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IN THE HIGH COURT OF AUSTRALIA

Cody

v.

Gallagher.

ORAL.

REASONS FOR JUDGMENT

Judgment delivered at Sydney.

on THURSDAY 21st November 1946.

H. E. Daw, Gov. Print., Melb.

J.12280/45

Cody v. Gallagher.

JUDGMENT.

LATHAM, C.J. This is an appeal by way of case stated from a decision of a Magistrate at Innisfail in relation to complaints laid for offences under the Black-Marketing Act 1942. There were seven complaints; I take the first as an example.

The Respondent was charged with being guilty of an offence of black marketing in that, on or about the 6th day of September 1943 he did sell goods, namely, 5 dozen bottles of Corio Whisky, 5 dozen bottles of Vickers Australian Gin and certain other specified quantities of other liquor for the sum of £157.13. 2. a greater price than the maximum price, namely, £135.13. 2. fixed in relation to the said goods under the National Security (Prices) Regulations, for the sale of the said goods.

The Magistrate found that the Defendant did sell on seven occasions liquor at the prices alleged to Thomas Joseph Vandeleur, who was trustee for the children of the Defendant and his brother, and who held the Exchange Hotel as such trustee . But the prosecution failed because the Magistrate held that there was no proof of what the liquor was that was sold, and therefore no proof of the cost of the liquor, and therefore no proof of the maximum permissible price under Prices Order 1015. The goods in question were goods which were not substantially identical with goods which had been sold previously by the Defendant, and accordingly the maximum price of the goods depended upon the cost of the particular goods. The Magistrate dismissed the complaints.

It has been contended for the Appellant that there was evidence of the identity of the goods. In my opinion, the case for the prosecution fails before the question of the identity of the goods as sold, or disposed of, to the Exchange Hotel is reached. The Magistrate did not draw an inference as to the identity of the goods. It may be that such an inference might have been drawn, namely that goods alleged to have been sold by Samuel Allen & Sons Ltd. were goods which were afterwards sold to the Exchange Hotel. But the Magistrate did not draw that inference and it seems to me

to be impossible to say that he must have drawn that inference, so that it could be contended that he ought to have convicted the Defendant.

In my opinion, however, the Prosecution fails at an earlier stage. The basis of the finding of the Magistrate that the Defendant Gallagher sold to the Exchange Hotel i.e. to the trustee Vandeleur, who was responsible for the Exchange Hotel, is that certain sales of liquor were made by Samuel Allen and Sons Ltd. as sales to one Saraceni. In my opinion, no admissible evidence of sales, that is, sales to Saraceni, was given. The witness Webb only gave evidence of the contents of documents. The witness Miss Clarke also gave evidence of the contents of documents; it may be that she further proved that monies were received as from Saraceni, but it is not the case for the prosecutor that Saraceni paid the money. In any event, that evidence would only show, even if it were admitted, that Saraceni paid money, that money was paid for something, but not for the identical goods referred to in the complaint. Accordingly, the evidence of sales, as sales to Saraceni, in my opinion, fails. Next however, Saraceni was held to be identified with Gallagher, the defendant; but there is no evidence that Gallagher, in the name of Saraceni, was a purchaser from Allen & Sons Ltd. in the transactions in respect of which Allen & Sons Ltd. received monies. The correspondence in the dates of cheques drawn by and payable to Gallagher with deliveries by Saraceni, and the correspondence in shillings and pounds with the amounts charged by and paid to Samuel Allen & Sons Ltd. in my opinion, show some association of Gallagher with the transactions with Allen & Sons Ltd; but they fall short of showing that Gallagher bought liquor from Allen & Sons and resold that liquor to the Exchange Hotel. It is equally consistent with the evidence that Gallagher paid the difference between the amounts of the cheques and the amounts received by Samuel Allen & Sons to some other person and did not retain it as an intermediate seller. In my opinion, therefore, there was not the necessary evidence to support convictions in any of the cases and the appeal should be dismissed.

The appeal is dismissed with costs.

RICH J.: In my opinion, the admissible evidence does not warrant reversal of the Magistrate's decision, and I agree that the appeal should be dismissed.

CODY v. GALLAGHER

JUDGMENT. STARKE J.

One of the questions asked by the Magistrate is:- "From all the facts proved in evidence before me was there sufficient material to warrant calling upon the respondent?" I think there was and that it would have been better if the Magistrate had not given a decision until the whole of the evidence closed. But on the evidence as it stands the Magistrate was quite entitled to conclude that it did not establish the charges made and to dismiss the informations.

C O D Y v G A L L A G H E R

ORAL JUDGMENT DIXON J.

This appeal comes from a Court of Petty Sessions exercising Federal jurisdiction in the State of Queensland. It comes by case stated, under sec. 226 of the Queensland Justices Act, but that is merely the vehicle provided by sec. IV of the Appeal Rules by which it is brought to this Court. As we have repeatedly held, such appeals, when here, must be considered in accordance with the ordinary principles governing the exercise of the general appellate jurisdiction of the Court, and we are not confined to the Queensland procedure. I refer to Wishart v Fraser 64 C.L.R. 470 at p.480 and the cases there quoted.

The charge is laid under sec. 3 (a) of the Black Marketing Act, and is a charge based on " selling ". The case made against the defendant is, in my view, one of circumstantial evidence. The facts are curious, not to say singular.

The defendant is a solicitor carryong on a practice at Innisfail as a member of a partnership. But he and his partner apperently have acquired more than one hotel. The particular hotel concerned, the Exchange Hotel, they acquired in the name of a trustee, whom they constituted trustee for their respective children. Little appears in evidence about the trust, but it would seem that the children are entitled to the income as well as the capital. One of the clients of the firm is an Italian of the name of Saraceni, who was interned in 1942. He had a spirit licence of some sort. The hotels, or one of them, apparently bought supplies of liquor from a firm named Allen & Co.

The case made against the defendant is that he bought spirits and wines for himself, so that the property vested in him, and resold them to the trustee of the Exchange Hotel ; and that it is attempted to make out by circumstances. It has to be remembered, in considering the circumstances proved, that the defendant himself undertook the management of the hotel for the trustee. It is not clear whether both partners in the firm of solicitors did not manage the hotel, but,

at all events,the defendant himself was the most active person in its management.

He had to secure liquors and the sources from which he obtained them remain,from beginning to end of this case,a matter of obscurity. In the accounts of the Exchange Hotel there is a list of cheques for considerable sums for stock. The butts of the cheques are preserved and they show nothing but payments to the defendant for stock. The cheques are open and there is otherwise nothing to show what they were for or what was the intended application of the proceeds.

Examination of the records of Allen & Co.showed that,on or about the dates of many of these cheques,spirits and wines were sold by Allen & Co. to a buyer in the name of Saraceni. There is some evidence to show that the firm of solicitors was advising the female relatives of Saraceni,who continued to manage his business whilst he was interned. It appears,too,that,after the period in question in this appeal,the firm of solicitors,or one of them, actually acquired the licence of that business and,at either this or an anterior date,acquired the whole of the stock-in-trade.

Now the case made is that the defendant,being in the position I have stated,interposed himself between the Exchange Hotel and Allen & Co.,as an intermediate purchaser of the liquor,that he bought it and resold it to the trustee of the Exchange Hotel, bought it in the name of Saraceni's business and resold it in that way to the trustee of the hotel at advanced prices exceeding the maximum prices. The circumstances relied on to make out the proof consist in a coincidence of the dates of the invoices from Allen & Co. made out in the name of Saraceni as buyer,with the dates of the cheques, a coincidence of the shillings and pence,in many of the cheques,with the shillings and pence in the invoices of closely corresponding dates,and the fact that the differences in the pounds in the respective sums,in some cases at least,may be shown to amount to an addition to Allen & Co's invoice price to Saraceni of about £2.0.0. a case of spirits.

If all the evidence of these circumstances be admissible,I think perhaps that,although the inference is a little speculative,

the transactions may be associated and there is enough to show that there was an association in the transactions by which Allen & Co. sold the liquor and the Exchange Hotel paid for it, and that means that the liquor which was in these instances obtained by the hotel was identical with that sold as if to Saraceni. But the question remains whether it is a proper inference that the defendant interposed himself as a purchaser in the name of Saraceni between the trustee of the hotel and Allen & Co. and resold ~~it~~ to the trustee. Is that inference to be adopted in preference to the supposition that he bought from Allen & Co. for the hotel, that is for the trustee ? There are several possible explanations of the excess in the amount shown by the cheques over the sums shown by the invoices besides the explanation upon which the Crown relies, which is that the defendant, the solicitor, who was managing the hotel for his children's trustee, was buying the liquor and reselling it at the advanced prices to the trustee. The difference may or may not have gone into his own pocket, but, in either event, there are other explanations with which the facts are compatible. (It is unnecessary to mention them) They have been mentioned in argument and some of them reflect on other people who are not parties as well as on the defendant. But, in addition to the explanation upon which the Crown relies, there are at least three possible explanations of his taking the added sum whether as a reimbursement or as a secret profit. The choice between them seems to me to be entirely speculative and they are all reasonable hypotheses. Although I can see in the evidence some slight grounds for thinking that the conjecture of the Crown may be the right one, it would be quite unsafe to base a conviction upon such indications as there are. It is true that the Magistrate has found one of the facts, namely that the defendant and his partner did act as purchasers. I myself think that on the evidence he was not entitled to do so. I, therefore, think that, in substance, the proofs fail and the prosecution has not established the charges against the defendant. The appeal is a rehearing and, on the view that I have formed of the evidence, the dismissal of the complaint was correct. But I think it right to add that I am anything but satisfied that the contents of the invoices and the subject and

terms of the sale to Saraceni were proved by admissible evidence. Counsel for the Crown found himself in difficulties at the hearing of the complaints, and, in attempting to extricate himself from them, I think that he failed to pursue the strict rules of evidence. The evidence he led was objected to and I think that the objections were well taken.

In conclusion, I should like to quote a statement of Sir John Madden, reported in 28 V.L.R. at p. 614. Dealing with entirely different offences His Honour said :- " Our law requires that a " person accused shall be charged with precision and exactness, in " order that he may be able to show the Court, that however " reprehensible his act may have been it did not amount to a crime. " To do this he must know what the crime alleged against him is, " and that very crime and none other, must be made the ground of his " conviction. There is a not unnatural tendency to desire to convict " a man who is obnoxious to a well-founded belief that he is guilty " of <u>some</u> crime, whatsoever may be the precise charge on which for the " moment he may be presented. This course seems to vindicate " morality and saves laborious thinking. Indeed, public opinion has " crystallised this frailty in that story whose long survival seems to " warrant its verisimilitude, of a jury who, having a prisoner in " charge for murder, could not discover that he had killed anyone, but " as there was some reason to believe that he had stolen the " foreman's horse, they convicted him in the interests of eternal " justice. This robustness has its beauties, doubtless, but it has its " disadvantages, too, which the law regards more, and the charge, and " the distinctly relative evidence which supports it, and it only, is " always insisted on. "

This case, perhaps, provides another example of the operation of the legal principles as well as of the other considerations to which the learned Chief Justice of Victoria alluded.

For these reasons I think the appeal should be dismissed.

for more than the amounts recorded in the books of the company is not sufficient to raise a reasonable inference that the respondent purchased the liquor from the Company as Saraceni and then resold it to the hotel but as to part only at a profit.

The difference between the two amounts may have gone into the pocket of the respondent or some other pocket, but even if it can be inferred in the absence of any explanation by the respondent that it went into his own pocket, this would still not be sufficient to prove that it did so as the result of a transaction having the legal effect of a resale of the liquor by himself as vendor to himself as purchaser on behalf of the hotel.

I agree that the appeal should be dismissed.

LATHAM, C.J. The appeal is dismissed with costs.

THE COURT AT 3.20 P.M. ADJOURNED UNTIL 10.30 A.M. THE FOLLOWING DAY, FRIDAY, 22ND. NOVEMBER 1946.

J U D G M E N T.

WILLIAMS, J.

The Crown case depends upon proof beyond reasonable doubt of two essential matters. 1. That the respondent bought certain liquor from S. Allen & Sons Ltd. in the name of Saraceni; 2. That the respondent sold the same liquor, so far as it consisted of spirits, to the Exchange Hotel at a higher price alleged to be £2 per case. The respondent is charged with having entered into such transactions on seven occasions between September and October, 1943. The Crown hoped to prove the first matter on five of the occasions by the evidence of Webb, the Innisfail Manager of the Company, that he had sold the liquor to the respondents in the name of Saraceni. But Webb proved to be a hostile witness and said that the respondent had nothing to do with the sale. The Magistrate disbelieved this evidence, but this disbelief does not prove that the respondent was the purchaser. There is no evidence that the goods were delivered by the Company to the respondent or Saraceni or the hotel. The Crown was therefore forced to rely on evidence of entries in the books and records of the Company of sales to Saraceni. In my opinion, these entries were never made admissible against the respondent and the evidence should have been rejected.

There is no other evidence on which the Magistrate could reasonably find that the Crown had proved the first matter. In case I am wrong in this view, I am also of opinion, that there is no evidence on which the Magistrate could reasonably hold that the Crown had proved the second matter. The Crown relies for proof of this matter upon the circumstance that the cheque butts state that the cheques were for purchases, in one case for bar purchases, and that they were for a larger sum than the respondent paid to the Company. But the respondent was admittedly in the habit of purchasing liquor for the hotel, so that the entries in the cheque butts would primarily appear to refer to reimbursements, and the mere fact that they were