

43/83

SUPREME COURT OF VICTORIA

DOWLING v DAVIDSON

Lush J

30 August 1983

CRIMINAL LAW – SELLING/ASSISTING IN SELLING OBSCENE ARTICLE – MEANING OF 'SALE' – GOODS ACT, S6 – DATE OF SALE – WHETHER VARIANCE IN DATE MATERIAL: POLICE OFFENCES ACT 1958, S166.

Davidson was charged with selling and assisting in the sale of an obscene article to wit a Super 8, 41.7 mil. film. The facts were that the informant spoke to Davidson at an Adult Book Shop, and asked to buy 'blue' movies. Davidson said that the films were not kept at the shop, but the method of dealing was that the customer paid for the film, was then given a box for the film plus a receipt, and Davidson would then arrange for the film to be dispatched to the customer. At the end of the prosecution evidence, it was submitted that there was no evidence of a 'sale'. The magistrate agreed, and dismissed both charges. Upon order nisi to review—

HELD: Order nisi absolute.

1. The evidence was consistent with the defendant's having the role of agent for an undisclosed principal or of a commission agent. In these circumstances he had a case to answer in respect of the assisting in the making of the sale.

2. As to whether there was evidence of a 'sale', the magistrate was correct in having recourse to the terms of the Goods Act, 1958, s6(3).

LUSH J: *[After setting out the facts, His Honour continued]:* ... **[3]** Orders to review were obtained in respect of each charge, although that relating to the second charge was wrongly drawn up and was the subject of the granting of leave to amend at the beginning of the proceedings before me. The substance of the grounds was, firstly, that there was evidence capable of establishing the elements of the relevant charges and that there was a case to answer, and, secondly, that the Magistrate had misinterpreted s166(1)(c) and was wrong in holding that there was no sale or assistance in a sale.

In my opinion, the Magistrate was correct in having recourse to the terms of the *Goods Act* 1958, s6(3). Unlike the *Health Act* 1958 and the *Poisons Act* 1962, the **[4]** *Police Offences Act* 1958 contains no definition of sale. Mr Golombek for the applicant argued that s166(1)(c) was directed to a general social problem, and should not be restricted to a narrow commercial interpretation. The obvious counter argument is that the sub-section contains penal provisions, which ought to be strictly construed.

The reason why the Stipendiary Magistrate considered that there had been no sale appears to have been that there was no delivery of specific goods at the time when agreement was reached between the applicant and respondent and the money was paid. However, if that agreement amounted, within the terms of the *Goods Act* 1958 s6(3), to an agreement to sell, it became a sale probably when the film was posted, but if not then, when the film was delivered to the Post Office box. This comes about by the operation of s6(4) and s23 Rule 5 of the *Goods Act*.

[5] It may also have been in the Stipendiary Magistrate's mind that if the sale was not completed until approximately 19th September, it was not the sale charged in the Information as occurring on 17th September. If this were in his mind, the course which should have been considered was that contemplated by *Magistrates (Summary Proceedings) Act* 1975 s157(3), (4). There was no reason for treating the variance in date as material or prejudicial to the respondent in any way. So far as the proceedings had gone, no reason even for granting an adjournment because of the variance in dates had appeared.

There was, however, in my opinion another reason for doubting whether there had been a

sale from the respondent to the applicant. There is really nothing to suggest that the respondent was on 17th September, or at such later time as the property in the film passed to the applicant, the owner of the film. The evidence is consistent with the respondent having the role of agent for an undisclosed principal or of a commission agent, and in fact suggests that one of these was the case. This might provide the respondent with an escape from the first charge, but it brings him squarely within the second charge of assisting on 17th September in the making of a sale (by persons unknown) at some date between 17th and 19th September. The possibility is that it might come to light if the facts ever became fully known that the respondent was the owner of the film does not, in the context of the alternative charges provided for in the relevant paragraph, lead to a conclusion that the assisting charge will not lie. In these circumstances, there was in my opinion clearly a case to [6] to answer on the second charge.

With alternative charges before the court, the Stipendiary Magistrate should not have dismissed the first charge until all evidence was complete at the close of the defence case. This course is required both by logic and authority – see *Archbold* 40th ed, Paragraphs 576, 1456 and 1496, and *R v Plain* [1967] 1 All ER 614; (1966) 51 Cr App R 91; [1967] 1 WLR 565. If it then appeared that the respondent was not the seller the first charge would be dismissed.

If the substance of the prosecution evidence remained, but it was doubtful whether the respondent was or was not the real owner of the films at the time of the agreement, he should have been convicted on the charge of assisting. During the course of the argument there was a passing reference to the provisions of *Police Offences Act* 1958 s166A, requiring the written authority of the Chief Secretary for a prosecution under s166 in respect of any publication. Mr Radford for the respondent, admitted that *Preswell v Baughurst* [1977] VicRp 22; (1977) VR 193 at p198 was against him.

The order nisi will be made absolute and the orders of dismissal set aside.
