BARROW v VAN DEN BELD

SET 3

DUNEDIN REGISTRY No. M.83/84

BETWEEN JAMES WILLIAM GORDON BARROW

Appellant

A N D J. GERRIT VAN DEN BELD

Respondent

Hearing: 16 October 1984

Counsel: W.J. Wright for Appellant
P.S. Rollo

Judgment: 14 NOV 1984

JUDGMENT OF HOLLAND, J.

The respondent was charged in the District Court in Dunedin that he imported into New Zealand 13 films the importation of which was prohibited in that they were indecent documents within the meaning of the Indecent Publications Act 1963. The prosecution was brought under section 48(7) of the Customs Act 1966. The respondent was acquitted of the charge and the Crown in the name of the Collector of Customs appeals by way of case stated against that dismissal.

The issues involved relate to the question of mens rea and in particular the application to the facts of this case of the recent decision in Civil Aviation Department v MacKenzie (1983) N.Z.L.R. 78. It is necessary to set out the case stated in full as follows:-

"It was proved or admitted upon the hearing that:

1. THAT on the 28th day of March 1983, the Respondent imported into New Zealand certain goods including 13 films.

2. THAT acting on information received a Customs Officer searched the goods imported into New Zealand by the Respondent and seized the said films.

3. THAT a seizure Notice was issued by the Collector of Customs on the 28th day of April 1983 claiming that the goods were forfeited as being indecent within the meaning of the Indecent Publications Act 1963.

4. THAT the Respondent gave notice of his intention to dispute forfeiture on the 5th day of May 1983 on the grounds that the said films were not indecent and that at the time of importation he was not aware that his actions contravened any law.

5. THAT all the films were indecent within the meaning of the Indecent Publication Act 1963.

6. THAT the Respondent has lived in New Zealand since 1953 and returning to Holland in March 1982. That on this previous occasion the Respondent had imported similar types of films into New Zealand, these were subsequently seized by the Police following showing at a football club evening and the Respondent was warned by the Police about showing such films.

7. THESE films were subsequently passed to the Customs who subsequently returned them to the Respondent and no prosecution followed.

8. THAT the Respondent concluded that it was not illegal to import such films into New Zealand.

9. THAT while overseas the Respondent was given the 13 films from the proprietor of a sex shop in Holland and although he had not viewed them he was aware of the type of films they were and that they were known by him to be "sex films".

10. THAT the films concentrated to the exclusion of almost everything else on the lewd aspects of sexual activity and the sole purpose of their production was to gratify sexual interests.

I DETERMINED that all 13 films were indecent within the meaning of the Indecent Publications Act but that the information should be dismissed for the following reasons.

"(a) That in a prosecution under s.48 Customs Act the Respondent's state of mind was relevant and it was necessary to establish that he knew that what he was bringing into the Country was indecent.

(b) That in accordance with the principle enunciated in Strawbridge there was a presumption of mens rea which in order to obtain an acquittal required the Respondent to point to evidence that raised the issue of lack of mens rea.

(c) That the Respondent had only to raise a reasonable doubt that viewed objectively he did not know the films he was importing were indecent and he was entitled to an acquittal.

(d) That the Respondent knew what sort of films he was importing and deliberately brought them into New Zealand but looked at objectively it was reasonably possible that he could have been misled by his previous experience into mistakenly believing that while it was wrong to show them publicly there was nothing wrong in his bringing films of this type into the country and keeping them for his own use.

(e) That the Respondent had accordingly discharged the onus on him of raising a reasonable doubt that he knew the films were indecent in terms of the law relating to indecency.

(f) That if I were wrong in applying the ordinary criminal standard of proof to a prosecution under s.48 and if the proper standard was that set out by the Court of Appeal in MacKenzie v Civil Aviation Dept C.A. 29/83 (delivered 28 June 1983) that the Respondent had to satisfy me on balance that he acted without fault before he could be acquitted I was nevertheless satisfied that the Respondent honestly believed that his importing films into New Zealand would not offend against the Criminal Law of New Zealand. I was therefore satisfied on the balance of probabilities that he acted without fault.

DETAILS of such reasons being more fully set out by me in decision of the 20th March 1984, a copy of which is filed herewith.

THE QUESTIONS FOR THE OPINION OF THIS COURT are whether my decision was erroneous in the following points of law:

1. Is an offence against s.48(7) Customs Act 1966 of importing into New Zealand documents that are indecent within the meaning of the Indecent Publications Act 1963 an offence of absolute liability?

2. If it is not an offence of absolute liability does the prosecution have to prove mens rea or is mens rea presumed.

3. If mens rea is presumed is it sufficient for a Respondent to point to evidence that raises a doubt as to his state of mind or must he satisfy the Court on balance that he acted without fault.

4. If it is sufficient for a Respondent to raise a doubt about his state of mind, does a belief that the documents imported into New Zealand are not indecent, in terms of the law relating to indecency in New Zealand, raise a reasonable doubt which would, in law, entitle a Respondent to have an information dismissed.

5. If the proper test is absence of fault is the belief that the importation of such documents is not an offence against the criminal law of New Zealand sufficient to establish absence of fault."

Although the case stated includes the reasons for the decision of the District Court Judge, it is unnecessary to set them out in full. The first task undertaken by the District Court Judge was to examine whether the imported films were indecent. There were 13 films which he deemed it advisable to examine in detail. He reached the conclusion that they were indecent and in doing so found that "they concentrated to the exclusion of almost everything else on the lewd aspects of sexual activity, they had no literary merit - there was little or no attempt at a story and most were without dialogue. The sole purpose for their production was to gratify sexual interests". There has been no challenge to the finding that they were indecent documents and I have not found it necessary to examine the films at all.

It appears from the argument of counsel that the District Court Judge may have misunderstood the submissions of counsel for the defendant appearing before him. His judgment records that counsel submitted that the offence was not one of strict liability. The District Court Judge upheld that submission and held that it was one of the class of cases described in R v Strawbridge (1970) N.Z.L.R. 909 where in the absence of evidence to the contrary, knowledge on the part of an accused person will be presumed, but where there is some evidence that he honestly believed on reasonable grounds that his act was innocent, he will be entitled to be acquitted unless it is established by the prosecution beyond reasonable doubt that this was not so. With respect to the District Court Judge the conclusion which he reached was one that may not have been open to him in view of the decision of the Court of Appeal in Fraser v Beckett & Stirling Ltd & Anor (1963) N.Z.L.R. 481 which seems directly in point. There is nothing in what was said by the Court of Appeal in R v Strawbridge to indicate that it overruled the earlier decision and in fact that decision was specifically affirmed by the Court when giving judgment in R v Strawbridge (see p911).

Fraser's case was apparently not referred to the District Court Judge because it was not the intention of the defendant to submit that the offence was not one of strict liability. The defendant's case was that although the offence was one of strict liability, the facts were such that under the principle explained in MacKenzie's case (supra) the defendant had shown that he had taken all reasonable care and that accordingly he should be acquitted.

It was common ground that the first four questions in the case stated should be answered as follows:

(1) An offence against section 48(7) of the Customs Act 1966 of importing into New Zealand documents that are indecent within the meaning of the Indecent Publications Act 1963, is an offence where proof of the knowledge of the indecent character of the documents is not a requirement of the offence (see Fraser v Beckett & Stirling Ltd at p500).

(2) In the light of the answer to question (1) it is unnecessary to answer questions (2), (3) and (4).

The real issue is question (5) as to the effect of the decision in MacKenzie's case.

Subsection (7)(a) of section 48 of the Customs Act 1966 provides as follows:-

> "Every person commits an offence against this section who-
> (a) Imports into New Zealand or unships or lands in New Zealand any goods whose importation is prohibited by this section or by any Order in Council made thereunder and in force at the time of importation."

Subsection (1) of the same section at the time of the offences provided that every person who committed an offence was liable to a fine not exceeding $1,000 or three times the value of the goods to which the offence relates whichever sum is the greater.

In Civil Aviation Department v MacKenzie (supra) the Court held that an offence created by section 24 of the Civil Aviation Act 1964 was not one of absolute liability on the part of the pilot and that exculpation should be grounded in proof of absence of fault, stating:-

> "In this class of case an intention to make a pilot guilty though wholly without fault

should not be imputed to the legislature and we hold the total absence of fault is a defence to the charge."

It is clear that MacKenzie's case was not in any way purporting to overrule the long standing law accepted as being the law of New Zealand following the decision of R v Strawbridge (supra) where the Court, applied Sweet v Parsley (1970) A.C. 132 and Woolmington v Director of Public Prosecutions (1935) A.C. 462. The law prior to MacKenzie can be stated in the following terms:-

"(1) There is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence

(2) The presumption is particularly strong where the offence is 'truly criminal' in character.

(3) The presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute.

(4) The only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern.

(5) Even where a statute is concerned with such an issue the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

(6) That there is a class of case where there is no presumption of mens rea but if there is some evidence that the accused had an honest belief on reasonable grounds that his act was innocent then he is entitled to be acquitted unless the Court is satisfied beyond reasonable doubt that this was not so".

(The first five of these propositions are adapted from the judgment of the Privy Council given by Lord Scarman in Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong) (1984) 2 All E.R. 503. The sixth proposition is taken from the judgment of the Court of Appeal in R v Strawbridge.)

In Police v Creedon (1976) 1 N.Z.L.R. 571 the Court of Appeal held that a regulation of the Transport Regulations was not one of strict or absolute liability, and imported some element of fault. The Court then somewhat reluctantly applied R v Strawbridge holding that if the evidence cast doubt upon the inference that the defendant was guilty of fault then there was an onus on the Crown to prove absence of all fault. The reluctance appears to have arisen not from doubt about the correctness of R v Strawbridge but because it applied to a more "truly criminal" type of offence. The decision in Civil Aviation Department v MacKenzie represents what might be described as an historical reversal to the liberal trend of the Courts in relation to mens rea in certain statutory offences which are not regarded as "truly criminal". The law of New Zealand before MacKenzie's case was relatively clear that unless the offence was one of the very extraordinary type where Parliament had specifically excluded any presumption of mens rea and fault so that the mere proof of commission of the offence was sufficient regardless of the state of mind or lack of fault on behalf of the defence, the onus of proving lack of fault where there was some evidence from which such lack could be inferred rested on the prosecution. MacKenzie's case recognised a certain kind of case in which the onus of establishing lack of fault rests throughout on the defendant. It came before the Court of Appeal on appeal from the High Court after an acquittal in the District Court, that Court having found that the appellant had established that the aircraft had been operated without actual fault on his part. In the High Court it was held that it appeared that the

District Court Judge had been applying a subjective test in referring to actual fault and because the High Court considered that the test was an objective test it remitted the matter back to the District Court. The defendant appealed to the Court of Appeal. It seems that the Court of Appeal was anxious to adopt what was said by the Supreme Court of Canada in R v City of Sault Ste Marie (1978) 85 D.L.R. (3d) 161 as being part of the law of New Zealand. That Canadian case had been specifically referred to by the Court of Appeal in Ministry of Transport v Burnetts Motors Ltd (1980) 1 N.Z.L.R. 51 when the question had been left open. In MacKenzie's case the Court decided to follow the path taken by the Canadian decision and said at p 85:-

> "First, that in the case of public welfare regulatory offences such as we are concerned with in this case under s.24 a defence of total absence of fault is available unless clearly excluded in terms of the legislation; and, second, that the onus of proving such a defence to the balance of probabilities standard rests on the defendant. First, it is artificial to speak in terms of mens rea. Liability under legislation of this kind rarely turns on the presence or absence of any particular state of mind. But in social policy terms compliance with an objective standard of conduct is highly relevant. Courts must be able to accord sufficient weight to the promotion of public health and safety without at the same time snaring the diligent and socially responsible. The principle of English criminal law that the burden of proof of a requisite mental state rests on the prosecution is not whittled down where in matters of public welfare regulation in an increasingly complex society the defence of due diligence is allowed because it is recognised that the price of absolute liability is too high. Second, as was emphasised in Sault Ste Marie, the defendant will ordinarily know far better than the prosecution how the breach occurred and what he had done to avoid it. In so far as the emphasis in public welfare regulations is on the protection of the interests of society as a whole, it is not unreasonable to require a defendant to bear the burden of proving that the breach occurred without fault on his part. As was emphasised in Creedon, a high standard of care is properly expected of a defendant in such a case and he must prove that he

> did what a reasonable man would have done. It would not in our view be appropriate to have a variable standard of negligence depending on subjective considerations affecting the individual concerned, as was suggested in argument at one point."

The question that arises is whether that passage of the judgment is of such a nature that the earlier decision of Fraser v Beckett & Stirling Ltd still completely covers the position. The principles explained in MacKenzie's case will not apply to every offence of absolute liability. MacKenzie's case was one where it was apparently common ground that some degree of proof of absence of fault was a defence. The only issues before the Court related to on whom the onus of establishing the fault lay and whether it required to be proved beyond reasonable doubt by the Crown. The Court did not refer the matter back to the District Court, although it was not clear what the District Court's judgment on the issue would have been. It simply decided that in the interests of justice the appellant should not be subjected to a further hearing. In Fraser v Beckett & Stirling Ltd the Court of Appeal held that in an offence of this nature under the Customs Act absence of fault was not a defence and accordingly the offence was an absolute one. It may well be in the light of Police v Creedon and Civil Aviation Department v MacKenzie that the earlier decision of Fraser v Beckett & Stirling Ltd is not of such permanent strength as might have otherwise been the case, but until it is clearly overruled or differed with it is in my view binding upon the District Court and on this Court and hence questions 1-4 were answered as previously stated. I am unable to detect in any of the judgments in the Court of Appeal subsequent to Fraser's case and in particular MacKenzie's

case itself anything which detracts from that earlier finding in relation to that particular statute. I am accordingly of the view that the principles expounded in Civil Aviation Department v MacKenzie do not apply to a prosecution under section 48(7) of the Customs Act 1966.

It may well be, however, that the view just expressed should ultimately be tested in the Court of Appeal because difficulties arise over determining the extent to which the principles in MacKenzie's case are to be applied. I am satisfied, however, that this is not such a case because even if the principles do apply there is no evidence on which the District Court Judge could have found that there was total absence of fault on behalf of the respondent, or even the lesser standard which is included in one passage of the judgment in MacKenzie of doing what a reasonable man would have done. The District Court Judge in applying the MacKenzie principle has said:-

> "I was nevertheless satisfied that the respondent honestly believed that his importing films into New Zealand would not offend against the criminal law of New Zealand. I was therefore satisfied on the balance of probabilities that he acted without fault."

The fact that the respondent honestly believed that his importing would not offend against the criminal law of New Zealand does not of itself establish that he acted without fault or that he did what a reasonable man would have done. The case stated makes it clear that the respondent had lived in New Zealand for 30 years. He was a native of Holland to which country he returned in 1982. Following his return to New Zealand he had had seized from him by the police what were described as similar types of

films which he had imported into New Zealand on his return from Holland. These films were seized following their having been shown at a football club evening. They were passed to the Customs Department but ultimately returned to the respondent and no prosecution followed. Apparently the respondent concluded that it was not illegal to import such films into New Zealand. That was clearly a mistaken view of the law. The fact that he was not prosecuted may well have been due to insufficient evidence that he had actually imported the films or insufficient evidence that they were being exhibited in a public place.

Apparently it is not an offence to be in possession of an indecent document of this nature although it is an offence to import such a document and it may be an offence to exhibit such a document in a public place. Nevertheless, it is clear that no authority has yet suggested that innocence of the law as such is an excuse in any criminal charge. The case stated records that the respondent acquired 13 films from a sex shop in Holland, and although he had not viewed them he was aware of the type of films they were and that they were known by him to be sex films. This is not a case of a man being mislead as to the nature of the goods he was importing. He was aware that he was importing sex films. Nor is it a case where he put forward the defence that the sex films were not in themselves indecent. Nor did he suggest that he honestly believed they were not indecent. It would be difficult for him to develop a defence based on MacKenzie as to the nature of the films where as here he knew the type of "document" he was importing and had chosen not to view them.

Accepting the bona fides of his belief, the only grounds of his belief can be a mistake as to the law of New Zealand. That does not establish an absence of fault or reasonable conduct within the provisions of MacKenzie and accordingly even if what was said in that case can apply to the Customs Act it cannot apply to the facts in the case presently before the Court. The answer to question 5 is that as the belief that the importation of indecent documents is not an offence against the criminal law of New Zealand is based solely on a mistaken view of the law of New Zealand it is not sufficient to establish absence of fault.

It accordingly follows the appeal must be allowed and the case remitted to the District Court for entry of a conviction with orders as to forfeiture in accordance with this judgment. There will be an order accordingly.

C D Haslam J

Solicitors:

Crown Solicitor, Dunedin, for Appellant
Brunton Farry, Cassidy & Gowing, Dunedin, for Respondent