PATEL'S BAZAAR LIMITED v THE PEOPLE (1965) ZR 84 (CA)

COURT OF APPEAL
BLAGDEN CJ, WHELAN J, EVANS Acting J
26th June 1965

Flynote and Headnote

[1] Criminal law - Absolute liability - general considerations in determining whether Legislature intended an offence of absolute liability:

In determining whether the Legislature intended to create an offence of absolute liability, the following considerations are useful:

(1) the reasonableness of holding that *mens rea* is not an ingredient of the offence;

(2) the object and scope of the prohibition;

(3) the ease with which the purposes of the statute could be evaded if the defence of absence of *mens rea* were to succeed;

(4) the nature and extent of the penalty.

[2] Public health - Sale of unwholesome food - absolute liability - section 79 (1) of Public Health Ordinance construed:

Subject to the accused's right to show 'reasonable excuse' for contravening section 79 (1) of the Public Health Ordinance, that section creates an absolute liability.

[3] Public Health - Sale of unwholesome food - burden of proof as to defendant's 'reasonable excuse' - section 79 (1) of Public Health Ordinance construed:

The *onus* is on the accused of establishing by a balance of probabilities that he had 'reasonable excuse' and is not on the prosecution to show the contrary.

[4] Public Health - Sale of unwholesome food - 'reasonable excuse' interpreted - section 79 (1) of Public Health Ordinance construed:

Section 79 (1) of the Public Health Ordinance requires a high standard of excuse before a person will be exempted from liability which, fundamentally, is absolute; the fact that the goods were wrapped before reaching the accused, although relevant to an action based on negligence, cannot serve as a 'reasonable excuse'.

Cases cited:

(1) *Copperfields Cold Storage Co. Ltd v R* 5 NRLR 248.

(2) *R v Prince* (1875) 2 CCR 154; 44 LJ 122.

(3) *Cundy v Le Cocq* (1884) 13 QB D. 207; 53 LJ 125.

(4) *R v Tolson* (1889) 23 QB D 168.

(5) *Anderson Ltd v Daniel* [1924] 1 KB 138.

Statute construed:
Public Health Ordinance (1930, Cap. 126), s. 79 (1), as amended.
Mitchley, for the appellant
Shoniwa, for the respondent

BLAGDEN CJ

Judgment

Blagden CJ: In this case the appellant, Patel's Bazaar Limited, appeals against a judgment of the High Court dismissing its appeal against a conviction of the Magistrate's Court at Monze for the offence of selling unwholesome food contrary to section 79 (1) of the Public Health Ordinance (Cap. 126).

The relevant parts of section 79 (1) of the Public Health Ordinance (which for convenience I shall continue to refer to as 'the Ordinance') read as follows:

' No person shall sell without reasonable excuse any food for man in an unwholesome state.'

The facts of the case were simple and not seriously in dispute. On Saturday, 3rd October, 1964, a servant of the appellant company sold a wrapped sliced loaf to a customer from a consignment of such loaves which had arrived that very day from the manufacturers, Messrs Murdoch's of Livingstone. Upon being opened the next day it proved to be extensively contaminated with black mould. It was taken to the Monze Management Board on the Monday and opened by Mr Henderson, the Government Provincial Health Inspector, on the Tuesday - that is on the third day after its sale. He pronounced it as unwholesome. He described the mould as extensive and said that it had obviously been there for a week, possibly more. On the evidence the learned trial magistrate found that the bread was unwholesome at the time it was sold by the appellant company. That finding is not in dispute. *Prima facie* the appellant company was guilty of the offence charged, and the only substantial issue before the court was whether or not it had any 'reasonable excuse' for selling that unwholesome loaf sufficient to excuse it from liability under the Ordinance.
In both courts below the question of what precaution the appellant company took or should have taken against the possibility of any of its bread being sold in an unwholesome condition was extensively canvassed. It was contended on behalf of the State that the appellant company had taken no precautions at all; and it was contended on behalf of the appellant company that in the circumstances there were no precautions, or at any rate, no reasonable precautions which it could have taken, and in particular, that by reason of its course of dealing with the manufacturers who sold the bread no further precautions were necessary. With due respect, I do not think the presence or absence of adequate precautions was the proper criterion to apply. The section does not penalise the sale of unwholesome food without reasonable precautions or without proper diligence, but 'without reasonable excuse'.
The interpretation of the term 'without reasonable excuse' as used in section 79 (1) of the Ordinance, and the application of that term so interpreted, was considered in the case of *Copperfields Cold Storage Co. Ltd v R* 5 NRLR 248. That was a case which went on appeal to the Rhodesia and Nyasaland Court of Appeal and the judgment of that court delivered by Thomas, P., and reported on pages 264 - 9 establishes the following propositions:

(i) [1] The *onus* is on the accused of establishing that he had 'reasonable excuse' and is not on the prosecution to show that he had not.

(ii) [2] Proof of *mens rea* is not required to establish a contravention of section 79 (1). The liability imposed by that subsection is absolute, subject only to the exception that if the accused can show that he had a 'reasonable excuse' for contravening the section he will be excused from his liability.

[3] I do not share Mr Mitchley's apparent difficulty to visualise a liability which is absolute but in respect of which there can be circumstances in which the subject is excused. I would adopt the reasoning of Thomas, P., in the *Copperfield* case, and I cannot do better than repeat his words which appear at pages 268 - 9 of the report. They read as follows:

> 'Now there is no doubt that the maxim "*actus non facit reum nisi mens sit rea*" is a general principle of the English criminal law, and that the principle is applicable to statutory as well as to common law offences, except in those cases where the legislature intended to create an offence in which *mens rea* was not a necessary ingredient. The legislature may absolutely prohibit the doing of an act and constitute an offence without reference to the state of mind of the offender and regardless whether he had any intention of breaking the law, or otherwise doing a wrongful act. However, no fixed rule can be laid down for ascertaining the intention of the legislature, and the Courts are left to determine from "other considerations" whether a guilty mind is a necessary ingredient in the statutory offence under consideration.
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> *R v Prince* 2 CCR 154; *Cundy v Le Cocq*, 13 QB D. 207 and *R v Tolson*, 23 QB D. 186. From a review of these and other authorities it has been held that the "other considerations" include the following: The reasonableness or otherwise of holding that *mens rea* is not an ingredient of the offence; the object and scope of the prohibition; the ease with which the beneficial provisions of the Statute could be evaded if the defence of absence of *mens rea* could be set up, and the nature and extent of the penalty. Applying these criteria to the case leaves us in no doubt that the legislature intended that the prohibition under consideration should be absolute, and that *mens rea* should not be an ingredient of the offence.'

The substance of the appeal here is that in both courts below there was set too high a standard of 'reasonable excuse' and that on the evidence these courts should have found that there was a 'reasonable excuse'. It is true that the learned judge on appeal referred more than once in the course of his judgment to the *onus* on an accused person of showing 'reasonable excuse' in a case of this nature as being a heavy one. This is capable of misinterpretation. The *onus* of *proof* is no more than to establish a reasonable excuse upon the balance of probabilities. The difficulty which confronted the appellant company was not so much the discharge of the burden of proof as the adduction of an excuse which was not only sufficiently reasonable but also sufficiently excusatory to take it out of its absolute statutory liability. I think this is what the learned judge meant when he referred to the *onus* as being a heavy one.

There is no authority in England on the interpretation of the phrase 'without reasonable excuse' in connection with the sale of unwholesome food for the simple reason that the English Legislature has prescribed that the liability shall be absolute without any exception. To find a case for comparison it is necessary to look at other English legislation and it is difficult to find any which can really be regarded as *in pari materia*.

The nearest case in my view is the one cited by the learned judge namely, *Anderson Ltd v Daniel* [1924] 1 KB 138 where the interpretation and effect of section 1 of the Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27) was in question. Section 1 (1) of that Act provided in substance that a vendor of artificial fertiliser must give the purchaser an invoice stating the name of the articles, together with an analysis of its contents. Subsection (2) punishes a vendor who fails to give such an invoice 'without reasonable excuse'. The vendors in *Anderson's* case were selling quantities of a material known as 'salvage'. This was a trade designation meaning the sweepings of the holds of ships which had brought from abroad cargoes of various chemicals containing nitrogenous products, potash and phosphates. It was the custom of the trade to sell 'salvage' without giving such an invoice as was required by section 1 (1) of the Act, the reason being that it was commercially impractical and indeed virtually impossible to give it. The question to be answered in *Anderson's* case was accordingly, whether in the circumstances it could be said that the vendors had a 'reasonable excuse' for not supplying the statutory invoice. The Court of Appeal, reversing the decisions of the courts below, held that they had not. Bankes, LJ, said, on page 146:

' It seems to me quite plain that the prohibitive expense or the physical impossibility of analysis of the fertiliser sold is not excuse for the absence of an invoice. The statute is directed to the sale of articles of which the analysis was impossible, just as much as, or possibly more than, to the sale of those which are difficult of analysis or which are commercially unprofitable to analyse'.

[4] *Anderson's* case is by no means parallel to the instant appeal but it is of assistance as giving some indication of the high standard of excuse required to exempt a person from liability which, fundamentally, is absolute. In the instant appeal no 'excuse' in the proper sense of this term has been adducted at all. All that has been advanced in effect has been matters in mitigation. What has been said is that in the circumstances it would not have been reasonable for the appellant company to have taken the precaution of opening up all or indeed any of the consignment of loaves to ensure that none were in an unwholesome condition; that there was nothing else it could have done short of that, and that in those circumstances there was reasonable excuse. Attention was drawn to the opinion expressed by Mr Henderson, the Government Provincial Health Inspector, who is an expert in public health matters, that if Mr Patel sold the consignment of bread of which this loaf formed part within a few hours 'he could not be faulted'. I would agree if Mr Patel, or the appellant company, were being prosecuted for negligence. But that is not the position.

Clearly the intention of the Legislature in framing section 79 (1) of the Ordinance was to afford the public maximum protection against the danger of their being sold unwholesome food. That intention would be entirely defeated if it were accepted, as was contended by Mr Mitchley, that the vendor could rely on the fact that the food was wrapped as affording him a reasonable excuse for selling it in an unwholesome condition. If that argument was held to be good as regards wrapped goods, it would have to be extended to all packaged goods whether they were in wrappings, tins, bottles, cartons or boxes, and I would imagine

that this would exempt the average grocer from liability in respect of well over 50 *per cent* of his normal stock.
It is not part of this court's duty to point out what might or might not be a reasonable excuse within the meaning of section 79 (1). [1] The short point here is that it was for the appellant company to establish on a balance of probabilities, that it had a reasonable excuse for selling this one unwholesome loaf. On the evidence before him the learned Resident Magistrate held as a matter of fact that the appellant company had failed to do so. The learned judge on appeal supported that conclusion. I do not think we can quarrel with those decisions, and I would dismiss this appeal.
Appeal dismissed
Judgment
Whelan J: I agree.
Judgment
Evans Acting J: I agree.