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M NO 542/83

IN THE HIGH COURT OF NEW ZEALAND

WELLINGTON REGISTRY

1274

BETWEEN TAWA MEAT MART LIMITED

Appellant

AND DEPARTMENT OF TRADE AND INDUSTRY

Respondent

Hearing: 11 June 1984

Counsel: P F Boshier for Appellant
JBM Smith for Respondent

Judgment: 26 September 1984

JUDGMENT OF JEFFRIES J

This is an appeal by Tawa Meat Mart Limited against convictions and sentence pursuant to s 18(1)(a) of the Economic Stabilisation Act 1948 for failing to comply with the Price Freeze Regulations 1982. The informant had laid two informations alleging that the defendant company, being a manufacturer in one case, and a wholesaler in another, on or about 18 August 1982 did commit offences against s 18(1)(a) of the Economic Stabilisation Act 1948 in that it did without lawful justification or excuse, fail to comply with Regulation 4(1)(a) of the Price Freeze Regulations 1982, namely, did sell 12 kilograms of sausages to Paul Papasifakis, trading as Epuni Fish

Supply, for $1.75 per kilogram, making a total of $21.00, being more than the normal price at which sausages were last sold by Tawa Meat Mart Limited in similar quantities and under similar conditions of sale before the commencement of the said Regulations. The director and manager of the appellant company who gave evidence did not dispute the facts. He believed increases to the cost of meat were exempt from the Price Freeze Regulations 1982. The company had increased the price of its sausages because the cost of meat from its supplier had increased. After a Trade and Industry inspector had spoken to the managing director the prices were immediately reduced to their previous level. The District Court Judge convicted the defendant company on both charges and fined the company $200 on the charge referring to the company as a manufacturer, court costs of $20.00 and solicitor's fee of $75.00. On the other charge the company was convicted and discharged.

The company appeals on several points of law with regard to the convictions entered by the District Court Judge. Counsel for the appellant submitted:-

(i) That the sausages in question were "fresh meat" and therefore were exempted goods as specified in the Second Schedule to the Price Freeze Regulations 1982. This is the mistake relied upon if by law the sausages are held not to be "fresh meat".

(ii) That the price of the sausages was influenced to a substantial extent by the

prices realised for similar goods sold by auction and therefore were exempted goods as specified in the Second Schedule of the Price Freeze Regulations 1982.

(iii) That the appellant company was mistaken with regard to its right to increase the price of sausages and it therefore had "lawful justification or excuse" in terms of s 18(1)(a) of the Economic Stabilisation Act 1948 for its actions. See ground (i) above.

(iv) That the appellant company may be liable as a wholesaler, or as a manufacturer, but not both.

I propose to deal with the appellant's submissions as listed.

(i) Pre-Cooked Sausages - Fresh Meat?

Regulation 12(1) of the Price Freeze Regulations 1982 provides:-

"Except as provided in this regulation, nothing in these regulations applies with respect of goods or services specified in the Second Schedule to these regulations."

The Second Schedule exempts "fresh meat, and frozen fresh meat, except poultry". Fresh meat is nowhere

defined in the Price Freeze Regulations 1982 so the meaning attributed to those words must be their ordinary and natural meaning unless the statutory context otherwise requires.

On the evidence advanced by the company a batch of sausages was made from 20 kilograms of meat (beef and mutton trimmings), 3 kilograms of water, 1.5 kilograms of meal, 1.4 kilograms of seasoning and 0.5 kilograms of GS301 (emulsifier). The meat is minced and bound together with the other ingredients before going into a filler and sausage skins. The sausages in question were then cooked before they were sold to Epuni Fish Supply.

The precise issue here is whether sausages which contain seasoning and other additives and which are cooked can be described as meat which is "fresh". In the Shorter Oxford English Dictionary (Oxford University Press 1973) the definition given to fresh, which is indicated as applying to meat, is:-

> "II 1. New; not artificially preserved; not salted, pickled, or smoked".

It might be argued that the sausages were "new" in the sense that they were newly made but it could equally be argued that new is meant in the sense of original condition and in relation to meat this means raw meat. The overall sense conveyed by each part of the definition given is that fresh meat is meat which has not undergone any form of preservative treatment. What constitutes preservative treatment might be open to debate. For

instance today it is thought to be quite consistent to talk of "frozen fresh" meat as shown in the regulations although in the past frozen fish has been held not to be fresh fish. See William Warner's Sons & Co. v Midland Railway Co. [1918] A.C. 616. In the present case whether the sausages have undergone preservative treatment is perhaps not clear, I would favour the view that they have. However what I believe to be fatal to the appellant's case is the fact that the sausages were pre-cooked. Although the dictionary definition is unclear on this point as a matter of ordinary common usage when the word fresh is used in conjunction with the word meat it implies that the meat is raw. The statutory context provides no support for a contrary view. This ground fails.

(ii) The Price of Sausages Influenced by Auction Prices

The appellant's second submission is based on the second exemption contained in the Second Schedule of the Price Freeze Regulations 1982. This provision can be divided into two quite separate clauses. The first:-

> "Goods which have been sold by auction either to the owner for the time being of the goods or to any person through whom he derives title to the goods and ..."

the second:-

> "Goods sold by private treaty in circumstances where the prices charged are normally influenced to a substantial extent by the prices realised for similar goods sold by auction".

The appellant cannot rely on the first clause because the sausages were not "the" goods sold at auction. The sausages consisted of several goods purchased at auction minced together with seasoning meal, water, and emulsifier.

The second clause of the provision in the Second Schedule permits of some ambiguity. On one interpretation the "goods sold by private treaty" refers to goods that were never sold by private auction but which are goods privately purchased at a price based on prices paid at auction sales for goods which were the same or similar. On the other interpretation, favourable to the appellant, "goods sold by private treaty" refers to goods which were originally sold by auction but which have subsequently been sold by private treaty to other persons and undergone some changes although remaining similar to the originally auctioned goods. I must discount this second interpretation as it renders largely redundant the following part of the first clause "Goods which have been sold by auction ... to any person through whom [the owner for the time being] derives title to the goods ..." and further it would leave those persons who satisfy the first interpretation suggested, without any exemption. That is a result I do not think the regulations intended. This ground fails.

(iii) Lawful Justification or Excuse

The words "lawful excuse" and similar phrases have been considered in many cases. The courts however have

declined to give a precise interpretation to words of this kind. See Wong Pooh Yin, alias Kwang Sin, alias Kar Sin v Public Prosecutor [1954] 3 All E.R. 31; Police v Carter [1978] 2 NZLR 29, 33 per Cooke J. In considering the effect of these words it has never been regarded that they can justify an accused relying on a defence not recognised by law. This leads to the somewhat tautological conclusion that a lawful excuse is one supported by law. See R v Burney [1958] NZLR 745 (C.A.)

In the present case the primary inquiry is in reality whether or not the appellant's alleged mistaken belief constitutes a defence known to the law. The success of a defence of mistake depends very much upon the mens rea element of the offence required by statute. The Court of Appeal in Civil Aviation Department v MacKenzie [1983] NZLR 78 adopted the Canadian approach as outlined in R v City of Sault St. Mane (1978) 85 DLR (3d) 161 to determining this question. At page 84 in the joint judgment of Davison C.J., Cooke and Richardson JJ delivered by the latter:-

> "In the result the Supreme Court of Canada recognised three categories of offence: (1) those offences in which mens rea such as intent, knowledge or recklessness must be proved by the prosecution; (2) those offences in which the doing of the prohibited act prima facie imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care; and (3) absolute offences (pp 181-182). Public Welfare offences will prima facie fall

within the middle category unless it is clear from the statute that either absolute liability or full mens rea was specifically intended".

The present case concerns a public welfare regulatory offence. It is an offence constituted in an Act concerned with the regulation of the economy and commerce and the maximum penalty prescribed is not great. (Maximum fine of $5,000 for corporate body). Prima facie then this is an offence which falls in the second category listed above. There are no words such as wilfully or knowingly which indicate full mens rea was intended, nor is there any indication that absolute liability was intended. The words "lawful justification or excuse" might be of some relevance in this regard, see Sweetman v Industries and Commerce Department [1970] NZLR 139, 145-146. It is therefore open to the appellant to argue that mens rea was absent and that he was without fault although in light of the Court of Appeal decision in Civil Aviation Department v MacKenzie (supra) the onus for discharging the persuasive burden of proof is on the appellant. There is no doubt that an honest and reasonable mistake of fact is ground for showing that mens rea was lacking. In this way the public welfare is protected without at the same time "snaring the diligent and socially responsible". Civil Aviation Department v MacKenzie (supra) per joint judgment at p.85.

But having identified that the appellant is entitled to rely on a defence of honest and reasonable mistake of fact I must agree with the finding of the District Court Judge that what the appellant here contends

is not a mistake of fact but rather a mistake of law. Mistake of law is generally not a recognised defence in Commonwealth jurisdictions and therefore cannot constitute a lawful excuse. The only cases where it is clear that mistake of law may negative mens rea are those cases where the actus reus may be so defined that a mistake of law may result in the accused not being intentional with respect to some element in it and consequently not having mens rea.

In the present case the actus reus is not defined such that a mistake of law will negative mens rea in this way. In the ordinary case it is well established that mistake of law is no defence. See, e.g., R v Tolson, 23 Q.B.D. 168; Marshall v Foster (1898) 24 V.L.R. 155; Johnson v Youden and Others [1950] 1 K.B. 544; Bergin v Stack (1953) 88 C.L.R. 248; Sancoff v Holford ex parte Holford [1973] Qd. R. 25; Brook v Ashton [1974] Crim. L.R. 105.

In Cambridgeshire and Isle of Ely County Council v Rust [1972] 2 Q.B.D. 426 the respondent wrongly believed that he was entitled to set up a stall on a carriageway leading off a trunk road. The Highways Act 1959, s 127, prohibited pitching a stall in a highway but the respondent having made enquiries with local officials was informed that he was permitted to set up a stall on the carriageway. After the respondent had been operating for three years he was successfully prosecuted under the Highways Act 1959. Lord Widgery C.J. said at p.434:-

> "I think that in order for the defendant to have lawful excuse for what he did, he must honestly believe on reasonable grounds that the facts are

> of a certain order when, if they were of that order, he would have an answer to the charge, and indeed his conduct would be lawful and not contrary to the law. I do not believe at any time one can have lawful excuse for conduct because one is mistaken as to the law; everyone is supposed to know the law, but a mistake of fact of the kind which I have described seems to me to amount to lawful excuse".

There are some authorities which are not completely reconcilable with this proposition, notably Wong Pooh Yin v Public Prosecutor (supra) where the defendant was held to have lawful excuse in circumstances where he had been misled as to his legal position by government officials. In a sense ignorance of the law was held to be a defence but the ignorance was caused by reasonable reliance upon misleading official action. There may exist a doctrine of "criminal estoppel" although cases such as Cambridgeshire and Isle of Ely County Council v Rust (supra) cast severe doubt on such a proposition. See generally Ashworth "Excusable Mistake of Law" [1974] Crim L.R. 652, 657-661. Whatever view is taken on this point no case for "criminal estoppel" is open on the present facts. There was never any official representation or action which would have lead the appellant company to believe it was entitled by law to raise the price of its sausages.

The only possible argument that the appellant has here is that there was a mistake with regard to the meaning of "fresh meat" and that a mistake as to the

meaning of common words is in fact not a mistake of law but a mistake of fact.

An authority for treating the interpretation of a word in a statutory instrument as a question of fact is Brutus v Cozens [1973] A.C. 854 in which the House of Lords held that the meaning of "insulting ... behaviour" was a question for the jury. I think that this decision ought to be taken as no more than a recognition that there are some words such as "insulting", "disorderly", "goods", which are capable of a clear accepted definition and are commonly understood but with respect to which it may be difficult to determine whether a given fact situation satisfies that accepted definition; such a determination is a question of fact for the jury. See Sancoff v Holford (supra) where mistaken belief as to meaning of "obscene" held to be mistake of law. Where, however, there are doubts as to the definition of a word although no difficulty in applying that definition once determined then the determination involved is one of law for the judge. In the present case the words at issue, "fresh meat", fall into this second category and therefore their interpretation, or scope, is a question of law. The appellant's mistaken belief is thus not a defence known to law.

If I am wrong on this last point the appellant must nevertheless fail because I am not satisfied that it discharged the onus proof that it made an honest and reasonable mistake regarding the meaning of "fresh meat". In evidence the managing director of Tawa Meat Mart Ltd said:-

> "When I made the decision to put them up I was aware of the price freeze but I knew meat was exempt. I knew for a fact that meat was exempt. With sausages, like always, I assumed sausages were meat. They are meat as far as I am concerned".

This evidence clearly indicates that the mistake made was not a mistake as to the meaning of "fresh meat" but rather the mistake that the Regulations exempted meat in general as opposed to "fresh meat" only. The appellant has not shown on the balance of probabilities that it was mistaken as to the meaning of fresh meat : in fact its evidence suggests a mistake of a different nature which can only be viewed as a mistake of law and which therefore cannot avail it as a defence.

(iv) Manufacturer or Wholesaler

This ground of appeal can be disposed of briefly. Mr Smith for the respondent says it was represented to the trial Judge that the charges were in the alternative and that the informant only sought conviction on one, namely, as the manufacturer. The conviction on the wholesaler charge is therefore quashed. Otherwise the appeal against conviction is dismissed.

There was an appeal against sentence but it is dismissed as the penalty was not manifestly excessive.

Solicitors for Appellant: MacAlister Mazengarb Parkin & Rose

Solicitors for Respondent: Crown Solicitor, Wellington