HIGH COURT OF AUSTRALIA

Queen

Vs.

Wilkinson; Ex parte Brazell, Garlick & Coy

Dixon(1), McTiernan(1), Williams(2), Webb(3), Fullagar(1) and Kitto(1) JJ.

7 March 1952

CATCHWORDS

Constitutional Law (Cth.) - Freedom of inter-State trade and commerce - Marketing of primary products - Potatoes - Marketing Board constituted under State Act - Compulsory delivery to board - Exception - "In the course of trade or commerce between the States" - Potatoes sold by producer in State of production to agent of, and consigned to, firm in another State - Resale in that State - Knowledge of producer - The Constitution (63 & 64 Vict. c. 12), s. 92 - Marketing of Primary Products Act 1927-1940 (N.S.W.) (No. 34 of 1927 - No. 42 of 1940), ss. 3, 3A, 5 (8), 11 (1), (3)*.

HEARING

Sydney, 1951, December 3, 4.Melbourne, 1952, March 7. 7:3:1952 PROHIBITION.

DECISION

March 7, 1952.The following written judgments were delivered: -

DIXON, MCTIERNAN, FULLAGAR AND KITTO JJ.

These are appeals from convictions jurisdiction was exercised because the defendants, among other defences, set up s. 92 of the Constitution as an answer to the prosecutions. There are three defendants, who are the appellants, and three informations. The informations were for offences under s. 11 (3) of the Marketing of Primary Products Act 1927-1940. The material part of that sub-section provides that every producer (an expression which by force of various definitions covers a grower of potatoes declared to be a commodity) who, except in the course of trade or commerce between the States sells or disposes of or delivers any commodity, in respect of which a board has been appointed, to a person other than the board, and every person other than the board who, except as aforesaid, buys accepts or receives any such commodity from a producer shall be guilty of an offence. (at p478)

2. Potatoes have been declared a commodity and a board has been appointed with respect to them. The defendant Brazell grows potatoes near Dorrigo in New South Wales. The defendants Coy and Garlick are partners who carry on business at Dorrigo as produce agents. The offence of which Brazell was convicted was disposing of certain potatoes contrary to the sub-section. The offence of

which Coy and Garlick were each convicted was receiving the same potatoes from Brazell, a producer, contrary to the sub-section. The offences were laid as taking place at Dorrigo on 10th June 1950. (at p478)

3. All three defendants raise as one of their defences the exception in favour of inter-State trade and say that the disposal and receipt of the potatoes was in fact in the course of trade or commerce between the States. This defence arises primarily, of course, on the words of the State Act but, even if it is regarded as exclusively a matter of State law, it is a ground upon which the defendants may succeed in this appeal, notwithstanding that the appeal comes to this Court because of the Federal element which the defendants introduced into the case when in the Court of Petty Sessions they set up s. 92 of the Constitution. (at p478)

4. The facts upon which the defence turns are simple. Coy and Garlick buy potatoes as agents for a firm called J. E. Long & Co., by whom Coy and Garlick are kept in funds. J. E. Long & Co. are produce merchants carrying on business on the border of New South Wales and Queensland. Their head office is at Jennings, which is the name of the New South Wales town adjoining Wallangarra situated on the Queensland side of the border. The towns are divided only by the political and municipal boundary. The railway terminal is in Wallangarra and it is at the terminal that produce carried or to be carried by rail is handled. Potatoes arriving from New South Wales are forwarded by rail to various Queensland centres, although of course it would be open to J. E. Long & Co. to send them to some place in New South Wales, and no doubt potatoes arriving from places of production in Queensland are forwarded to New South Wales centres. What is done, however, is probably very much influenced by a desire to obtain the protection of s. 92. According to the view we take of the facts material to the charges against the defendants what occurred is this. (at p479)

5. Brazell had always delivered his potatoes to the board but he held a quantity of seed potatoes which the board would not take. He was aware that he might lawfully dispose of them in inter-State trade and he knew that Coy and Garlick's firm bought potatoes for Queensland. At some time in May 1950 Brazell verbally agreed with Garlick and Coy to sell about 48 bags of seed potatoes and to deliver the potatoes on trucks at Dorrigo. It was a term of the agreement that the potatoes should be consigned to a Queensland place of destination. In agreeing to buy the potatoes Coy and Garlick were acting for J. E. Long & Co. and this was disclosed to Brazell. Coy and Garlick obtained a railway truck or trucks and on 10th June 1950, Brazell brought the bags of potatoes on a lorry to the railway and under the superintendence or with the assistance of Coy proceeded to transfer them from the lorry to a railway truck. The consignment note was made out by Coy in the name of J. E. Long & Co. as consignors for conveyance of the potatoes to Wallangarra from Dorrigo consigned to J. E. Long & Co. as consignees. On the same day Coy paid Brazell by a cheque drawn upon the account put in funds by Long & Co. The potatoes arrived at Wallangarra where Long & Co. reconsigned them to railway stations in Queensland. While the potatoes were in process of loading at Dorrigo from the lorry to the railway truck an inspector of the board saw them and questioned Coy and Brazell, who maintained that what they were doing was lawful because the potatoes were going to Queensland. (at p479)

6. The "disposal" of the potatoes charged against Brazell consisted in the sale and delivery of the potatoes. The "receiving" of the potatoes charged against Coy and Garlick consisted in taking delivery of the potatoes at Dorrigo when they were placed in the truck. (at p479)

7. We think that the oral agreement for the sale of the potatoes made in May was an executory agreement to sell and that property in the potatoes did not pass until delivery. There was therefore

no disposal of the potatoes within sub-s. (3) of s. 11 until they were removed from the lorry for transfer to the railway truck. Nor was there any "receiving" of the potatoes by Coy and Garlick until they were so removed. (at p480)

8. In our opinion on the foregoing facts the disposal and the receiving made the subject of the informations were in the course of trade and commerce between the States, within the meaning of the exception in s. 11 (3). Under the agreement for the sale and purchase of the potatoes the agents buying were required to consign the potatoes to a railway station in Queensland, and they did so consign them. For the purpose of the exception the delivery of the potatoes from the lorry into the railway truck can bear only the aspect of an essential and integral, even if initial, step in the transportation of the potatoes to Queensland. Yet it is the very thing which forms the foundation of the charges of disposal and receiving. (at p480)

9. For these reasons we think that the defendants made out an answer under the exception to the three informations for offences against s. 11 (3). It is unnecessary to consider the other points made in support of the appeals. (at p480)

10. The appeals should be allowed with costs and the convictions set aside. The informations should be dismissed with costs in the Court of Petty Sessions, fixed at 10 pounds 10s. 0d. in each case. (at p480)

WILLIAMS J. These are appeals by three persons each of whom was convicted of an offence under s. 11 (3) of the Marketing of Primary Products Act 1927-1940 (N.S.W.). This sub-section provides that "Every producer who except in the course of trade or commerce between the States or save as exempted by or under this Act, sells, disposes of or delivers any of the commodity in respect of which a board has, before or after the commencement of the Marketing of Primary Products (Amendment) Act, 1934, been appointed, to a person other than the board, and every person other than the board who, except or save as aforesaid, buys, accepts or receives any of such commodity from a producer, shall be guilty of an offence and liable on summary conviction to a penalty not exceeding one hundred pounds". The first appellant, Brazell, is a producer of potatoes and he was convicted of disposing of a commodity, that is potatoes, in respect of which a board had been appointed to a person other than the board, which had not previously been tendered to and refused by the board, and had not been exempted by or under the Act and were not the subject of trade or commerce between the States. The other two appellants, Garlick and Coy, were convicted of receiving this commodity from Brazell. The prosecutions were launched in respect of a transaction which occurred on 10th June 1950. It was proved that on that date potatoes were a commodity in respect of which a board had been appointed, namely the Potato Marketing Board. It was also proved that proclamations had been made under s.5 (8) of the Act vesting in that board all potatoes other than those excepted by the proviso to that sub-section. The text of the proviso is as follows "Provided always (and without detracting from the generality of sections three and 3A of this Act) that such proclamation under this sub-section shall not affect any portion of such commodity as is the subject of trade or commerce between the States or as is required by the producers thereof for the purposes of trade or commerce between the States or intended by the producers thereof to be used for such trade or commerce". (at p481)

2. On 10th June 1950, Brazell sold 48 bags of potatoes to the firm of Garlick, Coy and Co., a Dorrigo firm, in which the partners were Garlick and Coy, which was acting as buying agent for the firm of J. E. Long & Co., general produce merchants and shipping agents. The head office of J. E. Long & Co. was at Jennings, which is on the New South Wales side of the border between New

South Wales and Queensland. That firm carries on business, including the business of purchasing and reselling potatoes, both in New South Wales and Queensland. About a week before selling the potatoes Brazell, who understood that he was entitled to sell potatoes for inter-State trade, had asked Garlick, Coy and Co. whether the potatoes would be resold in Queensland and had been told that the potatoes would be resold there. Brazell took the potatoes to the Dorrigo railway station and unloaded them into a truck which was consigned by Garlick, Coy and Co. on behalf of J. E. Long & Co. from Dorrigo to J. E. Long & Co. at Wallangarra, which is on the Queensland side of the border. The truck went to Wallangarra and the potatoes were sold by J. E. Long & Co. to a purchaser at Stanthorpe in Queensland. Before purchasing the potatoes Mr. Coy had been told by his principals that the potatoes were being purchased for resale in Queensland. (at p481)

3. The magistrate said that the potatoes were dug and were therefore in existence about a week prior to 10th June 1950, and that Brazell then had no intention of selling them to any particular inter-State buyer, that he did not then require them for the purpose of trade and commerce between the States and that at that time the potatoes without doubt had become vested in the board. This may be right. A proclamation vesting potatoes in the board was in force when the potatoes were dug, which is presumably when they became a commodity within the meaning of the Act. The proviso to s. 5 (8) would appear only to operate where at that moment of time the potatoes were the subject of trade or commerce between the States or were required by the producer thereof for the purposes of trade or commerce between the States or intended by the producers thereof to be used for such trade or commerce. The proviso is in a similar form to the proviso discussed in Matthews v. Chicory Marketing Board (Vict.) [1938] HCA 38; (1938) 60 CLR 263 . It was there held that the proviso was sufficient to prevent the proclamation infringing s. 92 of the Constitution. (at p482)

4. But it is irrelevant to these appeals to decide the validity of s. 5 (8) of the Act. The operation of s. 11 (3) does not depend upon the commodity having become vested in a board. The sub-section operates in relation to any commodity in respect of which a board has been appointed. A proclamation under s. 5 (8) may or may not be made. If it is not, the commodity must nevertheless be tendered to the board and s. 11 (2) (c) provides that subject to the Act the board may accept delivery of any of the commodity so tendered and the commodity so delivered to and accepted by the board shall be deemed to be absolutely vested in and to be the property of the board. It was contended that the appellants were entitled to succeed because s. 11 (3) only applies where there has been no proclamation vesting the commodity in the board and here there were proclamations. But the language of the sub-section is quite general, it is wide enough to cover the cases of proclamations and no proclamations, it is the sub-section which creates the offence, and, in my opinion, it applies to both cases. It has a residual operation where there is a proclamation. Commodities do not vest in the board under a proclamation which are required by the producers thereof for the purposes of trade or commerce between the States or required or intended by the producers thereof to be used for such trade or commerce. The producer might in the first instance require the commodity or intend to use it for this purpose but later change his mind. To avoid a breach of s. 11 (3) the producer would then have to tender the commodity to the board. If the board accepted it, the commodity would become vested in the board under s. 11 (2) (c). Something was said during the argument about the necessity of expanding the exception in s. 11 (3) so as to make its width correspond with the proviso in s. 5 (8). But there would appear to be no warrant for this and so to do would probably defeat the intention of the legislature. (at p483)

5. The first question that arises is whether the potatoes were not disposed of by Brazell and received by Garlick, Coy and Co. on behalf of J. E. Long & Co. in the course of trade or commerce between the States. If they were so disposed of and received, they came within the exception in s. 11 (3) and

the appellants were wrongly convicted. The magistrate held that the transaction did not come within this exception. He said that the evidence did not establish that, at the time Garlick, Coy and Co. received the potatoes from Brazell, there was any contract in existence for the sale of those potatoes to any person in Queensland or any other State of the Commonwealth nor did it establish that definite orders were held by J. E. Long & Co. for the supply of potatoes to ascertained inter-State buyers and that the potatoes purchased by Garlick, Coy and Co. were purchased to fulfil any such orders. This was right but the exception is not as narrow as that. It was obviously inserted in the sub-section so as to exclude all inter-State trade and commerce, the freedom of which is guaranteed by s. 92 of the Constitution. It appears to me in the ordinary use of language to cover every sale, disposition and delivery which occurs in the course of a transaction which in fact proves to be an inter-State transaction. It may be, as the magistrate said, that, although the subject potatoes were consigned to Wallangarra, there was nothing to prevent them being redirected to any other destination. Presumably they could have been stopped en route and unloaded at some intermediate station in New South Wales between Dorrigo and Wallangarra and then resold and delivered to some purchaser in New South Wales. But this did not happen. (at p483)

6. The sale by Brazell to J. E. Long & Co. was an intra-State sale but the potatoes went to Queensland and were resold there and delivered to a purchaser in Queensland. It was submitted to the magistrate that the transaction must be looked at as a whole and not split up into separate contracts of sale and resale. The magistrate rejected this submission. In doing so he fell into error. He should have regarded the transaction as a whole. On this basis the facts proved that the acts done by the appellants were done in the course of trade and commerce between the States. The facts brought the case within the reasoning of Dixon J. and myself in Clements and Marshall Pty. Ltd. v. Field Peas Marketing Board (Tas.) (1947) 76 CLR 401, at pp 409, 420 . In that case there were two sets of contracts, the first being contracts of sale by the producers to the dealers and the second contracts of resale by the dealers to buyers in other States. Dixon J. after pointing out that it was only the second set of contracts which in themselves were inter-State transactions, said "We should consider the commercial significance of transactions and whether they form an integral part of a continuous flow or course of trade, which, apart from theoretical legal possibilities, must commercially involve transfer from one State to another" (1947) 76 CLR, at p 429. I said "In my opinion a dealer in a State has a similar right under s. 92 to buy goods in that State for sale in another State to the right of the grower or manufacturer of goods in one State to sell them in another State . . . The fact that there are two sets of contracts, the one for sale and delivery in Tasmania by the growers to the plaintiff, and the other for the sale of the commodity by the plaintiff to purchasers in other States, is immaterial. In James v. Cowan (1932) AC 542; 47 CLR 386, the dried fruits which the defendant was attempting to prevent the plaintiff selling in other States included fruit which he had grown himself or bought from others. In James' Case (1936) AC, at p 631; 55 CLR, at p 59, Lord Wright said that 'in every case it must be a question of fact whether there is an interference with this freedom of passage' of goods from State to State. In my opinion each transaction must for this purpose be looked at as a whole" (1947) 76 CLR, at pp 409, 410. (at p484)

7. It was contended by Mr. Holmes that the exception in s. 11 (3) meant "in the course of the producer's trade or commerce between the States", so that the disposition by Brazell was outside the exception. But there are no words in the exception to limit it in this way. (at p484)

8. A preliminary objection was taken by Mr. Holmes to the jurisdiction of this Court to entertain the appeals. It was contended that the appellants had been prosecuted and convicted under a State Act and that the only questions arising on the appeals related to the construction of that Act. The appeals were brought to this Court by way of orders nisi for statutory prohibition made under the Justices

Act 1902-1947 (N.S.W.). But the appeals are full appeals on law and fact of the same nature as other appeals to the Court in its appellate jurisdiction: per Dixon J. in Wishart v. Fraser [1941] HCA 8; ; (1941) 64 CLR 470, at p 480. Before the magistrate the question was raised whether the Marketing of Primary Products Act infringed s. 92 of the Constitution. This was a matter arising under the Constitution and involving its interpretation. It was a matter in which original jurisdiction has been conferred on this Court by s. 30 of the Judiciary Act 1903-1950 pursuant to s. 76 of the Constitution. The magistrate decided that s. 92 was not infringed. In deciding this question he was exercising Federal jurisdiction within the meaning of s. 39 (2) of the Judiciary Act. Accordingly the appeals were properly brought to this Court, Judiciary Act, s. 39 (2) (b). (at p485)

9. The appeals should be allowed and the convictions set aside. The orders nisi should be made absolute with costs to be paid by the informant Wilkinson. (at p485)

WEBB J. Because of ss. 3 and 3A of the Marketing of Primary Products Act 1927-1940 (N.S.W.) I think that Act is wholly valid, and that the only question is as to the extent of its valid operation. By supplying definitions of words the legislature can alter their natural meaning, and on the same principle it can alter the natural meaning of combinations of words by providing that no matter what may be the natural meaning of, say, a section, the operation of the section shall be limited so as to be constitutional. In this way conflicts with s. 92 of the Commonwealth Constitution, and incidentally problems of construction, can be and are avoided, e.g., it is unnecessary to decide in this case whether the exceptions in s. 5 (8) are co-extensive with the requirements of s. 92 as they were thought to be by Starke J. in Matthews v. Chicory Marketing Board (Vict.) [1938] HCA 38; (1938) 60 CLR 263, at p 283. (at p485)

2. Once a commodity vests under this Act I think it remains vested for all purposes: there is no divesting. If then these potatoes vested under s. 5 (8) the convictions must be sustained. However, I think they did not vest. To hold that they did would be to affirm a legislative power to interfere with a grower selling his potatoes at his will in an inter-State or intra-State transaction. Such a power, whether exercised by way of compulsory acquisition, or by measures short of compulsory acquisition, infringes s. 92 (The Commonwealth v. Bank of New South Wales (1949) 79 CLR 497, at pp 635, 636). The grower, if he trades in potatoes, must be left at liberty to choose; but he is deprived of that liberty if his potatoes are taken from him, or out of his control, before he can decide how to dispose of them in the course of his business and according to its exigencies. The result may be that potatoes can be compulsorily acquired with certainty only while they are in the course of passing from one owner to another in an intra-State transaction, because the buyer when he becomes the owner may also have the protection of s. 92. There is nothing remarkable in this, as this New South Wales statute is, after all, nothing more than a trade and commerce measure directed at marketing to the advantage of the citizens of New South Wales. It stands at no higher level. If any State or the Commonwealth ever finds it impossible to acquire by voluntary purchase the commodities it needs for the purposes of government a situation of emergency will, I suggest, arise to be relieved by compulsory acquisition, as in the case of famine, disease and the like, that is if James v. Cowan (1932) AC 542, at p 558 per Lord Atkin continues to be regarded as wholly sound reasoning. At all events it can safely be said that s. 92 is not directed at making government impossible. (at p486)

3. I think then that s. 92 prevented the vesting of these potatoes, so that s. 5 (8) had no operation on them because of ss. 3 and 3A. (at p486)

4. But I also think that s. 11 (3) had no application to these potatoes. The appellant Brazell, the

grower, appears to have made only one decision about their disposal, and that was to put them in the inter-State trade. Before selling them he inquired of the buying agents, the other two appellants, whether they would be sold in another State, and he was informed that they would be. The buying agents had already been told by their principals that potatoes purchased by them would be sold in Queensland. Then Brazell put the potatoes into a railway truck which was consigned with its contents to Queensland. The potatoes went to Queensland and were sold by the principals in that State. It may be that there was no binding stipulation that the potatoes would be sold in another State, and that they could have been resold in New South Wales without breach of agreement. But a legal nexus with inter-State trade, by a contract with the grower, is not required to secure the immunity given by s. 92 (Field Peas Marketing Board (Tas.) v. Clements and Marshall Pty. Ltd. [1948] HCA 10; (1948) 76 CLR 414). I think then that the only reasonable conclusion from the evidence is that the potatoes were intended by Brazell to be put into the inter-State trade and that his intention was carried out, thus making s. 92 applicable. (at p486)

5. I agree that the appeals are properly before this Court. (at p486)

6. I would make the orders absolute in each case. (at p486)

ORDER

Order allowed in each appeal as follows: Appeal allowed with costs. Order absolute. Conviction set aside. In lieu thereof information dismissed with ten guineas costs.

</html</htm