IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.220/84

[redacted]

1067

BETWEEN WAIKATO CARBONISATION LIMITED

Appellant

A N D WAIKATO VALLEY AUTHORITY

Respondent

Hearing : 4th September 1984

Counsel : P.J. Morgan for Appellant
R. Wilson for Respondent

Judgment : 4th September 1984

(ORAL) JUDGMENT OF BARKER J

This is an appeal against the conviction of the appellant in the District Court at Hamilton on 28th March 1984. An appeal against sentence (a fine of $400 and costs) is abandoned.

The appellant was convicted on a charge under Section 34(1)(b) of the Water and Soil Conservation Act 1967 ("the Act"). The information alleged that on 18th August 1983, at Rotowaro, the appellant, other than in accordance with an authorisation by or under the Act or an exemption from the provisions of the Act, did "discharge waste, namely, char cooling water carrying suspended solids namely char and coal residues, into a drain passing through the property of Waikato Carbonisation Limited at Rotowaro into natural water, namely the Awaroa Stream".

Section 34(1) of the Act, as in force at the time of the alleged offence, read:

"34. Offences - (1) Every person commits an offence against this Act who, otherwise than as authorised by or under this Act or in accordance with an exception from the provisions of this Act, -

(a) Dams any river or stream; or
(b) Diverts any natural water or discharges any natural water or waste into any natural water; or
(c) Takes or uses any natural water; or
(d) Knowingly causes or permits any chemical, metallic, or organic wastes or any unsightly or odourous litter or refuse to enter any water that has been classified under section 26E of this Act."

I also record Section 34(3) which may have had some relevance to the prosecution:

"For the purpose of this section a person shall be deemed to discharge natural water or waste into natural water if he places or causes to be placed any natural water or waste in a position where it is liable to fall or descend, or be washed or to percolate into or be carried by wind, tide, or current, into any natural water."

The District Court Judge, rightly in my view, rejected a submission made at the conclusion of the prosecution case that there was no case to answer. The appellant then called evidence designed to show that, in the circumstances, the appellant had, on the balance of probabilities, proved that it had taken reasonable care to prevent the alleged discharge. The District Court Judge, in an oral judgment, found that the appellant hae discharged carbonaceous material into the stream and therefore that the prosecution had established an offence under Section 34(1)(b), which was an offence of absolute liability.

Counsel for the defendant (as the appellant then was) had submitted to the District Court Judge that an offence under Section 34(1)(b) was in the "public welfare" category recognised by the Court of Appeal in Civil Aviation Department v. McKenzie, (1983) NZLR 78. The District Court Judge held, contrary to that submission, that the offence created by that

section was one of absolute liability; he did not in his judgment consider whether the evidence called for the appellant was sufficient as to discharge the onus cast on the appellant to prove that it took all reasonable steps in the circumstances.

The principal submission of Mr Morgan for the appellant today is that the District Court Judge was wrong to have categorised the offence under Section 34(1) of the Act as one of absolute liability; rather, he should have considered that it was one of "strict" liability and adjudicated on the defence evidence.

The notion of a category of "public welfare offences" for which there is strict liability, but in respect of which the defendant has an opportunity of proving, on the balance of probabilities, that it took all reasonable steps, was first given prominence in the decision of the Supreme Court of Canada in R v. City of Sault Ste. Marie (1978), 85 DLR (3d) 161. In that case, the respondent municipality was charged with a statutory offence. The Act in question provided that every municipality or person "that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence". The Canadian Supreme Court, following certain comments in Sweet v. Parsley, (1970) AC 132, concluded that there was an intermediate category of offences between those of absolute liability and those where mens rea was an ingredient which had to be proved by the prosecution on the usual basis. It categorised such offences as those which relate to public welfare and held that with such offences, proof of the prohibited act prima facie imported an offence but it is open to the accused to avoid liability by proving affirmatively on the balance of probabilities that he took all reasonable care.

The majority of the Court of Appeal in McKenzie's case accepted the proposition in the Canadian case that there was a "half-way house" concept; it concluded that this concept had

been in New Zealand law from the time of the decision of the Court of Appeal in R v. Ewart (1905), 25 NZLR 709.

The decision therefore which I must follow is as set out in the judgment of the majority in McKenzie's case. There are now three categories of offences recognised, namely:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution, either as an inference from the nature of the act committed or by additional evidence;

2. Offences where there is no necessity for the prosecution to prove the existence of mens rea. 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. This involves a consideration of what the reasonable man would have done in the circumstances; the defence will be available if the accused believed in a mistaken set of facts which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event. These offences are called offences of strict liability;

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free from fault.

The rationale behind the creation of the category of "public welfare offences" is to be found in the Canadian decision where, at p.171, Dickson, J., delivering thejudgment of the Court, said:

> "Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has

> exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked."

The Court of Appeal put it this way at p.84 of McKenzie's case, adopting the rationale of the Canadian case:

> "Public welfare offences reflect the need in the complexities of a modern society to maintain through effective enforcement high standards of public health and safety. Such offences are not criminal in any real sense and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application even though they are prohibited in the public interest and enforced as penal laws through the utilisation of the machinery of thecriminal law. While public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests, the principle that punishment should in general not be inflicted on those without fault applies except where the legislation has made it clear that guilt follows proof of the proscribed act. Where the no-fault principle applies the burden of proof should fall upon the defendant as he is the only one who will generally have the means of proof and it is not improper to expect him to come forward with the evidence of due diligence."

The principles therefore seem to be clearly established; what are not entirely clear are the criteria for the precise definition of public welfare offences. This difficulty was pointed out by Gallen, J. in O'Neil v. Ministry of Transport (6th April 1984, M.66/84, Auckland Registry) and is mentioned forcefully in the dissenting judgment of McMullin, J. in the McKenzie case.

I must therefore consider whether the offence in question is one of strict liability or whether it is one of absolute liability as those categories are defined.

I consider that it was one of "strict" liability for the following reasons:

First, there is an absence of clear legislative intention to create absolute liability. In coming to this conclusion, I do not ignore Mr Wilson's careful submissions as to the scheme of the Act. However, it does appear to me that Section 34(1) does not necessarily lead one to the conclusion that absolute liability is intended. Indeed, the Legislature makes the distinction (noted by the District Court Judge) that an offence under Section 34(1)(d) requires proof of mens rea, whereas an offence under Section 34(1)(a), (b) or (c) does not. Just because there is that contrast, it does not necessarily follow that subsection (1)(a) to (c) create offences of absolute liability.

Secondly, the penalties which can be imposed, namely, a fine of $2,000 and a further fine of up to $100 per day for a continuing offence, indicate that the offence is regarded as a serious one - to be contrasted with offences where the penalty is slight. The cases indicate that a serious penalty such as the consequence of the conduct of the municipality in the Canadian case will be a fairly helpful pointer to a finding of strict as distinct from absolute liability.

Thirdly, the mischief aimed at by Section 34 is one which can also be the subject of other proceedings; namely, an application by the controlling regional water board or authority for an order in the District Court under Section 34B of the Act.

Fourthly, this is an Act clearly intended to promote "social welfare"; the purposes of the Act include keeping rivers and streams free from industrial pollution.

Fifthly - and this is perhaps the clinching consideration - in the Canadian case, which was specifically and comprehensively followed by the majority of the Court of Appeal in McKenzie's case, the offence under consideration which was held to be one of strict liability; that offence was very similar to the offence with which the present appellant was charged.

Therefore, it follows that I am of the view that the offence of strict liability was created.

I hold, in coming to this conclusion, that I am bound by the decision of the Court of Appeal; my decision appears to run counter to the House of Lords case of Alphacell Limited v. Woodward, (1972) AC 824. The section under consideration in that case created an offence for every person "if he causes or knowingly permits to enter a stream any poisons, noxious or polluting matter". The House of Lords held that the concept of mens rea was inapplicable. Viscount Dilhorne stated at p.839:

> "In this case it was argued that it was an essential ingredient of the offence that the appellants should - the case being dealt with as if there was no negligence - have intended the entry of the polluting matter into the river, that is to say, that they should have intended the commission of the offence. I cannot think that that was the intention of Parliament for it would mean that a burden of proof would rest on the prosecution that could seldom be discharged. Only if the accused had been seen tipping the polluting material into a stream or turning on a tap allowing a polluting liquid to flow into a stream or doing something of a similar nature could the burden be discharged. Parliament cannot have intended the offence to be of so limited a character. Ordinarily all that a river authority can establish is that a discharge has come into a stream from a particular source and that it is of a polluting character."

From my very brief perusal of the Canadian case and of the McKenzie case, that decision of the House of Lords does not appear to have been referred to in either decision. Howeve no matter how strong the persuasive authority of the House of Lords may be, in view of the clear commitment of the Court of Appeal to the Sault Ste. Marie principle, I consider that I am bound to hold that this particular offence is one of strict liability.

Before departing with the Alphacell case, I note that one of the problems foreseen by Viscount Dilhorne can be overcome by the approach in the Sault Ste. Marie and McKenzie cases. Both Courts recognised that problems for the

prosecution could be overcome by placing the onus of proof on the defendant within whose knowledge the relevant facts would always be.

It follows, therefore, that the District Court Judge was wrong to categorise the offence as one of absolute liability and he should have considered that it was one of strict liability. Therefore, the conviction must be quashed.

The question then arises as to what step should now be taken by the Court. Although I discussed with counsel a suggestion that I could consider the notes of evidence and decide from them whether the appellant had discharged the onus of proof on the balance of probabilities, neither counsel strongly submitted that I should take that course. Having looked at the nature of the evidence, it would be undesirable for me to take that course. There were some minor questions of credibility; there would be difficulties for another Judge considering notes of evidence out of context.

The alternatives, therefore, are merely to quash the conviction or to order a rehearing in the District Court. Both counsel submitted that it would be unfair for their respective clients to have to undergo a rehearing in the District Court.

The normal procedure on appeals against summary offences where there has been an error of law by a District Court Judge of the kind here, is to allow the appeal and quash the conviction simpliciter. There is little guidance as to the appropriate course, from the practice of the Court of Appeal on criminal appeals. The Court of Appeal usually allows an appeal and orders a rehearing for crimes; public policy requires that a person who has achieved a retrial on a technicality, should nevertheless face trial again.

The usual practice, as I perceive it, for appeals on summary offences including those involving some moral obloquy on the part of an appellant such as drinking and

driving offences, is not to order a rehearing. There have been scores of occasions when technical points have succeeded on blood or breath alcohol charges in this Court and yet no rehearing has been ordered even though an objective assessment might have concluded that the appellant was thoroughly blameworthy. For example, on some of those occasions, the blood alcohol reading becomes available which shows that the appellant was well above the limit but he has to be acquitted for some failure on the part of the prosecution to comply with the involved technicalities essential to secure a conviction.

In this case, the appellant presented its case to the District Court; it was entitled to have received a judgment on whether it had proved, on the balance of probabilities, that it had taken all reasonable steps. In my view, it is more unjust to require a defendant to go through a defended hearing again than to deprive the prosecution of a possible conviction. The amount of fine in this case ($400) when the maximum is $2,000, shows that this could not be considered the worst offence of its kind, even if the appellant were properly convicted. I therefore do not see any reason why the normal course should not obtain and the conviction simply be quashed.

I would also note that the 1983 amendment to the Act, Section 34(3), which came into force on 1st April 1984, provides that a fine of up to $150,000 for a summary conviction and a further fine not exceeding $10,000 per day for a continuing offence. Although that Act was not in force at the time of this alleged offence, the amendment shows how seriously the Legislature regards the pollution of streams and rivers; therefore, a fortiori, there is strong argument for holding that because the consequence of conviction is so drastic, this must be treated as an offence of strict liability and not of absolute liability.

The appeal is allowed and the conviction quashed.

R.D. Barker J.

SOLICITORS:

Almao, McAllen & Kellaway, Hamilton, for Appellant.
Swarbrick, Dixon & Partners, Hamilton, for Respondent.