IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 128/79

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BETWEEN IAN McWHIRTER

Appellant

AND HARVEY CHARLES NELSON MATTHEWS
(New Zealand Apple and Pear Board)

Respondent

Coram: Woodhouse J (Presiding)
Richardson J
McMullin J

Hearing: 1 April 1980

Counsel: V.R.W. Gray for Appellant
C.H. Toogood for Respondent

Judgment: 1 April 1980

ORAL JUDGMENT OF WOODHOUSE J

On 14 November 1978 Mr N.C. Jaine, S.M. convicted the appellant on a charge under s. 42(1)(b) of the Apple and Pear Marketing Act 1971 that he sold to persons other than the Board approximately 87 bushels of pears which fruit had not previously been purchased from the Board. In entering the conviction the Magistrate had before him short undisputed facts that the appellant as Manager in Palmerston North of a branch departmental store of McKenzies N.Z. Ltd. had arranged for a purchase of pears from a local grower which the next day had been delivered to the store and then were sold by sales people of the company at or in the vicinity of the store. In answer to this evidence the basic submission was made that at the time of the resale of the fruit the appellant himself was absent from the premises and also that he had taken no part in controlling the sale.

In his succinct and careful judgment the Magistrate has emphasised evidence given by an investigation officer of the Board to the effect that the appellant had made to that witness a very frank explanation of what had occurred. He had freely conceded that the fruit had come from a local grower. And then he was asked: "Did you buy three Wattie's bins of pears and resell them?" The answer according to the witness was "Yes". The evidence was not challenged. The Magistrate also referred to an admission by the appellant at the same interview that he had been approached by the local grower by telephone who had asked whether the appellant wished to purchase pears from that grower.

Against those two critical pieces of evidence, as the Magistrate clearly regarded them, he said this:

> "Section 2 of the Apple and Pear Marketing Act contains an extended definition of the word 'sale' and it includes the act of 'receiving for sale'. I am quite satisfied that, although Mr McWhirter was not present on February 22nd at the shop, his involvement in the telephone approach by the grower and his obvious acceptance that fruit could be brought into the shop and the subsequent acceptance at the shop of the fruit, the delivery of which had been arranged by Mr McWirther, and his acknowledgement that he had bought the three Watties bins of pears and resold them and that the

bins were the same bins as found outside the shop on February 22nd, that those actions fell within the extended definition of the word 'sale' and that the defendant should accordingly be convicted."

S.2 of the Act defines "sale" in the following way:

> "'Sale' includes barter and exchange or supply for profit; and also includes offering or attempting to sell, or receiving for sale, or having in possession for sale, or exposing for sale, or sending or delivering for sale, or causing or allowing to be sold, offered, or exposed for sale; and 'to sell' has a corresponding meaning:"

There followed an unsuccessful appeal to the Supreme Court. It raised the issue as to whether or not s.42(1)(b) has defined an offence of strict liability; and, on the basis that the offence was not one of strict liability, an argument was put before Beattie J that on the facts of the case it had not been shown that the appellant was possessed of the necessary mens rea. It is unnecessary to traverse the reasons for the judgment. The Judge held in effect that the offence was one of strict liability but he ended his judgment in the following way:

> "I have gone into these matters out of deference to the careful argument prepared by Mr Gray but basically it seems to me that the learned magistrate has held on the facts that the appellant did know that he was not purchasing Board fruit."

He was then asked for an order in terms of s.144 of the Summary Proceedings Act 1957 granting leave to appeal to this Court on the following grounds:

> A. THAT the question whether offences against section 42(1)(b) of the Apple and Pear Marketing Act 1971 are offences of strict liability not requiring mens rea on the part of the defendant as an essential ingredient of the offence is a question which, because of its general and public importance, ought to be submitted to the Court of Appeal for decision.
>
> B. THAT the decision of this Court dated 23 May 1979 holding (inter alia) that offences against the said section 42(1)(b) were offences of strict liability was erroneous in law.
>
> C. THAT there is no evidence or inadequate evidence in this case upon which a conviction against the Appellant can with propriety be based.

The Judge granted leave to appeal to this Court but quite clearly in doing so he was influenced by the question that would be raised in paragraph A of the grounds put forward in the motion. In passing it may be mentioned that paragraph C would really involve no more than an attempt to reopen in this Court the factual issues before the Magistrate in order to consider whether he had been justified in the findings to which reference has already been made.

Here today Mr Gray has put before us a carefully prepared synopsis of the argument that he would wish to present to this Court in support of the appeal. We have had the advantage of understanding the kind of argument that he would wish to advance. An initial question arises however as to whether on the facts found by the Magistrate any question of law of any general and public importance can possibly arise.

The short extract from the judgment of the Magistrate against the pieces of evidence already mentioned involves in my opinion a conclusion that Mr McWhirter knew in arranging for the purchase from the local grower that he was handling fruit for commercial resale purposes - no doubt on behalf of his employer but nonetheless as an individual - that might be described as non-Board fruit. That conclusion embraces the only issue of mens rea that could arise if it were assumed in appellant's favour that the offence does require proof of knowledge and intention. It is not possible on a case stated of this kind to develop what may be described as a general appeal in order to review the original findings of the Magistrate so that whatever the answer to the question posed in the case stated the inevitable result of that must be that Mr McWhirter has been rightly convicted. It has been consistently held by this Court that it is inappropriate to answer important questions of law on a hypothetical basis and really in the final analysis that must be the situation on the present occasion.

For those general reasons I would dismiss the appeal. The Court being unanimous the appeal is dismissed accordingly. The respondent does not seek an order for costs.

A.A. Williams J

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BETWEEN IAN McWHIRTER

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AND HARVEY CHARLES NELSON MATTHEWS (NEW ZEALAND APPLE & PEAR BOARD)

Respondent

Coram - Woodhouse J.
Richardson J.
McMullin J.

Hearing - 1 April 1980

Counsel - V.R.W. Cray for Appellant
C.H. Toogood for Respondent

Judgment - 1 April 1980

ORAL JUDGMENT OF RICHARDSON J.

An appeal to this Court under s.144 of the Summary Proceedings Act 1957, following a general appeal from the Magistrate's Court to the Supreme Court, is confined to questions of law arising in the original general appeal to the Supreme Court. Section 144 provides for the granting of special leave where in the opinion of the Supreme Court, or of this Court if the Supreme Court has refused leave, the question of law involved in the appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision.

The only such question of law specified in the application for special leave in this case is whether offences against s.42(1)(b) of the Apple and Pear Marketing Act 1971

e offences of strict liability not requiring mens rea on he part of the defendant as an essential ingredient in the offence. There was a further point raised in the application as to the sufficiency of the evidence before the Magistrate's Court to justify a conviction but Mr Gray for the appellant, rightly in my view, acknowledged that while that might raise a question of law it was not one of general or public importance. It follows that we cannot review the findings of fact of the Magistrate's Court.

The preliminary question for determination is whether or not on the evidence and findings of fact in this case the answer to the question posed would affect the ultimate decision in the present case. This is because in terms of s.144 our jurisdiction is limited to a "question of law arising in any general appeal" (s.144(1)) or as it is put in s.144(3) "the question of law involved in the appeal". Ministry of Transport v Burnetts Motors Ltd (CA 84/79 judgment 5 March 1980) is a recent case in which we concluded that a question of law referred to this Court did not really arise on the facts and we declined to answer it for that reason.

Like Woodhouse J. I am satisfied that the proposed mens rea question does not really arise on the facts of this case. For whether or not mens rea is an ingredient of the offence created by s.42(1)(b), on the facts, as found, a conviction must follow. First, the Magistrate found that the appellant had received the fruit for sale and accordingly fell within the extended definition of "sale" in s.2 of the Act. Mr Gray submitted that the Magistrate was not justified

the evidence before him in finding that there was such a receiving for sale. But on this appeal, which is limited to the proposed question of law already referred to, we are not entitled to go behind that finding. So as Beattie J. observed in the Supreme Court "the learned magistrate decided this matter on the facts away from any argument over strict liability." Second, there are the concurrent findings of the Magistrate's Court and the Supreme Court as to the appellant's knowledge that the fruit that he had arranged to purchase and which was sold in the supermarket was fruit which had not been previously purchased from the Board. At the end of his judgment, after dealing with the mens rea point, Beattie J. returned to the factual findings of the Magistrate as to the appellant's involvement in the incident. He said:

> " I have gone into these matters out of deference to the careful argument prepared by Mr. Gray but basically it seems to me that the learned magistrate has held on the facts that the appellant did know that he was not purchasing Board fruit. There was a certain evasiveness in his answers which reinforce the learned magistrate's findings in this respect. "

Clearly that purchase was for the purpose of subsequent sale to customers of the supermarket. Indeed, the appellant had made the further admission to the inspector noted in the Magistrate's judgment that he had purchased and resold the three bins of pears.

Against that background I am satisfied that the proposed question is not one which requires determination for the purposes of deciding the present case. In my view the difficult question of whether or not mens rea is an ingredient of the offence created by s.42(1)(b) must await another day.

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Coram - Woodhouse J.
Richardson J.
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Counsel - V.R.W. Gray for Appellant
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Judgment - 1 April 1980

ORAL JUDGMENT OF McMULLIN J.

I agree with what has been said by Woodhouse and Richardson JJ. and desire to add only a few remarks of my own on the subject of mens rea which Mr Gray would place at the heart of this appeal. By 'mens rea' is meant an intention to do that which the statute forbids. In Allard v Selfridge and Company Limited [1925] 1 KB 129, Shearman J. said "The true translation of that phrase is criminal intention, or an intention to do the act which is made penal by statute or by the common law." And further, "What has to be considered in each case is what is the act struck at by the statute." (137).

What s.42(1)(b) of the Apple and Pear Marketing Act 1971 forbids is the "sale", within the extended definition given to that word by s.2 of the Act, of apples and pears which

have not previously been purchased from the Board by the person who affects the sale or by some other person. There was ample evidence before the Magistrate in this case to support the findings which are implicit in his judgment that appellant, when buying the fruit for sale at McKenzies, knew that it had come from a source other than the Board. The fact that appellant may not have known of the extended definition of "sale" given by s.2 is a plea of ignorance of law, not of fact. It is on ignorance of fact only that a plea of lack of mens rea can be based because the absence of mens rea really consists in an honest and reasonable belief entertained by appellant of the existence of facts which, if true, would make the act charged against him innocent (Bank of New South Wales v Piper [1897] AC 383, 389).

I agree that in this case the question of law sought to be posed for the determination of this Court would not, in whatever way it was answered, affect the appellant's conviction. I agree, therefore, that the appeal should be dismissed.

Macfarlan J