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MAYER v. MARCHANT

No. 520 of 1973

Dates of Hearing: 15th and 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 Mr. Justice Hogarth

(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:	Mr. M.F. Gray
Solicitor for the Appellant:	Mr. L.K. Gordon, Crown Solicitor
Counsel for the Respondent:	Mr. R.G. Matheson, Q.C. with him Mr. D.E. Clayton
Solicitors for the Respondent:	Finlayson & Co.

Judgment No. 1685

MAYER v. MARCHANTNo. 520 of 1973Full CourtHogarth J.

I have had the opportunity of reading the reasons for judgment of Zelling J., and I accept his statement of the facts.

The appellant proved that the respondent's tanker was being driven on a public road, with axle loads in excess of the total permitted weight of 32 tons to the extent of one ton. The Special Magistrate found that this was brought about by exceptional density of the distillate fuel being carried on the day in question. He concluded that the respondent was reasonably ignorant of the density of the distillate fuel, and that such ignorance is available as a defence. He said:

"In such circumstances the possibility of an unusually high density in the fuel was not a matter which should reasonably have concerned the defendant because he well knew from his past experience that the only overload which might occur would not exceed the tolerance allowed by the Highways Department."

The grounds of appeal are in the following terms:

- "1. The said order of dismissal was against the evidence and the weight of the evidence.
2. The Special Magistrate was wrong in law in holding that "the defence of mistake" was available to an offence under sections 144 to 147 of the Road Traffic Act, 1961-1971.
3. There was no evidence or alternatively insufficient evidence upon which the Special Magistrate could properly find, if he did so find, that the defendant was mistaken.
4. The Special Magistrate was wrong in law in holding that there was a defence of "reasonable ignorance of fact" to an offence under sections 144 to 147 of the Road Traffic Act, 1961-1971, or alternatively there was no evidence or insufficient evidence to make out such a defence.
5. The Special Magistrate was wrong in law in not finding that the only defence available to the defendant in this matter was a reasonable belief in a state of facts which if true would

exculpate the defendant and the Special Magistrate should have found that there was no evidence or alternatively insufficient evidence to make out that defence.

6. Upon the whole of the evidence the defendant ought to have been convicted of the offence alleged in the said complaint."

I do not pause to consider grounds 1 and 6. They stand or fall with the more detailed grounds.

Grounds 2 and 3 raise the question whether a defence based upon Proudman v. Dayman (1941) 67 C.L.R. 536 is available in such a case. In Kain & Shelton Proprietary Limited v. McDonald (1971) 1 S.A.S.R. 39 at 55, although I did not find it necessary to express a definite opinion, I ventured the view that in a status offence such as that involved in that case and in this case, there is less room to impute to Parliament an intention that reasonable mistake should be a defence to the charge, than in the case of the majority of statutory offences. Again, in the present case, I do not find it necessary to express a definite opinion because as I understand the evidence the only belief attributable to the respondent was a belief that the vehicle with its load might be a little under or a little over the permitted maximum; but that in the latter event action would not be taken against him. This is not the same thing as saying that he had a belief in the existence of facts which, if true, would be consistent with his innocence. If the evidence had been that the respondent had a positive belief that the weight of the loaded vehicle would comply with the law so long as the vehicle did not carry a load greater than a particular gallonage; and if the evidence were to establish that the vehicle was only permitted to be on the road on the faith of that belief; and that that belief was formed honestly and reasonably; but that the facts were otherwise than he believed; then even in the case of a status offence such as the present, I am inclined to the view that a defence based upon Proudman v. Dayman would arise.

In my opinion, a defendant who wishes to rely on this defence is not required to advert particularly to the circumstances each time a recurring act occurs. If he applies his mind on one

occasion, and then forms the honest and reasonable belief that he is not in breach of the law, so long as the same set of circumstances is repeated, then I think that he is only required to establish a belief that in the particular instance the subject of complaint, he honestly and reasonably believed those circumstances were being repeated. Thus, if several years ago the respondent in the present case had honestly and reasonably formed a belief that a particular gallonage loaded onto his tanker would not result in the vehicle exceeding the legal limit, then in any case where he permitted the vehicle to be on a road only when it was so loaded, this would be sufficient to bring him within the defence. But those are not the facts of this case.

As to the onus of proof in such a case, on the present state of the authorities, I think that the trend overseas favours the proposition that there is no onus upon a defendant to establish such a belief, but merely to adduce evidence sufficient to raise a reasonable doubt as to its non-existence. See particularly Sweet v. Parsley (1970) A.C. 132 per Lord Diplock at 164; and R. v. Strawbridge (1970) N.Z.L.R. 909 at 914. The same view was taken by Menhennit J. in Kidd v. Reeves (1972) V.R. 563. This view of the law is contrary to the opinions expressed by all the members of the High Court in Maher v. Musson (1934) 52 C.L.R. 100; see per Dixon J. at 105; per Evatt and McTiernan J.J. at 109. In the ordinary course I would unhesitatingly follow that case; but the question arises whether the opinions there expressed must be taken to be qualified in the light of the decision of the House of Lords, delivered shortly afterwards, in Woolmington v. Director of Public Prosecutions (1935) A.C. 462. If he had wished to do so, Dixon C.J. had the opportunity of qualifying what he had said in Maher v. Musson when he delivered his judgment in Proudman v. Dayman. He there said (p. 541):

"The burden of establishing honest and reasonable mistake is in the first place upon 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."

In Sweet v. Parsley (at 164), Lord Diplock said that he understood Dixon C.J. to be saying that, in the light of Woolmington's Case, where there is any evidence of a reasonable but mistaken belief of facts, the jury should acquit the accused "unless they feel sure that he did not hold the belief or that there were no reasonable grounds upon which he could have done so." His Lordship then paraphrased his understanding of what Dixon C.J. had said in Proudman v. Dayman in the following words:

"Unlike the position where a statute expressly places the onus of proving lack of knowledge on the accused, the accused does not have to prove the existence of mistaken belief on the balance of probabilities; he has to raise a reasonable doubt as to its non-existence."

This interpretation of the judgment of Dixon C.J. in Proudman v. Dayman had a big influence on the judgments in R. v. Strawbridge and Kidd v. Reeves. But, with the greatest respect, is it the correct interpretation? It certainly goes beyond what Dixon C.J. actually said. Lord Pearce, in Sweet v. Parsley (p. 158) said:

"The Australian High Court, founding on Cave J. (1889) 23 Q.B.D. 168, 181, and Wills J. (at p. 175) in Reg. v. Tolson have evolved a defence of reasonable mistake of fact, and the burden of proving this and balance of probabilities rests upon the defendant."

His Lordship then cited from an article by Professor Colin Howard in the Law Quarterly Review (1960), Vol. 76, p. 547 at p. 566, where Maher v. Musson was cited as authority for the proposition. His Lordship pointed out that the case preceded Woolmington's Case, but, referring to the latter case, he added:

"I should be happy to be persuaded either that it does not prevent us from adopting such a satisfactory concept as the Australian Courts have evolved, or that its wide effect should be limited."

It is clear, then, that Lord Pearce did not understand Dixon C.J. in the same sense as did Lord Diplock; and on his understanding of the Australian approach, he was not satisfied that it conflicted with Woolmington's Case.

A most useful discussion of the problem is to be found in Professor Howard's work "Strict Responsibility" (1963). At p. 107 he refers to the passage in the judgment of Dixon C.J. in Proudman v. Dayman, and described it as "hesitant and at first glance difficult to understand." He went on:

"His Honour first lays down the rule that it is for D to establish mistake but immediately qualifies it by saying 'in the first place'. It can be in the interest of no one but D to establish the defence at any stage, so that 'in the first place' seems to be superfluous unless one assumes that reference was intended to the evidentiary and not to the persuasive burden of proof. This understanding is consistent with the doubt expressed in the next sentence as to whether any additional burden rests on D to satisfy the tribunal in case of doubt. The first sentence therefore apparently means that in all cases D must undertake the evidentiary burden of introducing or pointing to some evidence to support an assertion of reasonable mistake of fact. This is in accord with principle.

The second sentence seems in effect to express doubt whether in advancing this defence D undertakes any persuasive burden. It is submitted that such a doubt would be unjustified for the reasons advanced above, which come down to the fact that unless D does undertake a persuasive burden there is no way in which his defence can succeed. It is worth emphasising by repetition that unless D undertakes a persuasive burden there is no way in which he can come to grips with P's case through the medium of mistake, for initially P does not have to disprove mistake by D; and he does not have to disprove mistake because he does not initially have to concern himself with any state of mind in D at all."

He then poses the proposition that Dixon C.J., in the second sentence, may have been referring only to the quantum of proof upon a defendant. After some discussion he concluded (p. 109):

"If he (a defendant) seeks merely to deny part of P's case all he has to do is cast a reasonable doubt upon the truth of the facts, or any of them, asserted by P. He does not have to establish any contrary fact. But if he seeks to set up reasonable mistake he must persuade the court of the truth of what he asserts on the balance of probability, to its 'reasonable satisfaction'.

It would be theoretically possible for some fact relevant both to P's case and to D's reasonable mistake defence to be asserted by the former and denied by the latter, and for D to fail to establish reasonable mistake but incidentally to cast a reasonable doubt on this fact. If this situation should occur, D would be entitled to be acquitted."

Professor Howard's conclusions are to be found at p. 107, where he wrote:

"Therefore if this defence to regulatory offences is to work at all, and it has worked successfully now for many years, it must be on the basis that D undertakes more than a merely evidentiary burden of proof. Clearly he has to undertake a persuasive burden of proof so far as reasonable mistake is concerned. This does not mean, of course, that he is debarred from defending himself in any other way. If he wishes to cast doubt upon P's case, as by attacking the adequacy of the evidence that some event happened at all, or that at the relevant time he, D, possessed some relevant status, then it is open to him to do so in the same way as in any other criminal trial, namely, by satisfying the merely evidentiary burden of introducing or pointing to some evidence which casts sufficient doubt on that part of P's case."

I think that Lord Pearce and Professor Howard correctly set out the basis upon which Dixon C.J.'s judgment in Proudman v. Dayman has been understood in Australia, until doubts were raised by Lord Diplock and later by R. v. Strawbridge. It may be that those doubts are justified. Both what was said by Lord Diplock and by the New Zealand Court of Appeal in R. v. Strawbridge are of the highest persuasive authority. But they are in conflict with Maher v. Musson and, possibly also with the judgment of Dixon C.J. in Proudman v. Dayman. Until the matter is reconsidered in the High Court, I think it proper to follow Maher v. Musson. I would

hold, therefore, the onus is upon a defendant to prove (on the balance of probability) the facts necessary to bring him within a Proudman v. Dayman defence. It seems to me, however, that anything said on the topic in this case must be obiter, since the proved facts disclose that any operative mistake of fact was not one which, if true, was consistent only with the innocence of the respondent.

As to ground 4, that relating to the suggested defence of "reasonable ignorance of fact", I do not find it necessary to decide as a matter of law whether there is such a defence. If there is, I think that the ignorance must relate to the existence (or non-existence) of a fact, but for which the defendant's act would have been innocent. If the defence exists, it may be looked upon as the reverse side of the coin to the defence in Proudman v. Dayman. There, there must be a positive belief in a fact or set of facts which, if true, would render the defendant's act innocent. A defence of reasonable ignorance can only apply if the ignorance is of the existence of circumstances which, if they did not exist, would render the defendant's act innocent. But here any ignorance on the part of the respondent relates only to the full extent of the overloading. Even had there been no unusually heavy distillate, it seems (and the respondent has not proved otherwise) that the vehicle would have been overloaded to a minor degree. Such overloading would have been tolerated by the inspectors, but that did not render the act lawful. It follows, in my opinion, that if there is such a defence, it does not apply to the facts of this case.

Ground 5 raises the question whether there was any defence open to the respondent, other than that based on reasonable mistake of fact. In particular, was it open to the respondent to rely upon the doctrine enunciated in dicta in Norcock v. Bowey (1966) S.A.S.R. 250? In that case all three members of the Court were of opinion that even in the case of a status offence in which proof of mens rea was not necessary, and where on the facts the doctrine of reasonable mistake of fact did not apply, a defendant was nevertheless entitled to succeed in certain circumstances where the facts which prima facie



constituted the offence occurred in a manner which was beyond his control. See per Napier C.J. at p. 266; per Walters A.J. (as he then was) at p. 269; and my own judgment at p. 268. I last had occasion to consider the problem in Kain & Shelton's case at p. 53. The view which I expressed then was that it would be a defence to the owner of a vehicle such as that involved here, if he were able to establish (on the balance of probabilities) that at the time in question the vehicle was being driven, for example, by a thief or by somebody over whom he had no authority, and who had no authority from him to drive the vehicle.

Three questions arise here:

1. Where an unauthorised act is involved, must it be a wrongful act?
2. Where does the onus of proof lie?
3. How proximate must the unauthorised act be to the facts which prima facie constitute the offence?

My answer to the first question is "No", so long as the circumstances are brought about by the unauthorised act of a stranger, that is a person who was not, either in law or in fact, subject to the control of the defendant. In many cases the act will be wrongful - either criminal, or tortious, or in breach of contract; but not necessarily so. Strictly speaking, I think that it is not so much the person as the act or its effects which must be beyond the control of the defendant. Where he can control the person it follows that he can control the act of the person. But there may be cases where, notwithstanding the unauthorised act of a stranger, the defendant could have averted its effect by the exercise of reasonable foresight and care. In that case I think that he is bound to do so.

In Norcock v. Bowey and again in Kain & Shelton's case I said that I thought that onus of proof of this defence lies upon the defendant, on the balance of probabilities. Napier C.J. expressed the same view in Norcock v. Bowey. I adhere to that view, on the assumption that the onus of proving reasonable mistake of fact is upon the defendant in the case of a defence

based upon Proudman v. Dayman. If my views on the onus in the case of such a defence are mistaken, then I would concede that the onus on the defendant in the case of a Norcock v. Bowey defence should probably also be an evidential onus only.

On the view of the law which I presently hold, I ask: "Has the respondent proved, on the balance of probabilities, that the tanker was on the road in its overloaded state owing to the unauthorised (but not necessarily wrongful) act of a stranger, i.e. a person over whom the respondent had no control in law or in fact?"

This brings me to the third of the questions which I posed: "How proximate must the unauthorised act be to the facts which prima facie constitute the offence?"

There is no doubt that the vehicle was being driven on the road by Duncan, a person authorised by the respondent to do so. I think that it is sufficient for the purposes of a Norcock v. Bowey defence if only the unlawful state of the vehicle (when on the road) was brought about by the unauthorised act of a stranger. But here the overloaded state of the tanker was brought about by Duncan's action in loading it with the approximate gallonage which he was authorised to load for the respondent in the course of his employment by the respondent. Of course, whoever filled the tank from which Duncan obtained his supply was not an employee of the respondent. So here we are faced with the situation that the supplier had in its tank distillate of a heavier grade than usual. Although there is no evidence on the topic, I would assume that the supplier neither had nor needed the authority of the respondent to fill its tank in this manner. What, then, can be said to be the unauthorised act of a stranger which brings a Norcock v. Bowey defence into operation? The only possible nexus which I can see is the failure of the clerk who issued Duncan with the "trip slip" to warn him of the unusually heavy grade distillate in the company's tank. This, in my opinion, is an omission which may well have led the respondent to be under a reasonable mistake of fact; but I do not think that it should be regarded as the unauthorised act

of a stranger, within the meaning of the Norcock v. Bowey defence. Even if an employee of the supplier had filled the tanker, on the evidence I do not think that his act should have been regarded as an unauthorised act; but again, it may have led the respondent to be under a reasonable mistake of fact.

In my view, therefore, the appellant is entitled to succeed on ground 5.

For these reasons I would allow the appeal. I would be prepared to hear argument as to whether a conviction should be recorded, or whether the case should be remitted to the Magistrate's Court for rehearing or further hearing.