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SUPREME COURT OF VICTORIA — FULL COURT

BROWN v GJ COLES & CO PTY LTD

Smith, Adam and Little JJ

3 June 1970 — [1970] VicRp 108; [1970] VR 867

PUBLIC HEALTH – SALE OF ADULTERATED FOOD – NUT LOAF CONTAINING A NAIL – MEANING OF "AN OFFENCE" – MEANING OF "AGAINST COMMITTING AN OFFENCE" – WHETHER DEFENDANT HAD MADE AN ANALYSIS OR OTHER ADEQUATE TEST – WHETHER DEFENDANT OTHERWISE ACTED INNOCENTLY – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, SS238, 240, 291.

HELD: Order nisi discharged.
1. The expression "an offence" was not used in s291(1) of the *Health Act* 1958 to mean "any offence" and that the use of the indefinite article was not due to any intention in the legislature to require proof of the taking of precautions against any general category of offences. It was due, in all probability, merely to a view that the indefinite article was more appropriate than the definite, in a phrase referring to the taking of precautions. For precautions, in their nature, could not be taken against something completed and, therefore, properly to be described as "the offence"; they could only be taken against "an offence" yet to be committed or completed. And the words "against committing an offence" were intended to mean "against thus committing an offence", or, in other words, "against committing an offence by the subsequent act or transaction which has been made the subject of the charge".

2. Applying that construction of the words "against committing an offence" it was clear that there was evidence upon which the magistrate could find, as he did, that the defendant had taken all reasonable precautions against committing an offence.

3. The adequacy of the tests carried out by the defendant must be judged in the light of the precautions that were taken by the defendant, and the long trouble-free history, and in the light also, of the information made available by the arrangements operating in the sandwich bar and the cafeteria. For those arrangements, though they did not constitute testing, could be regarded as providing as much information as would have been provided by regular large-scale sampling. In all those circumstances it was open to the magistrate to find as he did, that there was adequate testing of the nut loaves produced.

4. It is impossible to construe the words "otherwise he acted innocently" as laying down an additional requirement that he prove inadvertent action or mistake of fact. Indeed it is difficult to see that the words can have any substantial operation. And this is illustrated by the fact that there was no plausible suggestion as to how the defendant, if it satisfied sub-paragraph (a), could have acted otherwise than innocently.

5. There was evidence upon which the magistrate was entitled to find that the requirement in s291(1)(c) was satisfied and dismiss the information.

SMITH J: This is the return of an order nisi to review a decision of the Court of Petty Sessions at Melbourne dismissing an information charging an offence against s238 of the *Health Act* 1958. The charge was that the defendant, on 7 July 1969, at premises situated at Bourke Street, Melbourne, "did sell food, to wit nut loaf which was adulterated"; and the form of the adulteration relied upon was that the nut loaf contained a substance, namely, a nail, to the prejudice of the purchaser: see s240. The magistrate was satisfied that the facts which the informant bore the onus of proving had been established; but he found also that a defence under s291 had been established and it was upon that ground that he dismissed the information.

Section 238, s240 and s291 are contained in Pt XIV of the Act, dealing with food and drugs; and s291, so far as material, is in these terms:—

> "291(1) Every person who sells prepares for sale manufactures applies a description to or sells under any description anything contrary to the provisions of this Part shall be guilty of an offence against this Part unless he proves—
>
> (a) that having taken all reasonable precautions against committing an offence he had at the time of the alleged offence no reason to suspect that there was in regard to the same any contravention of the provisions of this Part; and
>
> (b) that on demand by any officer he gave all the information in his power with respect to the person from whom he obtained the same; and
>
> (c) that otherwise he acted innocently— ...
>
> "(2) In any case of manufacture or applying of description or of the sale of milk reasonable precautions shall include analysis or other adequate tests."

The first ground of the order nisi is that there was no evidence on which the magistrate could find (as he did) that the defendant had taken reasonable precautions as required by the section.

This ground raises, in the first place, a question of construction, namely, "Against the commission of what offence or offences must a defendant show that he has taken all reasonable precautions"?

The legislative intention upon this point is so far from being clear that resort to the history of the provision would plainly be justified in aid of interpretation. But having examined that the history of the provision I am not able to see that it throws any clear light upon the question of construction. A solution must, therefore, be found by applying ordinary principles of construction to the language of the present section.

The words "against committing an offence" are so general that, taken literally, they would cover all offences known to the criminal law. But words which are "general and not express and precise are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular" (see *Cody v JH Nelson Pty Ltd* [1947] HCA 17; (1947) 74 CLR 629 at p646; [1947] ALR 314), and in accordance with this principle a reading down of the literal meaning of the words here in question is obviously necessary.

In argument various suggestions were made as to what form of reading down would accord with the legislative intention. And the widest of the constructions suggested was that the expression "an offence" was intended to mean "any offence whatever under this Part".

There are strong reasons, however, against imputing such an intention to the legislature. For upon this construction it would be necessary for a defendant to call, and for a Court of Petty Sessions to hear, evidence covering, in respect of a wide range of possible offences, every line of food and drink sold in the defendant's shop; and, indeed, in the case of a chain store, in every one of that defendant's stores, wherever situated in this State.

A further suggestion was that the expression might be construed as meaning "any offence under this Part of the class to which the offence charged belongs". But this would, as it seems to me, be an unworkable construction, because there would be no means of determining how widely, or how narrowly, the class should be defined. In the present case, for example, the class might, with equal justification be held to be that of sales of nut loaf containing a substance to the prejudice of the purchaser, or that of sales of any substance adulterated in that way, or that of selling or preparing for sale or manufacturing any substance adulterated in any way.

The true view is, I consider, that the expression "an offence" was not used here to mean "any offence" and that the use of the indefinite article was not due to any intention in the legislature to require proof of the taking of precautions against any general category of offences. It was due, in all probability, I think, merely to a view that the indefinite article was more appropriate than the definite, in a phrase referring to the taking of precautions. For precautions, in their nature, could not be taken against something completed and, therefore, properly to be described as "the offence"; they could only be taken against "an offence" yet to be committed or completed. And the words

"against committing an offence", I consider, were intended to mean "against thus committing an offence", or, in other words, "against committing an offence by the subsequent act or transaction which has been made the subject of the charge".

This construction of the words "against committing an offence" appears to me to be supported by indications of intention to be found in the context. In the first place the words to be construed echo the preceding expression "shall be guilty of an offence"; and in that expression the words "an offence" refer to, and characterize as criminal, the particular act or transaction that is postulated and assumed to have been charged. In other words, "shall be guilty of an offence" means "shall by that dealing with the article be guilty of an offence". In the second place the words to be construed are followed immediately by a reference to the particular act or transaction charged, namely, the words "the alleged offence". Thirdly, and passing over for the moment the second half of paragraph (a) (which I regard as speaking ambiguously in relation to this point of construction) we find in paragraph (c) the words "that otherwise he acted innocently"; and the innocence thus required is clearly innocence in the particular act or transaction charged.

In the second half of paragraph (a) the expression "the same" ties that part of the provision to the particular article the subject of the charge; and despite the generality of other expressions I think that the provision is fairly capable of meaning "no reason to suspect that there was in regard to the same (in the dealing charged)any contravention as alleged of the provisions of this Part".

Furthermore the unattractive nature of the rival constructions of the words "against committing an offence" points strongly to the correctness of the construction suggested. And it is a construction that involves no straining of the language of the section but is in accord with ordinary English usage. This may be seen more clearly, perhaps, if a simplified example is taken in another field. Thus if a statute provided that any person driving a car at a speed in excess of 60 m.p.h. or with dazzling headlights should be guilty of an offence unless he proved that he had taken all reasonable precautions "against committing an offence", it would be plain enough, I think, that the words quoted meant "against thus committing an offence" or, in other words, "against committing an offence by the contravention which has been made the subject of the charge". In that context it would not naturally occur to one that the words "against committing on offence" were intended to specify a general category of offences against which precautions must be taken nor that those words required that the precautions to be proved by a man who had driven at more than 60 m.p.h. should include precautions in relation to his lights.

If the construction suggested be the true construction of the words "against committing an offence" then it is clear, I consider, that there was evidence upon which the magistrate could find, as he did, that the defendant had taken all reasonable precautions against committing an offence.

The defendant's evidence, which was not seriously challenged, showed that the grades of ingredients selected for purchase were the best available; that the premises of the suppliers were inspected and the ingredients tested, and, if necessary, sent for analysis, before being purchased; that warranties were obtained from the suppliers that the ingredients complied with the requirements of Pt XIV of the Act; that proper procedures were followed to keep the bakehouse and storeroom clean; that the staff employed in the bakehouse were skilled persons and properly supervised; that standard recipes were worked out for each product and the observance of them checked by frequent sampling by supervisors: and that every month or six weeks the witness, Cook, a diplomate in Domestic Economy, sampled the current production of nut loaves to see that they complied with the standard recipe laid down for that commodity, and ate some to see what it was like. In addition there was evidence that care was taken that no utensils were used in the bakehouse which could cause foreign substances to be deposited in the product; that the bakehouse staff were warned to keep careful watch for and to eliminate any foreign bodies; and that the staff did in fact always look for foreign matter in dates and other ingredients.

It is true that some months before the occurrence of the alleged offence another nail had been discovered in one of the nut loaves produced in this bakehouse. But the evidence was that instructions were then given, and thereafter duly observed, that when any case was opened in the bakehouse any nails that came out of it were to be placed in a separate container and deposited

in the rubbish outside the bakehouse. And I consider that it was open to the magistrate to hold that, in all the circumstances, this was all that was reasonably required. For upon the evidence before him, there was nothing in the defendant's procedures that was calculated to bring a nail into the bakehouse except the opening of cases; and the possibility of another nail finding its way into the food produced could properly have been regarded by him as obviously remote, having regard to the long trouble-free period of large scale production, of nut loaves which, according to the evidence, had preceded the finding of this first nail. It may be added that such a view could properly have been regarded as confirmed by evidence which was given that about one-fourth of the nut loaves produced had for a long time been cut into slices and sold for consumption on the premises and that no complaint had ever been received of any foreign body in those loaves or slices.

The first ground, therefore, of the order nisi has not been made out.

The second ground is that there was no evidence on which the magistrate could find, as he did, that the defendant had made an analysis or other adequate test within the meaning of s291(2) of the Act.

That sub-section is expressed to apply only in cases of manufacture or applying of description, or of the sale of milk; and here, as already stated, the charge was one of selling nut loaf contrary to s238. It has been held, however, that the sub-section is applicable to a charge of selling where (as in the present case) the defendant is the manufacturer of the thing sold: see *Davies v Armour and Co Pty Ltd* [1958] VicRp 24; [1958] VR 122 at p125; [1958] ALR 489; (1957) 3 LGRA 139; *Taylor v Armour and Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at p355; (1961) 19 LGRA 232. And these rulings were not sought to be challenged in the present case.

It is clear that here there was no "analysis" within the meaning of the sub-section, and so the question for determination under the second ground of the order nisi is whether there was any evidence of an "adequate test".

There was evidence, to which some reference has already been made, that for a long period down to the day of the contravention charged, about one-quarter of the total number of nut loaves produced each day in the bakehouse of the shop where the contravention occurred had been sliced up and sold to customers for consumption in the sandwich bar and the cafeteria of the shop. There was evidence, in addition, that the employees working in those sections of the shop were under instructions to report immediately anything that they found wrong with any of the food and also any complaints made by customers. And there was evidence that those employees had found nothing wrong with the nut loaves and had received no complaints about them. These arrangements, however, and the information which was available to the defendant as a result of their adoption, did not, I consider either constitute or involve any "test" within the meaning of the sub-section. For that word, in any view, refers to some operation performed for the purpose of ascertaining the composition or quality of an article or substance. And here the evidence did not show that the arrangements in question, or anything done in pursuance of them, amounted to a "test" in this sense.

The only "tests", within the meaning of the sub-section, that were made of the defendant's nut loaves were the samplings by supervisors that have already been referred to and the periodic samplings already referred to made by the home economist, Cook, who was employed by the defendant to standardize its recipes and to see that the products complied with those recipes. I have felt some doubt whether this testing could be held to be "adequate", within the meaning of the sub-section. But its adequacy, I consider, must be judged in the light of the precautions, already described, that were taken by the defendant, and the long trouble-free history, and in the light also, of the information made available by the arrangements operating in the sandwich bar and the cafeteria. For those arrangements, though they did not constitute testing, could be regarded as providing as much information as would have been provided by regular large-scale sampling. And in all these circumstances I consider that it was open to the magistrate to find as he did, that there was adequate testing of the nut loaves produced.

The third ground of the order nisi is in these terms:—

"3.(a) Upon the proper construction of s291(1)(c) of the *Health Act* 1958 there was no evidence upon which the Stipendiary Magistrate could find that the defendant otherwise acted innocently.

(b) The Stipendiary Magistrate misdirected himself as to the meaning of s291(1)(c) of the *Health Act* 1958."

In support of these contentions it was submitted that s291(1)(c) requires that a defendant, who has shown (as required by sub-paragraph (a)) that he took all reasonable precautions and had no reason to suspect that there was any contravention, must also show that he acted inadvertently or under a mistake of fact.

In support of this submission reliance was placed upon a line of English cases dealing with the construction of s2(2) of the *Merchandise Marks Act* 1887 (Eng.) which provided the model for the Victorian legislation now embodied in s291(1) of the *Health Act* 1958. And it is true that in those cases s2(2)(c), which reads "(c) that otherwise he had acted innocently", has been held to require proof that the defendant acted inadvertently or under a mistake of fact: see for example *Slatcher v George Mence Smith Ltd* [1951] 2 KB 631; [1951] 2 All ER 388.

There is a vital difference, however, between s291(1) and the English provision from which it is derived. For in s291(1), sub-paragraph (c) lays down a requirement additional to the requirement, in sub-paragraph (a), of reasonable precautions and absence of reason for suspicion, whereas in the English provision the requirement in sub-paragraph (c) is an alternative to that in sub-paragraph (a).

The fact that under the English provision the two requirements were alternatives figured prominently in the reasoning of the English cases. The view appears to have been taken that sub-paragraph (c) was intended to provide a defence for a person who had reason for suspicion but who "otherwise...had acted innocently". And it is understandable that, upon that view, sub-paragraph (c) was held to apply only to cases of inadvertent action and action under a mistake of fact. Such reasoning, however, can have no application to the construction of s291(1)(c). For the problem which it raises is the very different one of giving a meaning to the words "otherwise he acted innocently", when applied to a defendant who has already established that he took all reasonable precautions and had no reason to suspect any contravention. It is impossible in that situation to construe the words "otherwise he acted innocently" as laying down an additional requirement that he prove inadvertent action or mistake of fact. Indeed it is difficult to see that the words can have any substantial operation. And this is illustrated by the fact that counsel for the informant was not able to put forward any plausible suggestion as to how the defendant, here, if it satisfied sub-paragraph (a), could have acted otherwise than innocently. The most likely explanation of the inclusion of sub-paragraph (c) as an additional requirement in s291(1) would appear to be that the draftsman intended to guard against the possibility of a restrictive construction of sub-paragraph (a), by stipulating that there must be a total absence of *mens rea*.

In my view, there was evidence here upon which the magistrate was entitled to find that the requirement in s291(1)(c) was satisfied: and I see no ground for thinking that he misdirected himself as to the meaning of the sub-paragraph. Accordingly, neither branch of ground 3 has been made out.

The fourth and last ground of the order nisi is that the magistrate should have held that the defendant had not established "the defence of reasonable precautions within the meaning of s291 of the *Health Act* 1958".

No arguments additional to those already discussed were put forward in support of this ground.

For these reasons, I consider that the order nisi should be discharged with costs to be taxed including reserved costs.

ADAM and LITTLE JJ: We have had the advantage of reading the reasons for judgment prepared by Smith J and we agree for the reasons given by him that this order nisi should be discharged.

The order nisi puts in issue the construction of s291 of the *Health Act* 1958 and in particular the meaning in subs(1)(a) thereof of the expression "having taken all reasonable precautions against committing an offence".

Do these words "committing an offence" mean "any offence whatsoever against the law", or perhaps more realistically in the context "any offence against Pt XIV" of the Act, or, on the other hand, do they refer to "the particular offence the subject of the charge against the defendant"—in this case the selling of a nut loaf containing a nail.

We would think that these are the only alternatives reasonably open if the words "an offence" may be read down at all. We see no sound reason for a third alternative which was suggested, namely, that they should be construed as referring not to the particular offence charged, but to "any offence of the like class". Apart from difficulties inherent in defining the limits of the class of offences of which the particular offence charged is to be taken as an example, to which difficulties Smith J has referred, there would seem to be no logical reason for reading down the general words so far but no further.

In a close and critical analysis of the grammatical arrangement of s291(1)(a) Smith J has, if we may say so with respect, given persuasive reasons why the expression in question should be read so as to refer only to the circumstances of the particular offence in relation to which s291 is relied upon as a defence. He has referred also to the inconvenience and practical difficulties which, if any other construction were to be adopted, would face many defendants attempting to rely on this exculpatory section—considerations which may properly be taken into account in seeking the real intention of the legislature: see *Maxwell on Interpretation of Statutes*, 12th ed., pp199 *et seq*.

There are we think further considerations favouring the narrow construction of the words "an offence". The section appears in Division 8 of Pt XIV headed "Offences, Legal Proceedings etc.". It is an exculpatory section of general application, applying as it does to a variety of offences in contravention of Pt XIV of the Act. Many of these offences to which s291 applies are initially created in terms which *prima facie* impose strict liability—s238 with which we are immediately concerned provides an illustration. In the case of such offences, what may be referred to as the totality of the ingredients of the offence are to be found not only in the initial charging section but in s291 read with it—s291 operating merely to cast the onus of proving matters of exculpation on the defendant: cf *Maher v Musson* [1934] HCA 64; (1934) 52 CLR 100 at p104; [1935] ALR 80, and *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37. Thus in the present case the substance of the offence which is the subject of the charge is not selling a nut loaf containing a nail without more, but selling the same without having taken all reasonable precautions etc. as referred to in s291.

If s291 is construed as requiring a defendant to prove that all reasonable precautions have been taken against the commission of the particular offence charged, it seems clear that by his satisfying that requirement and the other matters set out in the section, any fault or blameworthiness on his part in the commission of the alleged offence is negatived. To require that in addition he should prove that all reasonable precautions have been taken against the commission of "any other offence against Pt XIV" or "any offence of the like class" would mean that by reason merely of the absence of such additional proof he could be convicted of the offence charged notwithstanding that having otherwise satisfied the exculpatory provisions of the section he was free of all fault or blameworthiness in its commission.

It would, in our view, require clear and explicit language to produce a result apparently so unreasonable and unjust. It is to be borne in mind, moreover, that the statute is one creating offences and whilst unequivocal language in a statute, penal or otherwise, must be given its ordinary meaning in its context, it is also a well-recognized rule of construction, that in a penal statute, if there is reasonable doubt or ambiguity in the language or there are two reasonable meanings of the language, that interpretation which will avoid the penalty is to be preferred: *vide Re HPC Productions Ltd* [1962] Ch 466 at pp473, 474 and 485; [1964] 1 All ER 37; *Dyke v Elliott; The Gauntlet* (1872) LR 4 PC 184, at p191.

The principle is stated in *Maxwell*, *op. cit.* p240, in these terms:

> "If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. This is, in practice, by far the most important instance of the strict construction of penal statutes."

There is, we consider—and this is evident from the analysis made by Smith J—an ambiguity in the language which warrants an application of the rule of construction to which we have referred. Reading s238 and s291 together as setting out the elements of the offence, the rule requires, in our opinion, that the expression in s291 "all reasonable precautions against committing an offence" should be construed as involving no more than that a defendant should, by proving all reasonable precautions against it, negative any fault on his part in the commission of the offence charged.

It is not inapposite in this connexion to refer to the language of Lord Morris in *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132; [1969] 1 All ER 347; [1969] 2 WLR 470; 53 Cr App R 221, when in considering in relation to a statutory offence the principle that *mens rea* is an essential ingredient of guilt, his Lordship said at (AC) p153:

> "In considering whether Parliament has decided to displace what is a general and somewhat fundamental rule it would not be reasonable lightly to impute to Parliament an intention to create an offence in such a way that someone could be convicted of it who by all reasonable and sensible standards is without fault."

As some further indication perhaps that in relation to offences created under Pt XIV the relevant language in s291 is directed to provide that the alleged offender should prove he had taken all reasonable precautions against committing the offence charged against him and no more, reference may be made to s231, s232, s235(3), s236(3) and s267(1), where the legislature has included in the charging sections themselves the grounds of defence which qualify strict liability. In each of these it is to be observed that the grounds of defence are concerned with the conduct or state of mind of the alleged offender in relation only to the commission of the particular offence. It is the absence of fault in relation to the commission of the particular offence charged which affords a defence.

We agree with Smith J that but little if any importance should be attached to the choice of the words "an offence" in preference to "the offence". Section 291 contemplates that the reasonable precautions referred to are precautions taken before the commission of the offence. Where the particular offence ultimately committed was one which could not reasonably have been foreseen, a requirement that all reasonable precautions should have been taken against the commission of "the" offence may not seem altogether appropriate.

On the other hand, "an offence" seems more apt if the intention be that all reasonable precautions should have been taken against the happening of the event which, whether reasonably expected to happen or not, gives rise to the offence.

Order nisi discharged.

Solicitors for the informant: Mallesons.
Solicitors for the defendant: Moule, Hamilton and Derham.
