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DELIVERED **13 AUG** 1973

MAYER v. MARCHANT

No. 520 of 1973

Dates of Hearing: 15th & 18th June 1973

IN THE FULL COURT

Coram: Bray C.J., Hogarth and Zelling JJ.

J U D G M E N T of the Honourable the Chief Justice

(on appeal from P.M. St.L.Kelly, Esq., S.M., Adelaide
Magistrates Court

referred by order of The Hon. Mr. Justice Hogarth)

Counsel for the Appellant:
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Judgment No. **1684**

Full CourtBray C.J.

I have had the advantage of reading the reasons for judgment of Zelling J. in this matter. The facts are narrated in those reasons and I will not repeat them.

I agree with the order proposed by him, but I desire to add some remarks of my own.

In Kain & Shelton Pty. Ltd. v. McDonald 1971 1 S.A.S.R. 39 we held that it was not necessary for the prosecution to prove mens rea in a charge of an offence against sec.144 of the Road Traffic Act 1961-1972 (as amended by sec.26 of the amending Act of 1969). We left open the question of the availability of certain defences to such a charge. It is now necessary to consider some of those matters.

In general I adhere to the views I expressed in Kain & Shelton's case. Two possible defences arise in this case: the defence of honest and reasonable mistake of fact, commonly called the Proudman v. Dayman defence (Proudman v. Dayman 67 C.L.R. 536) and the defence of what is sometimes, though, I think, imprecisely, called act of a stranger, commonly called in this State the Snell v. Ryan defence (Snell v. Ryan 1951 S.A.S.R. 59).

I agree that the first defence is not open here on the facts, even if all arguable points of law are resolved in the respondent's favour. The defence has been variously expressed. For the present purpose I am content to adopt the formula of Cave J. in Reg. v. Tolson 23 Q.B.D. 168 at p.181:

" . . an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the prisoner is indicted an innocent act. . "

Here the respondent did not have a belief in circumstances which, if true, would make the act an innocent act. He believed, and probably on reasonable grounds, that if the load exceeded the statutory 32 tons by only 2 or 3 hundredweight the authorities would take no action. Assume he had that

belief on this occasion. Still that is not a belief in the existence of circumstances which, if true, would make the act innocent: it is only a belief in the existence of circumstances which, if true, would make the act one that could be committed with impunity. It relates to factual immunity, not legal immunity. Like Zelling J. I cannot agree with the learned special magistrate that it was a fair inference that the complaisance with which the authorities were prepared to regard an overload of 2 or 3 hundredweight was due to the possibility of error in the weighbridge. The Weights and Measures Act 1971 and the regulations thereunder, which were referred to before us, make it clear that the allowable tolerance for the possibility of error on a load of this size was only about 32 pounds at the most, far short of 2 or 3 hundredweight.

It is not, therefore, strictly necessary to say anything about the availability of the defence in law. But since the matter has been canvassed I desire to make some comments.

1. I think that the defence is open on a charge of a breach of sec.144 notwithstanding that the offence is a so-called status offence, i.e. that, as far as verbal form goes, what is penalised is the connection of the defendant with a vehicle in a certain condition in certain circumstances, not any act or omission of his. I adhere to what I said about status offences in Kain & Shelton's case. Such a statutory wording has not been held to foreclose all enquiry into the state of the defendant's mind, Maher v. Musson 52 C.L.R. 100, Bond v. Foran 52 C.L.R. 364 see per Rich J. at p.369. In truth it is a mistake to segregate 'mistake' from other general defences to criminal charges. I will cite again from Cave J. in Tolson's case referred to above at p.181:

"Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in

lunacy . . . So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication."

See also Handmer v. Taylor 1971 V.R. 308. Of course Parliament can exclude the defence expressly and no doubt it can also exclude it impliedly, but, as I said in Kain & Shelton's case, when Parliament has not seen fit to make any express exclusion I would be very loath to draw any such implication, except in unusual circumstances. I see no reason to draw any such general inference with regard to the Road Traffic Act as a whole, or with regard to sec.144 in particular, by reason of the specific reference to particular defences to charges under particular sections in the various parts of the Act to which we have been referred.

2. I agree that where the defence is applicable it is sufficient if there is a general belief in a general proposition covering the relevant circumstances, such as that a certain number of gallons of distillate loaded on to a vehicle of a certain type will produce a load of a certain weight, and that it is not necessary that there should be conscious advertence to each practical application of that proposition, such as that a particular vehicle on a particular day at a particular stage of its journey carried a particular load. To require this would, I think, be to deprive the defence of practical effect in a case like the present.
3. I think that before this defence falls to be considered by a court in any particular case, the defendant has to discharge an evidential onus by pointing to some evidence, either in his case or that of the prosecution, sufficient to raise it. Once that is done I think that the ultimate onus of negating it passes to the Crown. To put it another way, it is sufficient for the defence to raise a

reasonable doubt about the proposition. Again, this is only to put the defence into the same class as other general defences, such as provocation, self-defence and the like. I know that eminent authorities have taken the contrary view, but it seems to me that the weight of judicial opinion is now in favour of the proposition as I have stated it. It was indeed mooted as a possibility by Dixon J., as he then was, in Proudman v. Dayman itself. The learned judge said at p.541:

"The burden of establishing honest and reasonable mistake is in the first place on the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt."

The implications of Woolmington's case (1935 A.C. 462) have only gradually been recognised, not, on occasions, without disquiet at their width, see for example Sweet v. Parsley 1970 A.C. 132 per Lord Pearce at p.158. Once they are, it must, in my view, be accepted that the ultimate onus is always on the Crown, except in the case of insanity or where the onus is shifted by statute, and it does not matter whether the offence is the creature of common law or of statute. There is a wide range of authority to this effect both generally, Reg. v. Spurge 1961 2 Q.B. 205 at p.210, Burns v. Bidder 1966 3 All E.R. 29, Stokes v. Samuels (judgment of the Full Court delivered 6th April 1973) and with specific reference to the defence of mistake, Geraldton Fishermen's Co-operative Ltd. v. Munro 1963 W.A.R. 129 at pp.134-5, (it is true that this was a case under the Western Australian Criminal Code, but I do not think that is a material distinction),

Reg. v. Strawbridge 1970 N.Z.L.R. 909, Kidd v. Reeves 1972 V.R. 563, Sweet v. Parsley above per Lord Diplock at p.164. This was also the view of Chamberlain J. in Norcock v. Bowey 1966 S.A.S.R. 250 at p.257 and, with respect, I agree. The argument to the contrary, it seems to me, is largely based on considerations of policy, because, it is said, the facts in most cases are peculiarly within the knowledge of the defendant, see Howard, Strict Responsibility at pp.40-43, but with respect to those who take this view, I think there are two answers to that. One is that those policy considerations are largely answered by leaving the evidential onus on the defendant, but the stronger answer is, in my view, that the logic of Woolmington's case is compelling and I for one would be loath to tarnish the golden thread.

Since drafting these reasons I have had the advantage of reading the reasons for judgment of Hogarth J. It is true that the learned judges of the High Court in Maher v. Musson above spoke as if, in the case of a statute framed in apparently absolute terms, the onus was on the defendant to prove the defence on the balance of probabilities. But that case was decided before Woolmington's case, which, I think, has been generally accepted in Australia, with the consequence that pre-existing ideas about the passing of the onus to the defence in criminal cases have been greatly modified and in some respects abandoned. I think that in the passage from Proudman v. Dayman which I have previously cited Dixon J., who was a party to the decision in Maher v. Musson, was acknowledging this.

4. I think that we are bound to hold that to make out the defence the belief must be reasonable as well as honest, see Handmer v. Taylor above per McInerney J. at pp.312-315. There is, in my view, a contrast here with mens rea. If that is an essential element of the offence, a genuine

belief of fact, even if it is also an unreasonable belief, may well exclude it.

5. I do not think the case raises the question of honest and reasonable ignorance as opposed to honest and reasonable mistake. On this topic I refer to what I said in Kain & Shelton's case at p.45, but cf. Gherashe v. Boase 1959 A.L.R. 218. The respondent clearly enough had a belief about the weights of loads of distillate on his vehicle, even though it was a general belief and he may not have adverted to this particular load.
6. It is not correct, with respect to those who hold the contrary view, to say that to allow the defence of mistake with the ultimate onus of proof on the prosecution, while holding that the statute has excluded mens rea as an element in the case to be established by the prosecution, is to let in through the backdoor what you shut out by the frontdoor. There are real differences. One is that, in my view, an honest belief may exclude mens rea, but to establish the defence as the authorities now stand the mistake must be reasonable as well as honest. Another, and perhaps more important, answer is that the exclusion of mens rea dispenses the prosecution from having to prove the mental state of the defendant as part of its own case, and that means that, except in the unusual event of material sufficient to raise the defence of mistake appearing from the evidence of the prosecution, a submission that there is no case to answer at the end of the prosecution case on any ground connected with the defendant's mental state will seldom succeed.

However, for the reasons I have given, I do not think that the defence of mistake arises here. I turn now to the defence that the overloading was due to the act of a stranger, namely the supplier of the distillate. This type of defence was recognised by Napier C.J. in Snell v. Ryan above and by the Full Court in Norcock v. Bowey above, and I think it applies

to this charge. It remains, however, to decide its definition and scope. In Snell v. Ryan Napier C.J. referred to what was said by Griffith C.J. in Hardgrave v. R. 4 C.L.R. 232 at p.237. There the learned Chief Justice said:

"The general rule is that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident. It is also a general rule that a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist. I do not think the first rule has ever been excluded by any Statute."

It is quite true, as pointed out by Chamberlain J. in Norcock v. Bowey above at p.255, that Hardgrave v. R. was a case of an indictable offence. But the important consideration for the present purpose, as I see it, is that in that citation the defence in question is advanced as a general defence to criminal charges and one sharply separated from the defence of mistake, and I think that whenever that defence applies to a statutory offence then a fortiori the former defence does too and it may well apply even if mistake is excluded. Of course in most cases the question will not arise because the offence is usually defined in terms which preclude any argument that the defendant is liable for acts which occur independently of his will.

Sir Samuel Griffith's remarks about accident are not, of course, to be construed as excluding in an appropriate case criminal liability for negligence. But there is nothing to indicate that an act done independently of the will of the defendant by a stranger must be wrongful on the stranger's part in order to be of avail. On the other hand, there may, no doubt, be statutory offences where the defendant is expected by the legislature to foresee the possible intervention of other people and guard against its consequences. I cannot agree that the wrongful nature of the intervention is a

necessary criterion for the establishment of the defence. Snell v. Ryan was a case of a charge against sec.46 of the Impounding Act 1920-1947, which provided that if any cattle were found straying in a street or public place the owner should be liable to a penalty. The cow had got out on to the road as a result of the gate being left open by a trespassing stranger. If in that case the cow had escaped on to the road through a gate left open, not by a trespassing stranger but by an official inspector of the property with a legal right to enter, I do not think the result would have been different, at least if the defendant had no reason to foresee or guard against the visit or the leaving open of the gate. On the other hand if the gate had been left open by a departing visitor and the defendant had neglected to tell him to shut it behind him, the result might have been different. And, like Walters J. in Norcock v. Bowey at p.269, I think that events independent of any human activity, such, for instance, as were in a more reverend age classified as acts of God, stand on the same footing as acts of a stranger.

I would prefer to formulate the proposition in this way: that normally speaking it is a defence to a criminal charge, whether under the provisions of the common law or of any statute, to show that the forbidden act occurred as the result of an act of a stranger, or as the result of non-human activity, over which the defendant had no control and against which he could not reasonably have been expected to guard. This proposition, of course, has nothing to say to the question of vicarious liability which, in appropriate cases, it may well have been the intention of the legislature to impose.

The onus of proof of this defence is, in my view, exactly the same as in the case of mistake or any other general defence. The onus is on the defendant to point to some evidence capable of raising it. Once that has happened the ultimate onus is on the prosecution to exclude it so that a reasonable doubt as to its existence will result in an

acquittal. I refer to what I have already said on this matter.

The remaining question is whether the evidence here is capable of raising the defence. I have hesitated about this. But the learned special magistrate has found that the density of the distillate on this occasion was unusually high and not reasonably to be anticipated. As I read the evidence of the driver Duncan, he went to the BP depot on the day in question and got the slip, Exh.D.2, which simply refers to 6,400 gallons for O.T.C., i.e. Overseas Telecommunication Centre. Armed with that he filled up the tanker himself. There was nothing, as I see it, to indicate to him that any unusually heavy distillate would be supplied. I think the supply without notice of unusually heavy distillate when distillate of normal density was expected would be the unauthorised act of a stranger over which the respondent had no control and against which, prima facie at any rate, he could not reasonably be expected to guard. To supply without warning to a purchaser a product different from that impliedly ordered, the difference not being detectable by him, seems to me to be the positive act of a stranger for the present purpose, if it was the cause of the commission of the forbidden act, and not merely a circumstance inducing a mistaken belief. But I have had some doubt as to whether it was solely the supply of unusually heavy distillate which made the load overweight, or whether it would not still have been overweight with fuel of ordinary density, albeit to a much lesser extent. But Zelling J. has analysed the evidence about this and I am content to abide by his conclusions.

The only other matter to which I desire to refer is the passage from the judgment of Evatt and McTiernan JJ. in Maher v. Musson above at p.109 set out by me in Kain & Shelton's case at pp.45-46 and referred to by the learned special magistrate. That passage could be used to support the existence of a defence of honest and reasonable ignorance of

fact as opposed to honest and reasonable mistake. It may be that such a defence exists. It may be, on the other hand, that the only two relevant defences are honest and reasonable mistake and act of a stranger. It is fortunately not necessary to canvass that now.

I agree with the order proposed by Zelling J.