

CASE COMMENT

PUBLIC WELFARE REGULATORY OFFENCES: *MacKenzie v Civil Aviation Department* [1983] NZLR 78 C.A.

This important decision raises again the interesting issue of the courts' attitudes in relation to the treatment of the House of Lords' decision of *DPP v Woolmington*.

MacKenzie was charged under s.24(1) of the Civil Aviation Act 1924 with operating an aircraft in such a manner as to be the cause of unnecessary danger to persons and property. He had been flying his aircraft at a low level when the tail collided with power lines causing them to be dragged along the ground. As a result, two men were forced to take cover fearing for their safety.

The principal issue for the Court of Appeal to consider was whether the onus of establishing absence of fault, as a defence to a public welfare regulatory offence, should rest on the defendant. A majority of the Court (with McMullin J delivering a strongly dissenting judgment) decided the defendant did have such a responsibility. In making this determination it followed the Canadian Supreme Court decision of *R v City of Sault Ste. Marie* (1978) 85 DLR (3d) 161.

The decision as it stands is open to criticism, and some of these criticisms will be surveyed.

Classification Of Criminal Offences

Prior to this decision there were generally considered to be three classes of criminal offence. First, there were those termed absolute liability offences, whereby the prosecution needed only to show that the accused did the act the law prohibits. It is from proof of the prohibited act alone that liability flows, and no element of intent need be proved. Hence, the accused cannot exculpate himself by showing that he was free of fault. This class of offence defined as absolute liability is extremely limited and its evident harshness as a standard of criminal liability can be illustrated by reference to the case of *Germaine Larsonneur* (1933) 24 Cr App Reports 74.

The second category of offence recognised prior to the *MacKenzie* case came to be known by some as the 'half-way house.' Such terminology was employed because this category was seen as a com-

promise between the first and the third category of criminal offence. It was in *R v Strawbridge* [1970] NZLR 909 that the second category was recognised in New Zealand. It has been argued, however, that *Strawbridge* did not in fact create a true half-way house because such a category would have required the creation of a defence of absence of fault to rebut the offence of absolute liability. Indeed, *Strawbridge* did not go this far, due to North P's holding the belief that such a defence would have been inconsistent with the House of Lords decision in *DPP v Woolmington* [1935] AC 462. What *Strawbridge* did establish is that in a prosecution for cultivating cannabis it was not necessary for the Crown to establish as part of the prima facie case that the defendant had knowledge of the prohibited plants, but if the defendant discharged an evidentiary burden and showed she honestly believed on reasonable grounds that her act was innocent then she was entitled to be acquitted. Hence, the defendant in this category need only show an honest belief before the burden is again on the Crown.

The third category of criminal offence is known as the truly criminal offence, where existence of mens rea or guilty mind in whatever form, recklessness, intention, or even negligence must be proved by the prosecution. This may be proved by the nature of the act or by additional evidence.

Position of MacKenzie

Thus the problem is now whether simply to position *MacKenzie* into one of those categories or to acknowledge that as a result of the Court of Appeal's approval of the *Sault Ste. Marie* case there are now in fact four categories. The only category which would accommodate the *MacKenzie* characteristics would be the second for the simple reason that there is the same onus on the defendant to the extent that an onus is actually placed on him or her. However, as McMullin J pointed out in strong dissent, *MacKenzie* is radically different from *Strawbridge*. The latter case deals with criminal offences while *MacKenzie* is concerned only with public welfare regulatory type offences and it differs as to the actual burden of proof to be discharged. The *Strawbridge* defence, as seen earlier, requires only the discharge of an evidentiary burden whereas *MacKenzie* shifts the onus of proof to the defendant on the balance of probabilities. It will be remembered that *Strawbridge* was concerned with modifying the approach taken in *R v Ewart* (1905) 25 NZLR 709, in the light of *DPP v Woolmington*. Thus a logical conclusion might be that to extend *Strawbridge* is to ignore *Woolmington's* case to at least some degree. It can be said in favour of the Court of Appeal that it has expressed discontent with the *Strawbridge* case before *MacKenzie*, especially in *Police v Creedon* [1976] 1 NZLR 571. It was there the Court of Appeal stated that it

would prefer to see the *Strawbridge* defence limited to truly criminal offences. The Court of Appeal was quick to seize on this, and said of *Strawbridge* in the *MacKenzie* case (*supra*, 83)

“... the court did not and was not called on to explore the ramifications of the distinction between truly criminal offences and public welfare offences.”

Thus the Court effectively disposed of *Strawbridge* by making a dubious distinction between public welfare and truly criminal offences, but still had the hurdle of *Woolmington's* case, the ratio of which bears repeating. It is generally accepted that the ratio of *Woolmington* was stated by Lord Diplock in *Sweet v Parsley* [1970] AC 132, namely, it is a canon of statutory interpretation that a statute prohibiting certain conduct should be read subject to the implication that a necessary element in the offence is the absence of a belief held honestly and on reasonable grounds in the existence of facts which if true would make the act innocent. Such an implication creates an ingredient of the offence and all ingredients of the offence must be proved by the Crown. The Court of Appeal, it is submitted, chose to ignore the wider interpretation of *DPP v Woolmington* and used the argument in the *Saulte Ste. Marie* case itself to overcome the hurdle of *Woolmington*. The argument was that *Woolmington* was concerned only with true criminal offences and not public welfare offences. McMullin J disagreed with the majority on the validity of the distinction and stated (*supra*, 97):

“*Woolmington* is not a case about offences falling within class 1 [true mens rea offences] ... it is a case about the burden of proof generally....”

It can be seen, then, that the extension of *R v Strawbridge* has created a fourth category of offence which relates to public welfare offences. The criticism to be levelled at this judicially-created category is that the onus of proof created in *R v Ewart* has now been restored.

The second ground of criticism is based on the uncertainty that is certain to arise after the judicial identification of public welfare statutory offences according to the *Saulte Ste. Marie* decision. Indeed, McMullin J foresaw the problem when he stated that “... there may be difficulties in determining the limits of such a classification.” The classification created by the Canadian Supreme Court has already caused confusion in that country and McMullin J argues that such confusion would be absent if the *Strawbridge* test was to be maintained.

In conclusion it can be seen that the Court of Appeal in a majority judgment has judicially created:

- (a) a fourth class of criminal offence and in so reforming the law ignored the full implications of *DPP v Woolmington*, and
- (b) a class of which the boundaries are not defined with precision,

thus allowing for confusion to arise. It is anticipated that the practical consequences of such a decision will be that more defendants are advised by counsel to plead guilty because they now have a burden to discharge which they did not have prior to this decision. If this is the case, the decision may be seen as a victory for the crime control model (which embraces the notion that all crimes must be brought to justice) to the detriment of the due process model (which is concerned with the aspects of law that give rise to procedural protections for those who are brought to justice).

— *Christopher Morris.*

OPEN ADOPTIONS: *Re J* (Court of Appeal, Wellington, 22 November 1983, C.A. 95/83; Cooke, Richardson, Somers JJ)

This case will be of interest to those involved in Family Law because of the exploration made into the concept of the open adoption, a relatively novel arrangement in this country.

The child in this case was a five-year-old boy who was living with his maternal grandmother at the time of the hearing. His mother was unmarried and a committed feminist and lesbian. Though a strong bond existed between mother and child, it was found to be neither realistic nor desirable that she should have custody. However, the mother did not want her child to be raised by her parents with whom she had a long history of antagonism. Rather, she wanted J to be placed in an open adoption with a couple who had young children of their own and who were very experienced in foster care.

The High Court judge did not dispute the impeccable credentials of the mother's proposed adoptees, but he believed the most "natural and conventional" place for J to go was to his grandparents. In other words, His Honour laid stress on the blood tie between J and his mother's parents.

However, the Court of Appeal, after hearing additional evidence, formed a different view of the facts. The trial judge's emphasis on the blood tie was found to be "... a little suggestive of applying a rule of thumb..." and it did not consider it correct to start with any presumption in favour of the grandparents. The Court believed it necessary to weigh up the merits of entrusting custody to the grandparents, on the one hand, as opposed to placing J in an open adoption with the couple proposed by the mother, on the other.

The Court also noted the measure of stability which J had established with his grandparents after a previously unsettled existence: a shift to new adoptive parents could jeopardize that stability. It was also realized

that life with new adoptive parents might be disturbed by frequent access by his mother. But this had to be balanced against the undeniably close bond between mother and child, uncontroverted by any expert evidence, which could be threatened if the grandparents were given care of the child. Furthermore, new evidence, not laid before the trial judge, showed that the grandparent's marriage was not as stable as was previously believed.

On the balance, it was concluded that in the long term J was likely to be more fulfilled and develop a more rounded personality in the open adoption proposed by his mother than with his grandparents.

In focussing on the issue of open adoption, Cooke J stated:

"The legal incidents of [an open adoption] would be no different from any other adoption under the Adoption Act 1955. In law the adoptive parents would be deemed to become the parents of the child and the child would be deemed to cease to be the child of his existing parents. The adoptive parents would be solely responsible for the upbringing of the child but they would be free to consult the natural mother to allow her access to such extent as they saw fit; and continuing contact between her and the child would be contemplated. It is a concept comparatively new in New Zealand but having support from the Department of Social Welfare both generally and in this particular case. In both respects it also has the support of Social Workers employed by Barnardos New Zealand who are familiar with the circumstances of the present case. In general it is a concept that may gain ground in New Zealand, partly because of the numbers of solo parents and partly because of the shortage of babies for adoption. The evidence ... is that it is successful in other countries." (*ibid* 3-4)

Later in his judgment, Cooke J noted it was a concept not without dangers. His Honour made the question of access by the mother a matter for the discretion of the adoptive parents.

The leading judgment was delivered by Cooke J, Richardson J endorsed both the reasons for, and the result of, Cooke J's decision, but Somers J, while concurring in the majority result, made it clear he did so hesitantly and without assenting to all the reasons expressed by Cooke and Richardson JJ.

Comment

Open adoptions avoid many of the pitfalls of our present system. Birth mothers will be freed of much guilt and uncertainty, and will be able to have a voice in the upbringing of their child. Adoptees will know their true identity and thus will not seek refuge in fantasies of idealised birth parents which may be cruelly shattered later on.

But difficulties may arise under an open adoption system. It places a heavy burden on adoptive parents, who will have to deal with birth mothers' requests for both access and a say in the child's upbringing. Conflicts will inevitably arise and the continued happiness and stability of the child may be seriously jeopardized by feuding between the parties. Should such disputes always be resolved in favour of the adoptive parents? Would mediation by social workers be advantageous? It is the view of the present writer that despite the novel and untested notion of

open adoptions in New Zealand, they are vastly preferable to the current system of utter confidentiality which hinders the search for identity of the adoptee as well as forcing a birth mother to sever completely her links with her child.

— *Peter Spring.*