the extended meaning to be given to, or the reverse operation of, s192(1)(p) would serve to remove the applicants' shops from the reach of s91(1). That failure meant that the defence in each case was bound not to succeed no matter what evidence was led to support it.

Solicitor for the applicants: Peter G Arnheim and Associates.
Solicitor for the respondent: Brian M Dennis.
