Case No: 2001/05691/Z5

Neutral Citation Number: [2003] EWCA (Crim) 697
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOOD GREEN
MR RECORDER ROOK Q.C

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 17 March 2003

Before :

LORD JUSTICE SCOTT BAKER
MR JUSTICE HOLLAND
and
DAME HEATHER STEEL

- -

Between :

MISANKI KURANKU MATUDI — Appellant
- and -
THE CROWN — Respondent

- -

(Transcript of the Handed Down Judgment of
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- -

Matthew Lawson for the Appellant
Anthony Clover for the Respondent

- -

Judgment
As Approved by the Court

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Lord Justice Scott Baker:

1. Mr Matudi appeals against his conviction on 18 September 2001 in the Crown Court sitting at Wood Green before Mr Recorder Rook Q.C for importing animal products contrary to Regulations 21 and 37 of the Products of Animal Origin (Import and Export) Regulations 1996 (S.1. 1996 No.3124) (the 1996 Regulations). He appeals with the certificate of the trial judge on a point of law. The point of law is whether the offence requires mens rea or whether, as the judge held, it is an absolute offence. Following the judge's ruling the appellant changed his plea to guilty and was sentenced to a conditional discharge for 12 months, and ordered to pay £100 towards the costs of the prosecution.

2. The issue was initially of some importance not only to the appellant but also to the Crown. However the outcome of the appeal is no longer of such concern to the Crown as the relevant regulations have been replaced by the Products of Animal Origin (Third Country Imports) (England) Regulations 2002 (S.1. 2002 No. 1227) (the 2002 Regulations) and these regulations provide for a defence of due diligence.

3. The 1996 Regulations were introduced in order, inter alia, to give effect to Council Directive 90/075/EEC which lays down the principles governing the organisation of veterinary checks on products entering the Community from third countries and Council Directive 92/118/EEC which lays down animal health and public health requirements for trade in and imports into the Community.

Regulation 21 of the 1996 Regulations provides:

"21. – (1) no person shall import any product of animal origin (except fishery products or live bivalve molluscs or other shellfish) unless he has given to either the official veterinary surgeon at

the border inspection post or Minister the following periods of advance notice of arrival-

(a) for consignments arriving by air, at least six hours, given during the working day of the border inspection post;

(b)…..

(2) The notice referred to in paragraph (1) above shall be in accordance with Article 4(4) of Directive 90/675."

Regulation 21(3) prohibits removal, other than in accordance with certain specified conditions, of any produce of animal origin to which the regulation applies.

Regulation 37 makes it an offence to contravene the regulations and provides for a penalty of a fine and/or three months imprisonment on summary conviction and a fine and/or two years imprisonment following conviction on indictment.

Other than regulations 13, 14 and 36 to which I shall refer in a moment, the only other regulation which it is necessary to mention is 38 which makes a director, manager, secretary or other similar officer of a body corporate liable where an offence has been committed with his consent or connivance or is attributable to any neglect on his part.

The facts

4. On 28 November 2000 a consignment arrived at Heathrow from the Cameroons on a Swissair flight via Zurich. The consignor was Mrs Monie and the consignee and importer the appellant. The consignment contained for the most part frozen cassava leaves and indeed that was how the accompanying documents described it. However, when it was subjected to a spot check it was found to contain also eleven smoked monkeys, two pangolins and a number of tortoise parts. Each of these is an endangered species and importation is prohibited without an appropriate certificate. There was no such certificate in this case and the appellant faced, in addition to the charge under the 1996 Regulations, three other charges of fraudulent evasion of a restriction on the importation of goods contrary to section 170(2) of the Customs and Excise Management Act 1979. He was, however acquitted of these charges which do, of course, require mens rea.

5. On 30 November the appellant was advised that the consignment was ready for collection. It had been taken to the border inspection post. When he arrived at Heathrow later that evening he was taken to the border inspection post and there arrested. His home was searched and a piece of monkey was found in his freezer.

6. The consignment had earlier been inspected at the cargo inspection shed in a routine random inspection. The manifest referred only to vegetables but within the vegetables there were some black plastic carrier bags that appeared to contain frozen meat. This later turned out to be monkey. The consignment had come from the Cameroons and meat is not normally allowed to be imported from Africa. All sixty one boxes of the consignment were examined, eleven monkey carcases, two pangolins, various tortoise parts and some antelope were discovered, all hidden under cassava leaves and wrapped in black plastic bags.

7. The appellant ran a shop where he sold African food. He met Mrs Monie and she began to supply him with fruit and vegetables from Africa, in particular some items that he had found difficulty in obtaining. She had a sister called Flora who lived near the shop. The consignments arrived roughly once a month. He never ordered meat but meat had in fact come in the previous consignment, and when the appellant telephoned Mrs Monie and complained to her that it could get him into trouble she said it was hers and asked him to keep it for her until she arrived in the United Kingdom. He had no idea that the consignment which was the subject matter of this case contained any meat and, he said she had no business to send him any. He was only expecting cassava and sorrel. He had limited storage capacity and would not order what he could not store. The total charge payable to the authorities was £1639 which was about £250 more than he had anticipated.

8. Thus the appellant's defence to the offence under Regulation 21 was that he had no idea the consignment contained any products of animal origin. The judge ruled that this was no defence in law because the offence did not require guilty knowledge. Accordingly he changed his plea to guilty. In the light of the jury's verdict on the other counts the judge, as was appropriate, sentenced him on the basis that he did not know the consignment contained any products of animal origin.

The Law

9. It is a well recognised and long-standing presumption of the common law that mens rea is an essential ingredient of every offence unless Parliament has expressly or by necessary implication provided that it is not. The principle was identified by Wright J in Sherras v De Rutzen [1895] 1 Q.B. 918, 921:

> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered…."

10. The starting point must, it seems to us, be the words of Regulation 21. The language is general and nothing in the wording of the regulation indicates one way or the other whether it creates an offence of strict liability. Some assistance is, however, to be found by comparison with other paragraphs in the 1996 regulations. For example in each of the regulations 36 (1)(a), (b) and (c) there are words that import some element of guilty knowledge and regulation 18 provides a defence to what would otherwise be absolute duties imposed by regulations 13 and 14. It would have been, relatively simple for the draughtsman to have included the word 'knowingly' before import in regulation 21, if it was not intended to create an absolute offence. Regulation 38 renders the officer of a company liable, but only in the event of his consent, connivance or neglect. Alternatively, and has been done with the 2002 Regulations, some form of due diligence defence could have been provided.

11. The modern law on absolute liability is expressed through a number of decisions of the House of Lords: Lim Chin Aik v The Queen [1963] AC 160, Sweet v Parsley [1970] AC 132, Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong [1985] AC 1 and B (a minor) v Director of Public Prosecutions [2000] 2 AC 428.

12. It was emphasised in argument that the presumption of mens rea could not lightly be displaced. Indeed it could only be displaced if that was the necessary implication, in other words what Parliament *must* have intended. See Lord Reid in *Sweet v Parsley* 149E.

Counsel on both sides were agreed that the relevant propositions were identified by Lord Scarman in *Gammon* at p.14.

> 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 in particularly strong where the offences 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, and public safety is such as issue.
>
> 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.

13. Taking first the second proposition, there is some substance in the argument that an offence under Regulation 21 is truly criminal in character. It carries on indictment a maximum penalty of two years imprisonment. On the other hand, if the offence is one of strict liability there will be a wide range of gravity between those cases in which there is a quite deliberate importation of animal products and those in which the offence has been committed without mens rea, and the sentence will vary accordingly. It seems to us that consideration of the second proposition cannot be divorced from consideration of the fourth and fifth propositions.

14. Mr Matthew Lawson, who has appeared for the appellant, accepts that the regulation is concerned with public safety but argues that strict liability is not shown to promote the objects of the legislation. It is not, he submits, established that the creation of strict liability will encourage greater vigilance to prevent commission of the prohibited act.

15. The undisputed evidence of David Taylor, an experienced veterinary surgeon and specialist in zoo and wildlife medicine, pointed out that some of the diseases that could be imported into the United Kingdom in the material involved in this case included:

Foot and Mouth Disease.

Rinderpest, another viral disease of ruminants and swine and historically regarded as the most devastating of cattle diseases.

Contagious Bovine Pleuropreumonia.

Rift Valley Fever.

African Horse Sickness.

Anthrax.

Rabies.

Bovine Brucellosis.

Bovine Tuberculosis.

16. In our judgment the importation of products of animal origin into the United Kingdom from countries outside the European Community is a matter of considerable importance and social concern. There are significant public health implications that engage the safety of the public. Both human and animal health is involved and in some circumstances, for example Foot and Mouth Disease, there may be very serious economic consequences following a breach of the regulation.

17. The clear purpose of the regulation is that products of animal origin should not be imported into the United Kingdom without first having been vetted by those with the appropriate expertise to decide whether, in the circumstances, importation is appropriate. Furthermore, this is the policy of the European Community and not the United Kingdom alone. The greater the degree of social danger the more ready the courts will be to infer that Parliament's intention was to create a strict liability offence. Stephen Brown L.J, as he then was, said in Kirkland v Robinson [1987] 151 JP 377, 386:

> "In this day and age, there are areas of national life which are regarded as being of such importance that there must be an absolute prohibition against the doing of certain acts which undermine the welfare of society. The Wildlife and Countryside Act 1981 is designed to protect the environment. That is an objective of outstanding social importance. In my judgment, the provisions to which I have referred are intended by Parliament to be of strict application. Thus, those who choose to possess (inter alia) wild birds are to be at risk to ensure that their possession is a lawful possession within the provisions of the Act."

18. It seems to us that a person who chooses to be an importer takes upon himself the obligation of ensuring that any importation complies with the relevant regulations. The subject-matter of the regulation with which the court is concerned relates to a particular activity (importation) involving the potential dangers to which we have referred. Citizens have a choice in whether or not they choose to participate in such an activity. Those who do may, as Lord Diplock said in *Sweet v Parsley* at p163, place on themselves an obligation to take whatever measures may be necessary to prevent the prohibited act.

19. We were urged by Mr Lawson to look at the wider picture rather than concentrate on the facts of the instant case. He argued that if Regulation 21 is interpreted as an absolute offence the importer is in an impossible position; he cannot control what the consignor puts into the consignment. The only way he can ensure he does not break the law is to give notice in every single importation just in case the consignment might, contrary to what he is expecting, contain a product of animal origin. It was pointed out by Mr Clover, who has appeared for the Respondent, that this would prove to be a very expensive exercise because the transport and storage charges at the border inspection post are quite considerable and are calculated according to weight. Mr Lawson's answer was that the cost would be passed on to the customers. We are unimpressed. In practice no importer will give unnecessary notice. In our judgment an importer will emphasise to his supplier that the contents of the consignment must correspond with the information on the accompanying documents. Also, it is up to importers to ensure that their consignments come from a reliable source. In our view it is too simplistic for the appellant to say there is nothing he could have done about it. Strict liability imposes a clear black and white obligation on importers. It is up to them to ensure that they contract with consignors that they can trust who do not take risks on lax procedures.

20. This really leads to the final point and the one on which Mr Lawson places the greatest emphasis, that is whether strict liability will be effective to promote the objects of the legislation. There will obviously be a temptation with some importers to by-pass the notice provisions and thus save the delay and expense involved in the consignment being diverted to a border inspection post. It seems to us that strict liability is inevitably going to make the regulation more effective. But what of the fact that this is now a different provision in the 2002 Regulations and in particular a defence of due diligence which limits the effect of strict liability? It can be said on the one hand that this points against it ever having been necessary or appropriate to have strict liability and on the other that it was appreciated that the previous legislation as drafted required some relaxation. In our judgment the fact of a change in the legislation and its nature is neutral from the viewpoint of construing the previous regulation. We are told that the 1996 Regulations were not working because enforcement lay with the local authority and their spot checks were not leading to prosecutions. The 2002 Regulations are intended to be enforced by the Customs and Excise. There are other changes, including a formal certification procedure.

21. Having considered the five propositions in *Gammon* it is then necessary to consider whether the presumption has been displaced in the case of Regulation 21, Lord Nicholls said in *B (a minor)* at 463H when considering Section 1 (1) of the Indecency with Children Act 1960:

> "The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. "Necessary implication" connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is to be attributed to Parliament when creating the offence."

22. In our judgment the implication is compellingly clear in the present case. There are other paragraphs in the same regulations that expressly impose some mental element whereas Regulation 21 does not and, more importantly, the mischief sought to be prevented is such that the aim of Regulation 21 is likely to be better achieved if the offence is one of strict liability. We would also regard the prohibited act, to use Lord Reid's description in *Sweet v Parsley* at 149G as a quasi-criminal act, that is one that is not criminal in any real sense but which is in the public interest prohibited under a penalty in contradistinction to a truly criminal act.

23. We were referred to a number of other authorities where the issue was whether the particular statutory provision under which the offence was charged required mens rea. We gained little assistance from these cases because, in the end, each provision has to be considered in its own context applying the principles that we have described.

24. In the course of argument Holland J. raised a query as to the object sought by Regulation 21: was it aimed at banning the importation of products of animal origin? Or was it aimed at securing timely advance notice of the arrival of such? The absolute construction contended for could more easily be reconciled with the former than with the latter – that said, if it was the former, was there not an overlap with the provisions of Section 170(2) Customs and Excise Management Act 1979 that had been invoked for the purposes of Counts 1, 2 and 3 of the indictment? In response Mr Clover satisfied us that Regulation 21 was aimed at banning the importation of products of animal origin (in respect of which 'advance notice' has not been given) and that whilst on the instant occasion there was such an overlap with Section 170(2) (hence why acquittals on Counts 1, 2 and 3 inevitably led to a conditional discharge on Count 4), such did not necessarily arise. Thus, the advance notice sought by Regulation 21 was not just a matter of administrative convenience but was fundamental to securing specific inspection without which (together with a favourable result) there could be no lawful importation. This importation of products of animal origin was only exposed by way of a random check and, absent advance notice, might easily have evaded inspection. Again, the Crown was only able to invoke Section 170(2) on the instant occasion because of the nature of the respective meats: importation of each was independently banned by other statutory provisions, provisions which would not necessarily be available to the Crown with respect to importations of other products of animal origin. Regulation 21 was the only arrow in the quiver that was consistently available.

25. The effect of giving notice is to enable the consignment to be inspected and checked by an expert to see whether it is fit and appropriate to be allowed to come into the country. Once notice has been given a procedure commences whereby, inter alia, the goods are diverted for inspection. The fact that notice is given does, therefore, make a significant difference to the progress of the consignment and the cost incurred by the consignee.

Conclusion

26. In our judgment an offence under Regulation 21 of the 1996 Regulations does not require mens rea and the judge was correct so to rule. The appeal must be dismissed.