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SUPREME COURT OF VICTORIA

BUTTIGIEG v RAND

O'Bryan J

12 November 1982

LOCAL GOVERNMENT – INTERIM DEVELOPMENT ORDER AND MELBOURNE METROPOLITAN PLANNING SCHEME – FAILURE TO COMPLY – MENS REA UNNECESSARY: TOWN AND COUNTRY PLANNING ACT 1961, S49(1) .

The defendant was charged with two offences against section 49(1) of the *Town and Country Planning Act 1961* ('Act'). One alleged a breach of the Interim Development Order of the City of Melbourne and the other alleged a breach of the Melbourne Metropolitan Planning Scheme. There was uncontradicted evidence from which it could be inferred that the premises were being used as a massage parlour. This use was prohibited under both the I.D.O. and the Planning Scheme. There was an admission by the defendant that he was the owner of the premises. The defendant gave evidence that he was unaware that the premises were being used as a massage parlour and he did not think the land was being used for such a purpose. The magistrate found that the defendant was the owner of the premises and that the land was being used as a massage parlour contrary to the I.D.O., and Planning Scheme but that the defendant was not aware that the land was being used for that purpose and that the information must therefore be dismissed. Upon appeal—

HELD: Order nisi absolute. Remitted for determination by another magistrate.

The subject matter of the Act and its scope indicate clearly that s49 was intended by the legislature to create an absolute offence. Mens rea is excluded as an essential ingredient, in the case of an owner of land, having regard to the strict terms of the section and the absence of a word such as "knowingly" or "permitting". The offence created by s49 is not criminal in any real sense. What the legislature has done is to prohibit non-conforming use of land and buildings in terms which exclude knowledge of, or acquiescence in, the non-conforming use as an essential ingredient of the offence. Accordingly, the magistrate was in error in concluding that mens rea was an essential ingredient in the proof of the offences.

O'BRYAN J: ... An order nisi was granted on four grounds:-

- (a) having found that the respondent was the owner of the land and that the land was being used for the purpose of a massage parlour contrary to the Interim Development Order the magistrate was in error in failing to find the respondent guilty of an offence against the provisions of s49(1) of the *Town and Country Planning Act* because he was satisfied that the respondent was not aware that the land was being used for such purpose;
- (b) the magistrate ought, upon the evidence before him, to have found the respondent guilty of an offence against s49(1) of the said Act;
- (c) the magistrate was in error in holding that the ignorance of the respondent of the use being made of the land owned by him was a defence to the information; and
- (d) the magistrate was in error in so far as he found that the applicant bore the onus of proving that the respondent was aware of the use being made of the land.

On the return of the orders nisi the respondent was not represented. Mr Macaw appeared for the applicant and submitted that s9(1) creates an absolute offence and *mens rea* is not an essential element of the offence. The section creates an offence for two classes of persons; the actual offender, i.e, the person who contravenes or fails to comply with any provision of the Act or of any interim development order or planning scheme, and the owner of land in relation to which a contravention or failure to comply occurs. To prove its case against the respondent the applicant had to prove the following factual matters:

- (a) The existence of an interim development order or planning scheme affecting the subject land;
- (b) That a person had contravened or failed to comply with the interim development order or planning

scheme; and

(c) That the respondent was the owner of the subject land.

The question is whether, in addition, the applicant had to prove that the respondent had a guilty mind in the sense that he knew the land had been used in contravention of the Interim Development Order or Planning Scheme. The learned magistrate read the section as if the word "knowingly" or "permitting" was included in it somewhere. He did not state why he did so but, I shall assume, he probably concluded the legal presumption that *mens rea* is an essential ingredient in every criminal offence had not been displaced. The question whether *mens rea* is, or is not, necessary for the prosecution to prove in the case of a statutory offence has been the subject of much learning in the law.

[His Honour dealt with numerous authorities to which he was referred and continued.] ... The following principles are established, I believe, from the authorities. In the case of statutory offences, unlike common law offences, there is no presumption that *mens rea* is an essential ingredient of the offence. The terms of the section which create the offence, the subject matter with which the legislation deals, the omission of words such as "knowingly" or "intentionally" from the section are relevant matters to consider in determining whether Parliament intended the offence to be absolute without proof of *mens rea*.

Where the act which constitutes the offence is not criminal in the sense that social stigma attaches to the offender the law will regard it as a further indication that the legislature intended to create an absolute offence. A statute which imposes responsibility on someone as the owner of premises or of a vehicle or of a business and prohibits acts under penalty in the public interest usually creates an absolute offence.

The *Town and Country Planning Act* is modern social legislation dealing with a wide variety of matters concerned with the orderly development and use of land and buildings, and matters incidental thereto, throughout Victoria and, in particular, the metropolitan area as defined in the Second Schedule to the Act. The Act enables a responsible authority to prepare a planning scheme for an area or to make an interim development order for an area in respect of which it proposes, or has commenced, to make a planning scheme (ss9 and 17). The use and development of the land is controlled by the responsible authority through a permit system (s18). Persons aggrieved may appeal the decision or determination to a Town Planning Appeals Tribunal (s19). The section creating the offence makes an owner of land guilty of an offence if any person contravenes the Act or any interim development order or planning scheme.

The subject matter of the Act and its scope indicate clearly that s49 was intended by the legislature to create an absolute offence. In my view *mens rea* is excluded as an essential ingredient, in the case of an owner of land, having regard to the strict terms of the section and the absence of a word such as "knowingly" or "permitting". The offence created by s49 is not criminal in any real sense. What the legislature has done is to prohibit non-conforming use of land and buildings in terms which exclude knowledge of, or acquiescence in, the non-conforming use as an essential ingredient of the offence. It is also significant that the *Town and Country Planning Act* gives an owner of land a right to appeal against any restriction on the use or development of his land affected by a planning scheme or interim development order. An owner may appeal to a tribunal which may determine an owner's rights to use his land in the manner he desires.

It appears to me that the legislature intended, by s41, to create an absolute offence and to impose upon an owner of land responsibility to ensure that any one using his land complies with the Act or with any interim development order or planning scheme affecting the land. This legislation falls into the category of "public interest" legislation where it is not necessary to show that a person knew he was contravening the statute before he can be found guilty. Mr Macaw further submitted that a defence of honest and reasonable belief in a state of facts which if true would render the respondent innocent of the charge was not available to the respondent as an answer to a charge of contravening s49(1) of the Act. Alternatively, Mr Macaw argued, the burden of establishing the existence of an honest and reasonable belief of facts which, if true, would exculpate the respondent was not discharged by the respondent. Consequently, the decision of the Magistrate cannot be supported on the basis that he honestly and reasonably believed the premises were not being used as a massage parlour."

[His Honour held that in this case the defendant did not adduce any evidence which raised a Proudman v Dayman [1941] HCA 28; (1941) 67 CLR 536 defence and declined to rule on whether such a defence would be available. His Honour held that all the grounds of the order nisi had been made out and remitted the case for rehearing before another magistrate.]
