

26/75

SUPREME COURT OF VICTORIA

McMASTER v YALLOURN BAKERY PTY LTD

Harris J

6, 26 June 1975 — [1976] VicRp 17; [1976] VR 233

PUBLIC HEALTH – SELL ADULTERATED FOOD – BREAD CONTAINING RODENT EXCRETA – BREAD GIVEN TO HEALTH INSPECTOR – BREAD ANALYSED AND FOUND TO BE ADULTERATED – CHARGE LAID AGAINST DEFENDANT FOR SELLING ADULTERATED FOOD – SALE TOOK PLACE IN JANUARY – INFORMATION ISSUED IN NOVEMBER – TIME LIMIT IMPOSED BY STATUTE OF SIXTY DAYS – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT 1958*, SS238, 295.

HELD: Order nisi discharged.

1. The person who had purchased the bread from a retailer and handed it over to the informant voluntarily and gratuitously was not a fact which prevented the bread from being food which had been procured for the purpose of analysis.

2. The question whether the purpose for which food had been procured was or was not "the purpose of analysis" was a question of fact. The magistrate's finding that the informant did procure the bread for the purpose of analysis was one which was open to him on the evidence.

3. This result seems to be in accord with what may be thought to be the policy of s295 which seems to be to ensure that, where a defendant is charged with an offence under the Act consisting of a transaction relating to food which can, from one point of view, be described as a "purchase", then if the food has been obtained by the informant (or by somebody who can be described as an opposite party to the defendant) for the purpose of analysis, no more than sixty days should elapse from the time when the food went out of the defendant's possession to the time when the prosecution is instituted. If conduct such as that by which the informant in this case obtained the bread was not a case where food had been procured for the purpose of analysis, then the situation would be that whether or not a defendant got the protection given by the section would depend upon the chance circumstances of whether an authorized officer obtained the suspected food by obtaining it directly from a shopkeeper or whether he obtained it after someone else had obtained it from a shopkeeper. There was no reason why the period should not be applicable in the latter case, and the construction placed upon the word "procured" in s295 did not produce the effect that it was not.

HARRIS J: On 25 November 1974, the Magistrates' Court at Morwell, constituted by Mr McAllister, stipendiary magistrate, dismissed an information in which the informant, Bruce Carlson McMaster, health inspector of the Shire of Morwell, alleged that the defendant, Yallourn Bakery Pty Ltd: "on or about 14 January 1974, at Morwell in Victoria did sell a food to wit bread which was adulterated contrary to the provisions of the *Health Act 1958* s238. Particulars: the bread contained rodent excreta".

The ground on which the order nisi to review that decision has been granted is:

"That the magistrate was wrong in law in dismissing the information on the ground that it had been issued outside the limitation period imposed by s295 of the *Health Act 1958* and that the magistrate should have held that the receipt or taking by a health inspector of a sample of food for the purpose, *inter alia*, of having it analysed from a person who had purchased that food and had complained to the health inspector about its quality or condition does not constitute a procurement of that sample for the purpose of analysis within the meaning of said s295."

At the hearing before the Magistrates' Court, the informant and the defendant were both represented by counsel. The defendant pleaded not guilty to the three informations against it. (Only one of these informations is the subject of an order to review.) The evidence called for the informant showed that the facts were these. On 14 January 1974, a woman purchased a two pound loaf of white sliced bread in an enclosed wrapping from a food shop in Morwell. When she opened the wrapping the next morning she observed a number of black spots in the bread

slices which appeared to be rodent droppings. She telephoned the informant who called at her home on 15 January 1974. She then handed the remaining bread slices and the wrapper to the informant. The informant looked at the bread slices. His evidence was that he told the woman that he was not sure what the black spots were, and that if she wished him to take the matter further he would take the slices and wrapper back to his office and examine them further and that if he could not then decide what the black spots were, he would send them to an analyst for analysis. He also said that he wanted to take the bread away for analysis and that analysis was one of the things in his mind. In addition, he confirmed that the evidence which the woman who had purchased the bread had given of his conversation with her was correct, although what she had said in evidence was that when she handed the bread slices to the informant, he told her that he would have them analysed in order to establish whether or not the black spots were rodent excreta, because he was not convinced that they were. The informant took the slices of bread and sent them to an approved analyst for analysis. The analyst gave evidence that an analysis showed that the slices of bread did have some rodent excreta in them. It was admitted on behalf of the defendant that it had sold this bread to the shopkeeper from whom the woman had bought it and that when the defendant sold it, the bread was in the same condition as it was when it was handed to the informant.

When the informant closed his case, counsel for the defendant elected to call no evidence and he put a submission to the court. He submitted that there was no case for the defendant to answer. He relied on the provisions of s295 of the *Health Act* 1958 and submitted that as the informations had been issued after the sixty day period imposed by that section they should be dismissed. The alleged offences had taken place on 14 January 1974, but the informations had not been issued until 1 November 1974.

After hearing argument from both counsel, the magistrate ruled:

"That the action of the inspector was a procurement for the purpose of analysis within the meaning of s295 and that because the said informations were issued outside the said sixty day limitation period imposed by that section he (the magistrate) further ordered that all three informations be dismissed."

What s295 of the *Health Act* 1958 provides is that:

"Where any food drug or substance has been procured or purchased from any person for the purpose of analysis any prosecution under this Part in respect thereof shall not be instituted after the expiration of sixty days from the time of the purchase."

The period of sixty days which is prescribed by s295 as the period within which the prosecutions referred to in it must be instituted runs from "the time of the purchase". It was held by Lush J in *Warner v Sunnybrook Ice Cream Pty Ltd* [1968] VicRp 11; [1968] VR 102; (1967) 15 LGRA 135 that the prosecutions which come within the time limit imposed by the section are all prosecutions in respect of any food drug or substance which has been procured or purchased for the purpose of analysis. Thus, time runs from the time of "the purchase", even though that may not have been the time when the food drug or substance was procured or purchased for the purpose of analysis. (In any prosecution that is within s295, the transaction, which is called "the purchase" in the section, would be described differently. The allegation in the information would almost certainly be that the transaction was a "sale" by the defendant, though it is unnecessary for the purposes of this case to make any exhaustive examination of what are the prosecutions which are covered by s295.)

As the transaction which brings a prosecution within the time limit imposed by s295 is not necessarily the same transaction as is alleged in the information, it follows that the food drug or substance in respect of which the prosecution is brought may not have been "purchased" for the purpose of analysis by "the purchase" from which time runs. Hence even the word "purchased" in the section is not necessarily linked to "the purchase" from which time runs. When one comes to the word "procured", it is also the case that the transaction by which the food drug or substance has been "procured" for the purpose of analysis is not necessarily "the purchase" from which time runs.

Where the section uses the word "purchased", it is clear that what is referred to is the purchasing of a food drug or substance by a contract for the sale of goods. Where the section uses

the word "procured", what has to be decided, in order to resolve the point of law in this case, is whether the word is used in a general sense of obtaining or getting possession of by some means or other, perhaps with some additional element of the use or effort or persuasion, or whether it is used in a special sense by reason of the same word being used in other sections of the Act. The word "procure" is used in other sections of the Act, where powers are given to authorized officers to "procure" samples of foods drugs or substances. In my opinion, an examination of those sections shows that the word "procured" in s295 is not used in the sense of "procured by an authorized officer pursuant to his powers under this Act". The relevant sections are s277, s278 and s279, but it may first be observed that s276, which entitles any purchaser of any food drug or substance to submit it to an analyst for analysis, upon payment of the prescribed fee, shows that any food drug or substance may be purchased by any person and not only by authorized officers, for the purpose of analysis.

Section 277, s278, and s279 may be set out in simplified form for the purposes of these reasons. So simplified, s277 and s278 are in these terms:—

"277. Any authorized officer—

(a) may (at the cost of the Department or the council concerned) procure samples of any food,...and

(b) if he suspects the same to have been sold contrary to this Act shall submit the same to an analyst for analysis."

"278. Any authorized officer who has reason to suspect that any food ... exposed ... for sale is adulterated ... shall obtain samples of the same and submit them to an analyst for analysis."

In s278, an express duty is imposed on an authorized officer to "obtain" samples. Section 279 shows how he is to go about obtaining the samples. It provides:

"279(1). Any authorized officer—

(a) (on payment...to any person preparing...any food...of the current market value thereof) may at any place of preparation...demand and procure such samples as are required for the purposes of this Act;

(b) may require such person to show and permit the inspection of any package in which such food... is at the time kept and to procure therefrom the samples demanded...

"(4) The procuring of any sample pursuant to this section and the payment of the current market value thereof...shall for all the purposes of this Act be deemed to be a sale by such first mentioned person...to such officer of the food...contained in the sample."

The three sections all relate to "authorized officers". An "authorized officer" is a person authorized by the Commission of Public Health or the council of a municipality (s3) and is the person generally referred to as a health inspector. An authorized officer has a duty to "obtain" samples of food which is exposed for sale and which he suspects is adulterated (s278), but his powers with respect to food are expressed as powers to "procure" samples of food (s277; s279(1)).

The conduct of an authorized officer by which he exercises his statutory powers to "procure" samples will always be something which constitutes a sale of the food (s279(4)), but, in my opinion, it does not follow that these are the only ways an authorized officer can get food into his hands for the purpose of analysis.

It seems to me that a member of the public may often bring an article of food to the attention of an authorized officer and that the authorized officer may decide that he should obtain the food from that person for the purpose of analysis, to see whether someone has committed a breach of the *Health Act*. In my opinion, it is an appropriate use of language, in such a case, to say that the food has been "procured" by the authorized officer for the purpose of analysis. "Procure" is a word that can mean merely "to get possession of", or "to obtain" as well as having a meaning which carries a connotation of the use of effort, or persuasion, or the use of special means. In my opinion, where the word "procure" is used in s277, s278 and s279 it is used as a convenient word to describe the act by which the food is got into the possession of an authorized officer, even though there may be some scope for thinking that it is used as some kind of term of art to

describe the special means by which an authorized officer may obtain samples of food. When one finds the word "procured" used again in s295, one finds that it is used in a clause expressed in impersonal terms. There is no apparent reason why such an impersonal clause should be limited in operation to authorized officers. It is capable of being applied, at least as far as concerns food which has been purchased for the purpose of analysis, to persons other than authorized officers. I do not see any reason why the word "procured" should be read as a condensed expression for "procured by an authorized officer pursuant to his powers under this Act". In my opinion, the reference in s295 to the alternative of "purchased" is not sufficient to produce such a result. Hence, in my opinion, the word "procured" in s295 is to be read as meaning "obtained" or "got possession of", without any further connotation.

The result is that I have come to the conclusion that the fact that, in this case, the woman, who had purchased the bread from a retailer, handed it over to the informant voluntarily and gratuitously, is not a fact which prevents the bread from being food which has been procured for the purpose of analysis.

The question whether the purpose for which food has been procured was or was not "the purpose of analysis" is a question of fact. In my opinion, the magistrate's finding that the informant did procure the bread for the purpose of analysis was one which was open to him on the evidence.

I add that the result which I have reached seems to me to be in accord with what may be thought to be the policy of s295. The policy seems to be to ensure that, where a defendant is charged with an offence under the Act consisting of a transaction relating to food which can, from one point of view, be described as a "purchase", then if the food has been obtained by the informant (or by somebody who can be described as an opposite party to the defendant) for the purpose of analysis, no more than sixty days should elapse from the time when the food went out of the defendant's possession to the time when the prosecution is instituted. If conduct such as that by which the informant in this case obtained the bread was not a case where food had been procured for the purpose of analysis, then the situation would be that whether or not a defendant got the protection given by the section would depend upon the chance circumstances of whether an authorized officer obtained the suspected food by obtaining it directly from a shopkeeper or whether he obtained it after someone else had obtained it from a shopkeeper. I can see no reason why the period should not be applicable in the latter case, and the construction I have placed upon the word "procured" in s295 does not produce the effect that it is not.

The order is: order nisi discharged with costs fixed at \$200.

Solicitors for the informant: Morrison, Teare and Purnell as agents for Ambroses.
Solicitors for the defendant: Middletons.