

08/85

SUPREME COURT OF VICTORIA

GIBBS v CLARK

McGarvie J

28 February, 1 March 1985 — [1985] VicRp 74; [1985] VR 778

CRIMINAL LAW – LICENSED AUCTIONEER EMPLOYED BY COMPANY – SALE OF SHEEP WITHOUT ASCERTAINING OWNERSHIP – ELEMENTS OF OFFENCE TO BE PROVED – WHETHER AUCTIONEER AS INDIVIDUAL RECEIVED AND SOLD SHEEP – WHETHER AUCTIONEER PAID OVER PROCEEDS: AUCTION SALES ACT 1958, S38.

G. a licensed auctioneer employed by Dalgety Farmers Ltd, was charged with selling by auction certain sheep, without first obtaining a certificate from a respectable person as to the ownership of the sheep as required by s38 of the *Auction Sales Act* 1958. The evidence showed that the sheep had been received and placed in pens used by G.'s employer, and that staff of G.'s employer – but not G. – were responsible for the payment over of the proceeds of the sale. The magistrate found the charge proved and released G. upon a recognizance to be of good behaviour. Upon order nisi to review the finding of guilt—

HELD: Order absolute. Order set aside and information dismissed.

(1) For an offence to have been committed under s38 of the *Auction Sales Act* 1958, the licensed auctioneer must have received the sheep, sold them and paid over the proceeds.

(2) As the evidence showed that the sheep were delivered into the possession of the licensed auctioneer's employer and that the proceeds were paid over by that employer, it was not open to the Court to find those elements of the offence proved beyond reasonable doubt as against the individual licensed auctioneer.

McGARVIE J: *[After setting out the nature of the charge and the result of it before the Magistrate, His Honour continued]: ... [3] The essence of the grounds in the order to review is that, on the proper construction of s38 of the Act, it was not open to the learned Magistrate to be satisfied beyond reasonable doubt of the existence of each of the essential elements of the crime charged.*

Section 38 provides:

"Where any licensed auctioneer has sold any cattle or sheep skins received by him for sale he shall before paying over the proceeds of any such sale require from the person who was the owner or possessor of such cattle or sheep skins at the time they were received a certificate from some known and respectable person that such owner or possessor of such cattle or sheep skins is of good repute, and that he believes such owner or possessor of such cattle or sheep skins would not commit an indictable offence but has become possessed of such cattle or sheep skins honestly. But where such licensed auctioneer has for a period of twelve months been personally acquainted with the owner or possessor of any such cattle or sheep skins, and believes him to be of good repute and to have honestly become possessed of such cattle or sheep skins, it shall not be necessary for such auctioneer to require such certificate before paying over such proceeds. And in any case in which such certificate is necessary every such licensed auctioneer who pays over any such proceeds without such certificate shall be liable to a penalty of not more than 5 penalty units."

It is common ground that the section is not limited to the sale of the skins of cattle and sheep but applies to the sale of sheep skins and cattle. Ewes, wethers, rams and lambs are amongst [4] the animals included in the meaning of "cattle" by an interpretation clause in s3(1). The effect of the evidence before the Magistrate was that Gibbs had been a licensed auctioneer for about 36 years and had been employed by Dalgety Farmers Ltd, ("Dalgetys"), for about 38 years. On 27 June 1983, a carrier engaged by one Mala delivered 143 sheep to Dalgetys at the Geelong Municipal Market for sale by auction. Gibbs was the auctioneer who conducted the auction sale.

On about 1 July 1983, the staff of Dalgetys sent by post to Mala a cheque, bearing that

date, for \$2,312.48, the net proceeds of the sale of sheep No certificate from a respectable person, such as is required by s38, was obtained by anyone. Indeed, Gibbs said in his evidence that he had never, in his experience, seen a certificate of that type. Before the cheque was sent to Mala, inquiries had been made of the carrier and others, which satisfied the staff of Dalgetys that Mala was a respectable person. Unfortunately, Mala had stolen the sheep from a farm and came from prison to give evidence before the Magistrate. As Gibbs gave evidence that he had not known Mala, there was no issue whether he had been acquainted with him for twelve months before. I consider that the elements of which the Magistrate had to be satisfied beyond reasonable doubt before finding the charge proved were these:

- (1) that Gibbs was a licensed auctioneer;
- (2) that he received the sheep for sale;
- (3) that he sold the sheep;
- (4) that he paid over the proceeds of the sale; and
- (5) that he did not, before paying over the proceeds of the sale, receive from a known and reputable person, a certificate [5] such as is specified in the section.

No argument was put to me on the basis that the carrier, as bailee, had been the possessor of the sheep. Argument proceeded on the basis that Mala had been the possessor of the sheep and the person who should have been the subject of the certificate. For the offence to have been committed, it must have been the licensed auctioneer who received the sheep, sold the sheep and paid over the proceeds of sale. Upon the plain words of this section, any other view would involve the forbidden process of creating an offence by construction: *R v Adams* [1935] HCA 62; [1935] 53 CLR 563 at pp567-8; [1935] ALR 421; 8 ABC 97. I consider that the words "received by him" refer to a receipt of possession of the sheep by the licensed auctioneer. In the simple case where an auctioneer carries on business on his own account, he is a bailee of the goods from the time he receives them from the seller until he delivers them to the buyer: *Biddle v Bond* [1865] EngR 269; 122 ER 1179 at 1182; (1865) 6 B & S 225; [1861-73] All ER Rep 477; *Halsbury's Laws of England*, 4th ed, Vol. 2, p368, para 719.

The section contemplates receipt of the sheep from the person who was the possessor or owner of them. This seems naturally to refer to receipt of possession of the sheep from one who had possession of them. What happened in this case was that the sheep were delivered by the carrier to an employee of Dalgetys named McIntyre and placed in pens used by Dalgetys. That amounted to a receipt of possession of the sheep by Dalgetys.

Mr Habersberger argued that it was open to find that, when the employee of Dalgetys received the sheep from the carrier, he received them on behalf of the auctioneer, Gibbs. I do not accept [6] that. There seems to me to be no factual foundation for it and I bear in mind the evidence that there were several auctioneers employed by Dalgetys operating that day at the market.

Mr Habersberger also argued that, when Gibbs went to the pens in the ordinary way of an auctioneer to conduct the auction, he received the sheep. An auctioneer who goes to a pen to auction sheep in the possession of his employer does not take possession of them. At most, he could take custody: *R v Alexander and Keeley* [1981] VicRp 31; [1981] VR 277 at pp282-3; *Moors v Burke* [1919] HCA 32; [1919] 26 CLR 265 at pp269-70; 25 ALR 213. I do not regard Gibbs as having taken custody of the sheep. Even if, contrary to my opinion, he did take them into his custody and that is sufficient to amount to a receipt of the sheep within the meaning of the section, he received custody not from Mala but from Dalgetys in whose possession they had been since the carrier delivered them.

Accordingly, I am of the view that there was no evidence on which the Magistrate could be satisfied beyond reasonable doubt that Gibbs received the sheep. In ordinary circumstances, that would be enough to dispose of this appeal but, as it has been made clear to me that these proceedings are in the nature of test proceedings to ascertain what is the law with a view to decisions being made as to whether it should be sought to have it altered, I deal with some of the other points.

Mr Habersberger argued that when s38 refers to a sale by a licensed auctioneer it refers to the conduct of an individual who is a licensed auctioneer and who conducts the actual auction. I take the view that, within the meaning of the Act, an [7] individual who performs the normal

duties of an auctioneer at an auction sale, sells by auction. This is the position in a case such as this, where Gibbs conducted the auction of the sheep, although he did so as employee of Dalgetys and although it was Dalgetys which contracted with Mala to have the sheep sold by auction. Accordingly, it was open to the learned Magistrate to be satisfied that Gibbs had sold the sheep. I leave to the second appeal the question whether, in that situation, the employer is also to be regarded as selling by auction. I go to the element, which I have numbered (4). There was no evidence that Gibbs paid over the proceeds of sale.

There was, as Mr Habersberger emphasised, evidence that Gibbs had made inquiries as to the standing and reputation of Mala. However, there is no evidence on which it was open to the Court to be satisfied beyond reasonable doubt that Gibbs paid over the proceeds of sale. The evidence indicates no more than that he, with other members of the staff of Dalgetys, made inquiries about Mala, that the inquiries were such that it was regarded as appropriate to make the payment and that the payment was made. The evidence is that the actual payment, the preparation, signature and forwarding of the cheque, was done by other staff members of Dalgetys on behalf of Dalgetys.

The result is that, on the evidence, it was not open to the learned Magistrate to be satisfied beyond reasonable doubt of the existence of the elements which I have numbered (2) and (4). The order of the Magistrates' Court will be set aside, and the information dismissed. **[8]** It is apparent that, in the conditions of today, when most auctioneers are employed by companies, s38 is ineffective to achieve the objective at which it aims.

Solicitors for the applicant: Mallesons. Solicitor for the respondent: RJ Lambert, Crown Solicitor.
