08/84

SUPREME COURT OF VICTORIA

TUCKER v PENHALLURIACK

Tadgell J

3 April 1984

LABOUR AND INDUSTRY – ILLEGAL WEEKEND TRADING – RETAIL HARDWARE SHOP – SELLING BENZINE AND OTHER ITEMS – WHETHER WITHIN ANY EXEMPTED CATEGORY IN FIFTH SCHEDULE – WHETHER "PETROL SHOP": *LABOUR AND INDUSTRY ACT* 1958, SS80, 82(7)(8), 91(1), 192(1) FIFTH SCHEDULE; *INDUSTRIAL RELATIONS ACT* 1979, S22(7); *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S168.

Section 80 of the *Labour and Industry Act* 1958 "Act" provides (so far as relevant):

> "Save as otherwise expressly provided in this Act all shops (except shops of the classes or kinds mentioned in the Fifth Schedule and petrol shops) shall be closed and kept closed—
> (a) on Sundays, for the whole of the day;
> (b) on Saturdays, from the hour of one o'clock;
> Provided that shops for the sale of motor cars may remain open on Saturdays until the hour of six o'clock."

In s82(7)(b) "Petrol shop" is defined to mean, unless inconsistent with the context or subject matter— shop for the sale of petrol benzine or other motor spirit motor oil or accessories or spare parts for any motor car within the meaning of the *Motor Car Act* 1958, including any place or premises on or in which a pump for supplying motor spirit is installed and any such pump itself."

Section 192(1)(p) provides that:

"The following provisions shall have effect with reference to all proceedings under this Act:-
(p) 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 on."

P, a retail hardware shop-keeper, was convicted of several counts of illegal weekend trading. At the hearing, evidence was given that in P's shop, a wide range of builders' and carpenters' hand tools and fittings and other requisites, electrical and other household appliances, paint, gardening implements and the like were offered for sale. P. put forward two defences. First, that his shop came within several categories in the Fifth Schedule, and therefore, was allowed to remain open; and secondly, that his shop was a "petrol shop" within s82(7)(b) of the Act. The Magistrate rejected these submissions, and convicted P. On order nisi to review—

HELD: Orders discharged.
(1) Section 80 of the Act does not cast on the Informant a burden of proving beyond reasonable doubt that a particular shop is or is not within a particular exempted category.

(2) Therefore, a shopkeeper is obliged to satisfy the Court that his shop could fairly and reasonably be regarded as within the class or kind exempted.

(3) The question confronting the Court was whether the defendant's shop was or was not one of a class or kind described in the Fifth Schedule of the Act.

(4) In answering this question, the Court was required to determine the character of the defendant's shop as a matter of substance; and on the evidence, the Court correctly categorised the defendant's shop as a hardware shop, and that it did not come within any particular exempted category.

(5) On the evidence, the Court was correct in deciding that the defendant's shop was not a "petrol shop" within the meaning of s82(7)(b) of the Act.

(6) The argument that because the defendant sold items which are sold in shops within the exempted category, it necessarily followed that the defendant's shop was, *ipso facto*, within the exempted category, can he exposed in the form of a fallacious syllogism.

TADGELL J: *[After setting out the details of the convictions, the types of goods sold in the defendant's shop,*

and the relevant provisions of s80(1) of the Act, His Honour continued]: ... **[3]** The question with which it is convenient first to deal is this: whether it was incumbent on the informant (the respondent before me) to prove that that shop was not one of the classes or kinds mentioned in the Fifth Schedule and that it was not a petrol shop, so that s80(1) applied to it, or whether it was incumbent on the applicant to prove that it **[4]** fell into one of the categories of shops to which the sub-section did not apply. The Stipendiary Magistrate held that the onus lay on the applicant to adduce evidence to show on the balance of probabilities that the shop was within one or more of the categories excluded from the ambit of s80(1), and that the onus had not been discharged. His Worship based that decision on s168 of the *Magistrates (Summary Proceedings) Act* 1975, which provides that -

> "(1) Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the Act, order, by-law, regulation, or other document creating the offence, may be proved by the defendant but need not be specified or negatived in the information.
>
> (2) Whether an exception, exemption, proviso, excuse, or qualification is specified or negatived or not no proof in relation thereto shall be required on the part of the informant."

The Stipendiary Magistrate decided that the words in parenthesis in s80(1), namely "... (except shops of the classes or kinds mentioned in the Fifth Schedule and petrol shops)...", constitute an "exception, exemption, proviso, excuse, or qualification" of the kind contemplated by s168(1). In so deciding he was in my opinion correct. The question is to be decided by considering whether the sense of the requirement of s80(1) is, on the one hand, that all shops are caught by it save those of a special kind or that, on the other, only shops not of a special kind are caught by it. On either construction shops of the special kind are outside the requirement, but on the former construction they are within it unless exempted and it is no part of the informant's case to prove that the exempting words do not apply. On the latter construction all shops are outside the requirements unless **[5]** brought within it by the informant's proof that they are not of a special kind.

A provision like s168 of the *Magistrates (Summary Proceedings) Act* has formed part of the statute law of this State for nigh on a hundred years and decisions upon its application are legion. One must ascertain, as a matter of construction, what the legislature has specified as the *prima facie* ingredients of the relevant offence: e.g. *Barritt v Baker* [1948] VicLawRp 85; [1948] VLR 491, 495; [1949] ALR 144. Those ingredients, and those only, need to be proved by the informant. If the provisions creating the offence contemplates that, notwithstanding their proof, the defendant might still be exculpated by reason of some further facts, it is up to him to establish them: *Dowling v Bowie* [1952] HCA 63; [1952] 86 CLR 136, 140; [1952] ALR 1001.

In this case I consider that the sense of s80(1) is plain. The very number and diversity of the kinds of excepted shops (over twenty in the Fifth Schedule alone) deny the idea that the Parliament intended to cast a burden on the informant to prove beyond reasonable doubt that a defendant's shop was outside each category. Furthermore, as will appear, I consider that the question whether a particular shop is or is not within a particular exempted category might well depend on a variety of facts which an informant could not be expected to be able readily to prove. A defendant, on the other hand, could be expected to be able to prove such facts relatively simply if they were capable of being established. These considerations lead, in my view, inevitably to the conclusion that the Stipendiary Magistrate's conclusion on this aspect of the case was right.

[6] The question with which it is convenient next to deal is whether the Stipendiary Magistrate was wrong in deciding, as he did, that the applicant's shop was not a petrol shop in terms of the *Labour and Industry Act*. This was covered by a number of grounds in the orders nisi but I can deal with them together. *[His Honour then set out the definition of "Petrol shop" in s82(7)(b) of the Act and continued]:* There was evidence that the applicant at his shop stocked over 20,000 different kinds of items and that very many, if not all of them, were items which one would expect an ordinary suburban hardware shop usually to sell. Among them were items of kind which could be, and probably are, used for or in connection with motor cars, such as extension mirrors, body filler, paint, cutting compounds, washing detergent products, car washing brushes, car motor oil, engine degreaser, motor oil additive, windscreen washer additives, spark plugs, radiator additive and a range of tools.

There was argument on the question whether items of these kinds could properly be found

to be either accessories or spare **[7]** parts for motor cars. The Magistrate seems to have found, however, that some at least of them were and I do not think he was wrong to do so. The applicant gave evidence that he did not sell petrol. When asked in cross-examination whether he sold benzine he said: "White spirit, I think that is benzine, perhaps two to ten litres per week in one litre bottles". The first argument advanced in favour of the view that the applicant's shop was a petrol shop was in essence that a shop which sells any goods of a kind referred to in the definition of "petrol shop" in s82(7)(b) is to be regarded as a petrol shop for the purposes of Part VI of the Act. It was contended that the mere fact of sale of any of these items is sufficient to produce that result. Their volume, turnover or proportion to goods of other kinds sold in the shop was said to be immaterial, as was the get-up of the shop or its other characteristics.

In my opinion the argument mistakes the effect of the definition. A shop "for the sale of" petrol etc. or accessories or spare parts for a motor car is by no means necessarily to be equated with a shop which happens to sell those items or one or some of them. 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* [1864] 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 **[8]** not necessarily exclusively, to the sale of the specified goods and includes what is commonly known as a petrol pump.

The question whether premises are properly to be classified as a petrol shop, as defined, will fall to be determined as a matter of fact by reference to their character, and that will depend on what is done and what is sold or offered for sale there, as disclosed by the evidence as a whole. Resolution of the 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 to in the definition 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, for plainly the character of the establishment might well be substantially governed or influenced by other considerations. That one such consideration could be the nature of other goods offered or exposed for sale or sold at the shop is suggested by sub-s(8) of s82. Another consideration could be the proportion of other goods sold compared with those of a kind referred to in the definition. But again, neither of these considerations need be determinative one way or the other save, it seems, that no dealing in briquettes by what is *ex hypothesi* a petrol shop could serve to deprive it of that character.

The Stipendiary Magistrate in his written reasons for his decision did address himself to the question whether, as a matter of its characterisation, the shop was properly to be regarded on the evidence as a petrol shop. He did so in these terms:

> **[9]** "Assuming that white spirit is benzine, a fact which was presumed by Mr Penhalluriack in his testimony but, to my mind, not satisfactorily proved, it is still stretching the language of the definition to characterise as a 'petrol shop', a shop which sells approximately 20,000 different items, only one of which is benzine. The definition speaks of a 'shop for the sale of' and not of a 'shop which sells' benzine. The words 'for the sale of' carry a connotation of purpose. In other words, the sale of benzine must be one of the significant purposes for which the shop exists. That is not the situation here and I feel unable to characterize the defendant's shop as a 'petrol shop'. I am satisfied that the defendant's shop is not a 'petrol shop' by definition".

These passages in His Worship's reasons were criticised by counsel for the applicant for their concentration on benzine to the apparent exclusion of other items sold by the applicant which, had they been considered, might have produced a different result in the Magistrate's mind. For example, it was submitted, the Magistrate did not consider whether the many other items sold by the applicant were motor car accessories in terms of the definition in s82(7). The criticism is valid so far as it goes but I think it does not carry the applicant very far. When one looks at the whole of the Magistrate's reasons (which if I may say so, were by no means perfunctory) it is clear enough that he had present to his mind all the myriad items which the applicant had for sale in his shop Indeed, he actually found as a fact that the applicant had established "that certain articles were sold in his shop which are usually sold in 'petrol shop'".

Although His Worship did not actually say so, I infer that he was referring to motor car oil and motor car accessories and motor car spare parts. At all events there was evidence on which the Magistrate could have found that the applicant stocked **[10]** items of that kind and I think I should draw the conclusion that he did so find, and to that extent favourably to the applicant. The Magistrate nevertheless was not only unpersuaded that the applicant's shop was a petrol shop but he was prepared positively to characterise it as a hardware shop.

I shall return to the question whether he has been shown to have been wrong to have done so. Meanwhile, it is convenient to deal with another submission that was designed to show that the applicant's shop was a petrol shop. The submission was that the provisions of s192(1)(p) of the *Labour and Industry Act*, in combination with the evidence, required the conclusion that the applicant's shop was a petrol shop within the meaning of the Act. *[His Honour then referred to s192(1)(p) of the Act, and continued]:* ... That provision is no doubt to be read in association with s91(1), which is also in Part VI of the Act and imposes an additional requirement in respect of shops in the following terms -

> "If in any shop any trade is carried on or any goods are dealt in of such descriptions or kinds as would by or under this Act necessitate such shop being closed during certain hours then such shop shall be closed for all purposes during such hours."

These two provisions are not altogether easy to construe together, or even separately, and much less so when **[11]** read along with s80(1). The effect of the three provisions, when read with the whole Act, seems, however, to be this. (1) Shops caught by s80(1) are to be closed in accordance with its terms, but (2) even shops which might otherwise be exempted from its operation are by reason of s91(1) to be closed during hours which any trade carried on or any goods dealt with in them would by or under the Act necessitate their closure. (3) If it is proved that any article is sold in a given shop which is usually sold in shops where a particular class of trade is carried on, that class of trade shall be deemed by reason of s192(1)(p) to be carried on at the given shop. (4) There is no provision in the Act which requires a shop to close by reference only to the class of trade carried on or the goods dealt with therein: closing hours of a shop are determined by type of shop it is by reference to its designation or description according (for example) as to whether it is or is not a Fifth Schedule shop or a petrol shop; but (5) the classification of a shop by reference to such designation or description may be influenced by the class of trade carried on or deemed to be carried on or the goods dealt with therein.

There was evidence led below on behalf of the applicant with a view to proving that at the relevant times articles were sold in his shop of a kind that are usually sold in petrol shops. As I have indicated, the Magistrate so held. It was argued before the Magistrate and in this Court that, upon such a finding, the trade of a petrol shop proprietor is by virtue of s192(1)(p) to be deemed to be carried on at the applicant's shop, and that therefore the shop is properly to be regarded as a petrol shop in the terms of the Act.

The **[12]** Magistrate considered that s192(1)(p) cannot, as a matter of construction, apply to characterise a shop artificially as a "petrol shop" when such a shop is already defined by s82(7)(b). He therefore concluded that s192(1)(p) can have no application to assist a shop to be classified as a "petrol shop". That conclusion was said on behalf of the applicant in this Court to be wrong and to be inconsistent with an unreported decision of the Industrial Appeals Court pronounced on 15th December 1980 in *Tucker v Watkins*. It was submitted before me that, by virtue of s22(7) of the *Industrial Relations Act* 1979, the decision in *Tucker v Watkins* bound the Magistrate and that, because he did not apply it, his own decision should be set aside.

It was also submitted, in an argument which I do not profess even now perfectly to understand, that by force of the same provision the decision in *Tucker v Watkins* binds this Court upon the present order to review proceedings because this Court must apply the law as the Magistrate should have applied it, including the law as *Tucker v Watkins* laid it down. Section 22(7) of the *Industrial Relations Act* provides that –

> "A decision by the Commission in court session upon a question of law shall be binding on the Metropolitan Industrial Court and Magistrates' Court in proceedings arising under this Act, the *Labour and Industry Act* 1958, the *Industrial Training Act* 1975 or the *Industrial Safety, Health and Welfare Act* 1981."

Even assuming that in s22(7) the expression "the Commission in court session" is equivalent to the Industrial Appeals Court (which is by no means clear) it does not follow that this Court is bound by a decision of the Industrial Appeals **[13]** Court when reviewing the decision of a Magistrates' Court upon a prosecution under the *Labour and Industry Act*. I shall not elaborate this question, however, because I find it unnecessary to decide it. 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*. In that case the defendant was prosecuted under s80(1) of the *Labour and Industry Act*. The question that arose before the Industrial Appeals Court was whether a shop which was fundamentally a chemist's shop, and therefore *prima facie* within the Fifth Schedule and therefore outside s80(1), was nevertheless subject to the provisions of s80(1) because the defendant dealt in a number of items which were alleged by the informant to attract the operation of s91(1). The defendant proprietor proved however, that all the particular items on which the informant relied were within the range of items usually sold nowadays in a chemist's shop.

The Industrial Appeals Court held that s192(1)(p) of the *Labour and Industry Act* therefore operated in relation to those items to deem such a shop to be one where the class of trade of a chemist's shop proprietor was carried on. It followed, it was held, that the defendant's dealing in the goods on which the informant relied to attract the operation of s91 did not do so because s192(1)(p) deemed such dealing to involve him in carrying on the trade of nothing more than a chemist's shop proprietor. Assuming the correctness of the reasoning of the decision in *Tucker v Watkins*, I think it is distinguishable from the present case. There, the shop in question was **[14]** characterised as or assumed to be fundamentally a chemist's shop. The items on which the informant relied to deprive it of the benefit of that classification were held not to do so. Here, on the other hand, the Magistrate classified the applicant's shop as fundamentally a hardware shop, which was what the informant all along contended for.

The present informant's case, as I understood it, was not primarily that s91 deprives the applicant of the benefit of any Fifth Schedule classification that it might otherwise enjoy. Rather, his primary case was that the applicant's shop was not properly to be classified as a shop within the Fifth Schedule, but as a hardware shop. Assuming (as the Magistrate found) that the applicant sold articles of a kind usually sold in petrol shop, and assuming further, as I do, contrary to the Magistrate's view, that s192(1)(p) accordingly deems the trade of a petrol shop proprietor to be carried on there, that does not mean it was a petrol shop. To be a petrol shop it has to be a shop "for the sale of" specified items. The deemed carrying on of the trade of a petrol shop proprietor there does not necessarily produce the result that it is a shop "for the sale of" the specified items. The categorisation of the shop as a petrol shop remained to be made as a matter of fact and the matter of fact was resolved, on the whole of the evidence, against the applicant.

[15] The third and final principal question raised by the orders nisi is whether the Stipendiary Magistrate was wrong to decide that the applicant's shop was not within any of the six classes or kinds of shops mentioned in the Fifth Schedule within which the applicant sought to bring it. Whether the shop was properly to be regarded as a Fifth Schedule shop again depended on matters of categorisation. Of the classes or kinds, relied on by the applicant three are designated in the Schedule in a sense adjectivally by reference to their wares or the business of their proprietor – flower shops and retail plant nurseries; booksellers' and newsagents' shops; chemists' shops.

The other three are described as shops "for the sale of" particular goods, viz. shops for the sale of boats caravans or other trailers or spare parts or accessories therefor; shops for the sale of works of art and handicraft; shops for the sale of swimming pools. None of these, and indeed no shop of a class or kind referred to in the Fifth Schedule is defined. The only two kinds of shops that are defined at all in the Act are petrol shops and butchers' shops. The question, therefore, whether a particular shop is or is not one of a class or kind described in the Fifth Schedule will always fall to be determined as a matter of fact by the tribunal that has to decide it. The facts proved have to be measured against the descriptive words in the Schedule as they are understood in common language. It is an exercise of a kind that the courts are used to performing day in and day out in a variety of contexts.

I shall consider first the submissions relating to **[16]** the first three of the above-mentioned classes or kinds of shops. In this case there was really no evidence that the applicant's shop was a bookseller's shop or a newsagent's shop and counsel before me did not press that point. The argument that it was a flower shop, or a retail plant nursery or a chemist's shop depended essentially on evidence to the effect that the applicant stocked and sold some items that are usually sold in establishments of that kind. There was, for example, evidence from witnesses called for the defence that they had seen plant nurseries selling carpenters' tools and chemists' shops selling electrical goods.

There was very little evidence, if any, that the shops taken as paradigms were properly called plant nurseries and chemists' shops respectively or, if they were, exactly why they were entitled to be so regarded for the purposes of the Act and to enjoy the status of Fifth Schedule shops. Assuming, however, that these exemplars were Fifth Schedule shops and that the applicant had for sale in his shop some or even many of the articles of a kind sold in them, his shop was by no means necessarily on that account to be characterised as a flower shop or a plant nursery or a chemist's shop. To argue otherwise is to rely on a false syllogism of a kind which has been exposed and denied by the courts in a line of cases concerning restrictive covenants designed to prevent retail businesses of particular kinds from being carried on.

In *Stuart v Diplock* [1889] 43 Ch D 343 there was a covenant which precluded the covenantor from permitting or suffering to be carried on in or upon certain shops the trades or businesses of ladies' outfitting, juvenile **[17]** outfitting or sale of baby linen. The defendants, who were bound by the covenant, carried on the business of hosiers and drapers at one of the subject shops, and sold various articles which were sold by ladies' outfitters, including combinations. At first instance Kekewich J concluded that the business of a ladies' outfitter could not be successfully carried on without the sale of those articles and that therefore the defendants were carrying on the trade of ladies' outfitter in contravention of the covenant. That reasoning was held on appeal to be indefensible. As Bowen LJ put it at p352 of the report, the invalidity of the argument can be exposed in the form of a fallacious syllogism:

> "all ladies' outfitters sell combinations, the defendants sell combinations, and therefore the defendants are ladies' outfitters".

So, here, the kind of argument that the applicant seeks to put forward may be stated: chemists' shops nowadays sell electrical goods and plant nurseries sell carpenters' tools; the applicant also sells these items so his shop is a chemist's shop and a plant nursery. This cannot be right, as a moment's reflection will confirm. It could not even be necessarily right to characterise the applicant's shop as a chemist's shop or a plant nursery if it were proved that he sold some traditional chemist's shop items, such as headache powders, and traditional plant nursery items, such as garden bulbs, packets of seeds and fertiliser. Were it otherwise, every corner milk bar selling headache powders would *ipso facto* be a chemist's shop for the purposes of the Act.

Further examples of cases where similar arguments have been advanced without **[18]** success are *A Lewis & Co (Westminster) Ltd v Bell Property Trust Ltd* [1940] Ch 345 and *Labone v Litherland Urban District Council* [1956] 1 WLR 522. A similar kind of point was clearly made, if I may respectfully say so, by Megarry J in *Rother v Colchester Corporation* (1969) 2 All ER 600; (1969] 1 WLR 720. There, the court had to consider a covenant by landlord to the effect that he would not let any other shop on a housing estate for the purpose of general hardware merchant and ironmonger, the landlord having let one to the plaintiff for that purpose. There was on the housing estate another shop let by the defendant landlord for the purpose of a food hall where, to some extent, general hardware items were sold. The plaintiff claimed that a breach of the covenant was thereby committed on the part of the landlord. At WLR p729 Megarry J, rejecting the contention, said:

> " ... when a letting is for some specified purpose, then unless that purpose is or includes the purpose of a general hardware merchant and ironmonger, I do not think that there is *necessarily* any breach of the covenant merely because the purpose includes the sale of some articles which a general hardware merchant and ironmonger may be expected to sell. Trades overlap; and in the last two decades the overlapping has tended to increase ... In my judgment, a covenant not to let other premises for the purpose of trade A does not prohibit the letting for the purpose of trade B unless the carrying on of the trade B can fairly be said to be, or to include, the carrying on of trade A or, perhaps, of a substantial

> part of it. In deciding this, what matters is the substance: *it is not enough merely to establish that there is a minor degree of identity between the types of articles sold in the two trades*."
> (Italics supplied).

Of course, the parallel between those cases and the present one is not exact because in the present case **[19]** the question is whether the shop is to be classified as a particular kind of shop and in the authorities I have mentioned it was whether a particular kind of business was being carried on or whether a shop had been let for the purpose of carrying on a particular kind of business. The necessary process of characterisation is, however, not dissimilar in each kind of case. The question of fact must be decided, having regard to the evidence, as a matter of substance upon the application of general knowledge and common sense.

I was pressed for the applicant with the case of *Slattery v Bishop* [1919] HCA 58; [1919] 27 CLR 105. There, the High Court had to consider whether the defendants, who in the course of their business habitually sold small quantities of groceries (i.e. goods commonly sold by grocers) as well as items not usually sold by grocers, carried on the business of a "grocer". It had been held below that the business of a grocer had not been carried on by them. By a majority, however, the High Court held that:

> " ... 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 ... .

For the applicant it was argued in this Court that the Stipendiary Magistrate's conclusion adverse to the applicant was inconsistent with that reasoning. I do not agree. In *Slattery v Bishop* the facts were fully found and were not in dispute and the findings of fact made left no alternative, as the High Court held, to the conclusion that the defendants were carrying on the **[20]** business of grocers. It is implicit in the decision that a "grocer" relevantly meant or included a person who habitually sold groceries in the course of trade. The Court said:

> "We agree that the question whether the business carried on by the defendants was that of grocers is primarily a question of fact; but we do not think that it is such a mere question of fact as to prevent the informant from challenging the decision of the magistrates in a superior court if the conclusion at which they arrived was not reasonably open to them on the evidence."

Here, on the other hand, the Magistrate was required to decide what is meant in the Fifth Schedule by the expressions "flower shop and retail plant nurseries", "booksellers' and newsagents' shops" and "chemists' shops". They are, I think, used in a popular and not in any technical sense. The Magistrate had therefore to determine their meaning by reference to the common understanding of the words as a matter of fact: *Brutus v Couzens* [1972] UKHL 6; [1973] AC 854; [1972] 2 All ER 1297; [1972] 3 WLR 521; (1972) 136 JP 390: *New South Wales Associated Blue Metal Quarries Ltd v Federal Commissioner of Taxation* [1956] HCA 80; (1956) 94 CLR 509, 512; [1956] ALR 286; 11 ATD 50; (1956) 6 AITR 239; (1956) 29 ALJR 775; *Hope v Bathurst City Council* [1980] HCA 16; [1980] 144 CLR 1, 7; (1980) 29 ALR 577; (1980) 12 ATR 231; (1980) 54 ALJR 345; (1980) 41 LGRA 262.

Having done so the Magistrate had to decide, again as a matter of fact, whether the defendant's shop fell within that meaning. *Slattery v Bishop* is authority for no more than that, on the facts as fully found in that case, it was not reasonably open to conclude that the defendants were not carrying on the business of grocers. In particular, that decision did not compel the Magistrate in the present case to conclude that, on the facts before him, the applicant's shop was a shop of any particular class or kind. His categorisation of the **[21]** applicant's shop depended on the facts as he found them. Only if on the facts properly so found there was no conclusion reasonably open other than one favourable to the applicant could the Magistrate's conclusion be upset in accordance with the reasoning in *Slattery v Bishop*.

So far as I can see, the decision of the Magistrate can only be shown to have been wrong in this respect if the various designations in the Fifth Schedule refer to shops that sell any goods of a kind usually sold by shops of the kind designated. As I have indicated, I do not consider that this is at all what the Fifth Schedule means. For example, in popular and commonly understood parlance a shop is not a chemist's shop merely because it sells some goods of a kind that a

pharmaceutical chemist commonly sells. In the same parlance, a shop is not a plant nursery merely because it sells blood and bone, as everyone knows plant nurseries usually do.

The submissions relating to the remaining three classes or kinds of shops designated in the Fifth Schedule relied on by the applicant are substantially answered by the remarks I have made concerning the first three and petrol shops. These remaining classes or kinds are designated as "shops for the sale of" specified items. Again the argument was that the sale of these items, or some of them, was sufficient to require the Magistrate to conclude that the applicant's shop was of the designated kinds. For the reasons I have given I do not consider that it was.

Furthermore, even if the facts were sufficient to attract the operation of s192(1)(p) (as I assume they were) it does not in my opinion, as I have endeavoured to explain, **[22]** assist the applicant to say that the Magistrate was necessarily wrong in declining to be satisfied that the applicant's shop was not a Fifth Schedule shop. The applicant's right to have the Magistrate's decision upon a question of fact upset on proceedings by way of order to review in this Court is limited. *[His Honour then referred to a passage by Stephen J in* Spurling v Development Underwriting (Vic) Pty Ltd *[1973] VicRp 1; [1973] VR 1 at p11; (1972) 30 LGRA 19, and continued]:* ... It follows from this analysis that the Magistrate's decision can only be upset if the conclusion that the applicant's shop was a petrol shop or a Fifth Schedule shop was the only conclusion that the evidence could reasonably sustain. It is to be remembered that the onus lay on the applicant to establish that the shop was within one of those categories.

The magistrate, while he held that the shop was not a petrol shop by definition and that s192(1)(p) did **[23]** not assist the applicant, allowed for the possibility that he was wrong in his conclusion about s192(1)(p). He said:

> "If I am wrong in this conclusion and paragraph (p) can be applied to 'petrol shops', then, in my view, the evidence led by the defendant was sufficient to establish on the balance of probabilities that certain articles were sold in his shop which are usually sold in 'petrol shop'. He would therefore be entitled to have his shop deemed a shop carrying on a class of trade known as a 'petrol shop' and, I think, no complaint could be made concerning goods carried in his shop which were usually sold in other 'petrol shops'. He would, of course, still have to seek the protection of the Fifth Schedule in relation to the remaining goods offered or exposed for sale in his premises and this is so because of section 91."

I take the Magistrate there to have meant that, assuming the trade of a petrol shop proprietor was deemed to be carried on at the applicant's shop, the shop was therefore a petrol shop which was not caught by s80(1) but that it was still *prima facie* subject to s91(1) unless the applicant proved that it did not apply. It will be apparent that in my opinion this passage was unduly favourable to the applicant in as much as the Magistrate supposed that the mere deemed carrying on of the trade of a petrol shop proprietor at the shop made it a petrol shop.

The Magistrate also appears to have considered that the applicant, in order to escape conviction, was obliged by virtue of s91(1) to prove that all goods in his shop not of a kind usually sold by petrol shops were of a kind which would entitle him "to seek the protection of the Fifth Schedule". As I follow the Magistrate's reasons, he was saying that the applicant had an onus in respect of all items of goods he sold, not being goods of a kind usually **[24]** sold in a petrol shop, to prove that no item disqualified him from being regarded as a shop within one or other of the classes or kinds designated in the Fifth Schedule. That this was the Magistrate's view appears from the following later passage in his reasons:

> "To carry the burden successfully, the defendant must satisfy me on the balance of probabilities as to what items were exposed or offered for sale by retail in his shop on the occasions in question and thereafter that those items were such as would allow him to bring his shop within one or more of the classifications contained in the Fifth Schedule with no items of stock unaccounted for."

The Magistrate considered an argument addressed to him that this was an unreasonable and unduly burdensome onus to place on an accused person. He accepted that the defendant:

> "... would be required to satisfy the court as to the existence and classification of every single item exposed or offered for sale in his shop."

His Worship said:

> "I am mindful of the weight of this argument as not only is the defendant placed in an invidious situation but the courts are likely to find themselves faced with interminable exercises in evidentiary classification of goods. Nevertheless, the fact remains that the law is clear and the legislature is entitled to place such an onus on accused persons if it sees fit."

I cannot agree with these observations. Just as the mere sale or exposure for sale in a shop of some particular goods will not necessarily suffice to type the shop as one of a character which usually sells goods of that kind, the mere sale or exposure for sale in a shop, which is of a particular character, of goods that are not usually sold at such a shop will not necessarily suffice to **[25]** deprive it of that character. The matter of characterisation comes down to matters of substance and degree. It is just such a situation as that of which Lord Morris of Borth-y-Gest spoke in *Brutus v Couzens* (*supra*) at p863:

> "Having found the facts it was for the magistrate applying rational judgment and common sense to reach a decision."

I refer also to what Dixon J said in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation* [1931] HCA 20; (1931) 45 CLR 224, 233; 37 ALR 240. Referring to the problem of deciding whether an ordinary English word in a statute is apt to cover facts as found, he remarked that:

> "... in such matters one must often be guided to a great degree by one's own experience in the use of terms."

In my opinion, therefore, the applicant here did not have to provide an inventory of his stock and classify each item favourably to his contention that his shop was of a class or kind mentioned in the Fifth Schedule, "with no items of stock unaccounted for". What he was obliged to do, however, was to satisfy the Magistrate that his shop was fairly and reasonably to be regarded as of such a class or kind. Even applying that test, less stringent than the one the Magistrate formulated, I think it is plain that the applicant did not satisfy it. Manifestly the Magistrate was satisfied to conclude on the evidence that the correct categorisation of the shop was as a hardware shop. I think it is impossible to conclude that the evidence was insufficient to entitle him to do so. Criticism was directed at the Magistrate's statement in his reasons that:

> "For example, to obtain the benefit of the Schedule, the sale of caravan accessories would need to be a significant aspect of the shop's *raison d'être*. It seemed clear to me **[26]** from the evidence that this was not the case. In the commonly accepted sense, the shop was a hardware shop and the characterisation of it as a caravan accessory shop was nothing more or less than an attempt to frustrate and/or circumvent the provisions of the Act."

The Magistrate would appear to have applied a similar criterion to the other designations in the Fifth Schedule on which the applicant relied, or at least to those described as being for the sale of" particular items. I do not consider the criticism to be justified. The language His Worship used indicates that he correctly sought to determine the character of the applicant's shop as a matter of substance. Notwithstanding the statements in his reasons with which I have ventured to disagree, the Magistrate's ultimate decision can be supported independently of them. I do not think it has been shown to have been wrong.

For these reasons each of the orders nisi will be discharged.
