

18/69

SUPREME COURT OF VICTORIA

GALE v OSBORNE

Starke J

20 October 1969

SUMMARY OFFENCES – DEFENDANT CHARGED WITH THROWING OFFENSIVE MATTER TO WIT PIG SEWERAGE INTO A WATER COURSE – DEFENDANT PUMPED THE SEWERAGE AND POLLUTED WATER INTO THE CHANNEL – WHETHER DEFENDANT DID "THROW" THE OFFENSIVE MATTER – DEFENDANT ADMITTED TO TIPPING A COUPLE OF VATS OF PIGS' URINE INTO THE CHANNEL – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – MAGISTRATE FAILED TO TAKE INTO ACCOUNT THE EVIDENCE OF THE DEFENDANT'S TIPPING THE VATS – WHETHER MATTER SHOULD BE REMITTED TO THE MAGISTRATE FOR FURTHER CONSIDERATION: *SUMMARY OFFENCES ACT 1966, S7(d)*.

HELD: Order nisi absolute. Remitted to the Magistrate for a decision in relation to the evidence concerning the tipping of the pigs' sewerage.

1. There was nothing in the *Oxford Dictionary* or other dictionaries referred to to suggest that the word 'throw' in any of its senses could be synonymous with the word 'pour', which was what happened in this case. The polluted liquid by use of a mechanical pump was poured from where it lay into the channel. To extend the meaning of the word 'throw' as construed in its ordinary sense to include 'pour' would be to do a violence to the language of the statute which was not justified.

2. It was quite impossible by reading what was in the affidavit to decide whether the Magistrate had or had not taken into account the evidence in relation to the tipping of the pigs' urine.

3. In those circumstances the order nisi was made absolute with a direction that the matter be remitted to the Magistrate for a decision on whether that evidence was accepted by him or not, and if accepted, whether in his opinion there should have been a conviction or not.

STARKE J: This is an order nisi to review the order of a Stipendiary Magistrate sitting alone, on 8 May 1969. The Information was heard at Shepparton.

The defendant, who is respondent in these proceedings, was charged on 13 March 1969 that on 5 January 1969 at Orrvale he did throw offensive matter to wit pig sewerage and whey into a water course whence a supply of water for human use is obtained. During the proceedings the information was amended by deleting the words "and whey" therefrom.

This information is laid under s7(d) of the *Summary Offences Act 1966*. This section provides:

"Any person who ... throws any offensive matter or thing or any animal into a river, water course, canal or other place whence a supply of water for human use is obtained shall be guilty of an offence. Penalty \$500 or imprisonment for six months or both."

The evidence reveals that the defendant had a pump adjacent to a channel which either crossed or abutted onto his property. Also nearby he apparently reared pigs, and in the vicinity of the channel there was, either in tanks or simply lying on the surface of the earth, a quantity of pig urine. The channel apparently overflowed or excess water was lying around in the vicinity of the tanks, and the water became mixed with the pigs' urine. The defendant pumped this polluted water into the channel and there was evidence that people lower down the channel used this water, and it was in a polluted and unhealthy state.

The main point argued in this order to review is what construction should be placed on the word "throw" in s7(d) of the *Summary Offences Act*. However, this was not the only matter raised in the order nisi to review.

The order nisi was granted by Master Bergere on 6 June 1969 on the following grounds:

A. That the Stipendiary Magistrate was wrong in holding, if he so held, that the discharging of an offensive liquid into the water course by means of a mechanically operated device did not constitute the act of throwing that liquid into the water course within the meaning of clause (d) of s7 of the *Summary Offences Act 1966*.

B. That the Stipendiary Magistrate should have held that by causing force to be applied to offensive matter and thereby moving it from its existing position into a water course the defendant threw the matter into the water course within the meaning of clause (d) of the said section, notwithstanding that the force was applied by mechanical device set into motion by the defendant and not by the defendant personally, and should have held that a *prima facie* case had been established against the defendant.

On the application of Mr Murdoch this morning I allowed an amendment to the grounds by way of adding a further ground, which reads as follows:

That on the evidence before him the Stipendiary Magistrate ought to have held that the defendant did throw offensive matter, to wit pig sewerage, into a water course when a supply of water for human use was obtained.

There appears to be no authority for the meaning of the word "throw" either in this context or any other context, and therefore one is thrown back on the dictionary meaning of the word 'throw'.

I have been referred to various dictionaries, but in substance they do not seem to me to vary in any material way. In the *Shorter Oxford Dictionary* the following meanings so far as they are relevant appear for the word 'throw'. Firstly to twist or turn, and derived uses. Secondly, to project or propel through the air and connected uses. To project anything with force of the nature of a jerk from the hand or arm, so that it passes through the air or free space, to cast hurl or fling, to cast by a sudden jerk or straightening of the arm, especially at the level of or over the shoulder. Thirdly, to cause to pass, go or come into some place or position by some action likened to throwing, to put or place with haste, suddenness or force.

It is to be remarked that this is a penal statute and therefore it must be strictly construed. In my view, the word 'throw' is to be construed here in its ordinary, natural, common or popular sense, and because it is a penal statute, it is necessary that it be strictly construed. I find nothing in the *Oxford Dictionary* or other of the dictionaries which have been drawn to my attention to suggest that the word 'throw' in any of its senses can be synonymous with the word 'pour', and that is what, in my view, happened here. The polluted liquid by use of a mechanical pump was poured from where it lay into the channel. I think to extend the meaning of the word 'throw' as construed in its ordinary sense to include 'pour' would be to do a violence to the language of the statute which is not justified. Accordingly as far as these grounds are concerned the order nisi will not be made absolute.

However, there is another difficulty raised by Mr Murdoch for the informant. He pointed out that at least in two places there was evidence which suggested that there was a throwing of pigs' urine into the channel by a means other than a pump. I refer to firstly p4 of the affidavit in support of the order nisi, where head bailiff for the State Rivers and Water Supply Commission was giving evidence. He said:

"After further discussion with Mr Osborne (that is the defendant) he finally said 'I might as well admit that I had tipped a couple of vats of pigs' urine in the channels'".

Before that, in the evidence of Mr Blythe, there appears this passage:

"Osborne at first denied responsibility but after further questioning he admitted 'I might as well admit that I did tip a couple of vats of pigs' piss into the channel'".

Mr Towers, who appeared for the defendant, made a submission at the end of the prosecution's case that there was no evidence that the defendant had thrown any material into the channel at all. On the literal meaning of the word 'throw' it would be physically impossible to lift and throw the contents of a 7ft concrete tank into the channel. Now it is to be noted that Mr

Towers referred to a 7ft concrete tank. In the passages I have read from the expressions used was the expression 'vat'. Whether by 'vat' the defendant meant to refer to these 7ft concrete tanks or not I know not.

What troubles me here is that as far as the decision of the Magistrate is concerned, he does not seem to have adverted to this submission at all, or to this evidence, perhaps because there was an interval of two weeks between the hearing and the submission and the Magistrate's final decision. So far as the affidavits are concerned the Magistrate appears to have said this, he upheld Mr Towers' submission and stated that there must be some physical action on the part of the defendant regarding the subject matter and he held that the prosecution had not proved such a thing and therefore dismissed the charge.

In the answering affidavit it is stated that the Stipendiary Magistrate then referred to ss245 and 246 of the *Water Act* and s3 of the *Litter Act*. The Stipendiary Magistrate also referred to the first definition of 'throw' in *Webster's Dictionary* and to the words synonymous with the word 'throw'. The Stipendiary Magistrate then said that the evidence led by the prosecution did not support the information and he dismissed it.

Despite the fact that a submission was made touching on this particular matter, I am very far from satisfied that the Magistrate has considered the two passages of the evidence to which I have referred at all. It may be he did, and it may be that in dismissing the information he did that on the basis that he did not accept this evidence, or it may be that in the course of the passage of time he forgot. I think it is quite impossible by reading what is in the affidavit to decide whether the Magistrate has or has not taken into account the two passages that I have just read.

In these circumstances I think that I am bound to make the order absolute, and to direct that the matter be remitted to the Magistrate to be dealt with in accordance with this judgment. I am certainly not directing him to record a conviction; all that I am remitting it back to him for is for a decision on whether the two passages I have referred to were accepted by him or not, and if accepted, whether in his opinion there should be a conviction or not. In the result, the order nisi will be made absolute. [After a discussion about costs] I will make no order as to costs.

APPEARANCES: For the applicant/informant Gale: Mr NST Murdoch, counsel. Thomas F Mornane, Crown Solicitor. For the respondent/defendant Osborne: Mr I Abraham, counsel. Abernethy, Towers & Dowd, solicitors.
