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CASE NO. 675/92

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

AMALGAMATED BEVERAGE INDUSTRIES
NATAL (PROPRIETARY) LIMITED Appellant

and

THE CITY COUNCIL OF THE CITY OF
DURBAN Respondent

CORAM: BOTHA, HEFER, EKSTEEN, NIENABER, JJA et KRIEGLER, AJA

HEARD: 9 SEPTEMBER 1993

DELIVERED: 22 February 1994.

J U D G M E N T

HEFER JA:

This is an appeal against a conviction in a

magistrate's court where, in a private prosecution at the instance of the present respondent, the appellant was charged with a contravention of the Food By-laws of the City of Durban.

These by-laws were promulgated on 14 December 1950. The enabling legislation at that stage was sec 197(1)(f) of Ord 21 of 1942 (N) which authorised a city council in the province of Natal to make by-laws

> "...restricting or prohibiting the introduction into or the sale or other disposal of food within the borough where there has been a failure to observe the requirements of the by-laws, or any food which is diseased, unsound, unwholesome or otherwise unfit for human consumption..."

Ord 21 of 1942 was repealed and replaced by Ord 25 of 1974 but, by reason of the provisions of sec 336(1)(a) of the latter, the original by-laws, as amended from time to time, are still in force. By-law 18(c) on which the charge in the present case is based, reads as follows:

"18. No person who carries on any business involving the manufacture, preparation, storage, handling or distribution of food shall in connection with such business -

...

(c) cause or permit any article of food or drink which is not clean, wholesome, sound and free from any foreign object, disease, infection or contamination to be kept, stored, sold or exposed for sale or introduced into the city for purposes of sale."

In terms of By-law 9

"(any) person committing a breach of any of these By-laws shall be guilty of an offence...."

The appellant is a bottler and distributor of soft drinks. Its business involves the manufacture, preparation, storage and distribution of food. The discovery of a bee in a bottle of carbonated mineral water which it had sold to a supermarket in Durban led to the prosecution under by-law 18(c) read with by-law 9. At the trial it was formally admitted on appellant's behalf that it had caused or permitted an

article of food which was not free from any foreign object to be kept, stored, sold or introduced into the city for purposes of sale. After explaining to the court that the issue was whether mens rea was an ingredient of the offence charged defence counsel led evidence to show that the bottle in question had passed through appellant's plant without the offending insect being discovered despite elaborate steps to avoid contamination. The evidence did not avail the appellant since the magistrate found that by-law 18(c) imposes strict liability. His view was subsequently confirmed on appeal to the Natal Provincial Division whose judgment is reported in 1992(3) SA 562. The main contention on appellant's behalf in this court is that the court a quo erred in doing so.

Whether the absence of mens rea constitutes a defence to a charge under by-law 18(c) depends of

course on the nature of the prohibition contained therein. Arising from the nulla poena sine culpa principle of the common law there is, as JAMES JP indicated in Ismail and Another v Durban Corporation 1971(2) SA 606 (N) at 607 E, "a strong current of judicial opinion ....against finding anyone guilty of an unlawful act unless that act is accompanied by mens rea". But it is generally accepted by the courts that the legislature may dispense with the requirement of mens rea and the only question in any given case is therefore whether it has in fact done so. The answer is to be sought in the intention of the legislature. Sometimes its intention is expressed precisely and in clear language; but often it is not. The approach in such cases was described as follows in S v Arenstein 1964(1) SA 361 (A) at 365 C-D:

> "The general rule is that actus non facit reum nisi mens sit rea, and that in construing

> statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. (R. v. H., 1944 A.D. 121 at pp. 125, 126; R. v. Wallendorf and Others, 1920 A.D. 383 at p. 394). Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of mens rea. (R. v. H., supra, at p. 126.) "

(See further S v Qumbella 1966(4) SA 356 (A) at 364 D-G; S v Oberholzer 1971(4) SA 602 (A) at 610H-611A; S v de Blom 1977(3) SA 513 (A) at 532 B-D.)

The present enquiry may conveniently be commenced with an examination of the context of the prohibition.

The Food By-laws contain under separate headings a full range of measures aimed at ensuring the supply of clean, wholesome food to the city. Under the heading "General " provision is made inter alia for the appointment of officers with far-reaching powers

of inspection and examination whose main function it is to administer the by-laws and enforce their compliance. A section styled "Structure of premises" lists all the requirements for premises where business is conducted involving the preparation, storage, handling, sale or distribution of food. Allied to this is a section styled "Manufacturing equipment, furniture, fittings and fixtures" which regulates the equipment used in such a business. Then there is a section under the heading "Food Protection, Storage and Distribution". This includes by-law 17, dealing with matters such as the maintenance of cleanliness and the cleaning of utensils, and by-law 18. 18(a) relates to the protection against dirt, 18(b) to so-called "unsound substances", (c) to the "introduction etc of unsound food", (d) to packings and wrappings, and (e) to so-called "compatible use". In each of these there is a

separate prohibition. Finally there are provisions relating to "Personal Hygiene Facilities" and "Housing Facilities" for employees. The general scheme of the by-laws is thus (1) to prescribe certain conditions and (2) to prohibit certain acts in connection with the manufacture, preparation, storage, handling, sale and distribution of food. By-law 18 - like several others - is specifically directed at persons who carry on this type of business. In terms of 18(c) they may not cause or permit what may conveniently be referred to (in order to avoid the draftsman's cumbersome litany) as the distribution of contaminated food.

I turn to the wording of the by-law. This calls for a number of observations. The main one is that there is no indication of an intention to dispense with mens rea. Equally important is the description of the actus reus: what members of the affected

class are prohibited from doing is to cause or permit the distribution of contaminated food. This is what the English text says in unequivocal terms. In the Afrikaans text "cause or permit" is translated by the single word "laat" ("laat hou, opberg, verkoop" etc). The use of the same word in by-law 18(a) led the court in Ismail's case (supra) at 609E to doubt whether "cause or permit" were intended to convey separate concepts; but it appears that, whereas "laat" is used in 18(a), (b), (c) and (d), "cause or permit" is translated literally in (e) by "veroorsaak of toelaat". Taking into account the consistent use of the same English expression and that there is no reason to suspect that it was not intended to convey precisely the same in (a), (b), (c), (d) and (e, the logical conclusion is that "laat" and "veroorsaak of toelaat" are used synonymously. There is thus no need for combining the concepts. The use of the word

"laat" tends to confirm, however, that "cause" ("veroorsaak" in (e)) is used, not in the general sense of bringing about in one way or another that adulterated food is kept, stored, sold etc, but that it is specifically authorised or directed to be kept, stored or sold. (cf Brigish v Johannesburg City Council 1939 TPD 339 at 341 - 342; Rex v McFarlane 1914 EDL 101 at 102-103.) This is in any event the usual connotation of the word when it is juxtaposed with "permit" in the expression "cause or permit". As Lord Wright said in McLeod (or Houston) v Buchanan [1940] 2 All E R 179 (HL) at 187

> "To 'cause' ... involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case. To 'permit' is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate."

(See also Shave v Rosner [1954] 2 All E R 280 (QBD)

at 281-2.)

It appears from the judgment in Lovelace v Director of Public Prosecutions [1954] 3 All E R 481 (QBD) at 483 that

> "[it] has been held repeatedly that, although the prohibition of doing an act is absolute so that scienter or mens rea is not necessary, different considerations apply where a person is charged with 'causing' or 'permitting' the act to be done, because one cannot 'cause' or 'permit' an act to be done unless one has knowledge of the facts."

South African courts have consistently followed the same course except only, as far as I am aware, in Ismail's case. As early as 1896 the Cape court decided in Queen v Otto 13 SC 251 at 253 that a statute penalising the permission of drunkenness on licensed premises implied knowledge of the drunkenness on the part of the accused. Otto's case was followed in R v Schmitz 1912 CPD 507 at 510-511 and Warncke v Rex 1931 S W A 43 at 47-48. The

decisions in R v Webb 1911 TPD 280 at 282, Moonsamy and Another v Rex 1942 N P D 135, R v Mlumbi 1945 E D L 163, R v Govinder 1956(4) S A 133 (N) and R v Joao 1959(1) S A 563 (0) are all based on the principle that a person can only be said to permit an act if he has knowledge of its commission (cf also Cape Town Council v Benning 1917 AD 315 at 319). As indicated in S v Kritzinger en 'n Ander 1973(1) S A 596 (C) at 598 E permission implies knowledge of the relevant act coupled with consent or acquiescence. In Davidson v Rex 1910 T P D 1236 at 1240, it was held that a person must be taken to permit an act if he has power to prevent it and does not do so, but, even in such a case, knowledge is logically still required for a man cannot truly be said to have the power to prevent something of which he has no knowledge. The correct formulation of this principle appears in INNES ACJ's judgment in Alexander v Johns 1912 AD 431

at 445 where it is said that

> "(a) man who has undertaken not to suffer or allow a particular condition of things violates his undertaking, if, knowing of its existence and being able to prevent it, he does not do so."

The courts were dealing, in most of the South African cases, with the word "permit". There is scant authority in this country on the word "cause" appearing either alone or in the expression "cause or permit". English cases are by no means harmonious as to whether the word also carries an implication of knowledge of the facts. According to the judgment in Ross Hillman Ltd v Bond [1974] 2 All E R 287 (QBD) at 297-298, cases in which the enquiry related to "cause" alone are to be distinguished from others in which the word appeared with "permit" as part of the expression "cause or permit"; in the latter event the two words both imply knowledge. This, it appears to me, is a valid albeit inconclusive distinction.

The remaining part of the by-law answers the question: what is it that may not be caused or permitted? Members of the class may not cause or permit the distribution of contaminated food. Because one cannot logically be said to cause or permit the distribution of such food without knowledge of the contamination the wording is more consistent with the presence than with the absence of mens rea. It resembles the wording of the statute which concerned the court in S v Mathebula 1972(1) S A 495(T) and which led my brother BOTHA (acting in a different capacity) to say at 497 G that

> "...the use of the word 'permitted' in this section is more consistent with an intention on the part of the Legislature that mens rea was to be an element of the offence [of unlawful motor carrier transportation by a person permitting the conveyance] than otherwise."

This was said on the authority of South African

Criminal Law and Procedure (formerly Gardiner and Lansdown) by Milton & Fuller Vol III at 34 and the cases cited there. The relevant passage reads as follows:

> "The word 'permit' (or 'permitting') is fairly generally accepted as importing mens rea in that it requires a particular state of mind. This state of mind involves essentially some degree of knowledge of the wrongful act."

I must accordingly express my respectful disagreement with the remarks at 564 I-J of the report of the court a quo's judgment in the present case to the effect that the words "cause or permit" provide no clue to and have indeed no bearing on the question whether mens rea in the form of knowledge of the contamination of the food is an ingredient of the offence.

The court a quo's view that strict liability was intended, is based on the scope and object of the legislation, the fact that it only applies to persons

engaged in the specified business, and the ease with which liability may be evaded if mens rea were required. I shall deal with each of these in turn but before doing so it is well to be reminded of the extent of the appellant's submissions. Fairly summarized they amount to no more than that mens rea is required in the form of knowledge, or the culpable lack thereof, of the contamination of an article of food which a member of the affected class has caused or permitted to be distributed. That culpa may constitute an element of a statutory offence is trite (R v H 1944 A D 121 at 130). Whether it is sufficient (or whether dolus is required) depends of course entirely on the measure of foresight or care that the statute in question requires (S v Melk 1988(4) S A 561 (A) at 576 D-G). Having regard to the considerations mentioned in Arenstein's case at 366 F-I and in several later judgments of this court

referred to in Melk's case,there can be no doubt about the correctness of appellant's submission that negligence would suffice if it were to be found that by-law 18(c) does not exclude mens rea. (Cf Moonsamy and Another v Rex (supra) at 139; R v Govinder (supra) at 137 G.)

I mention this in view of the remark at 564 G of the court a quo's judgment that

> "[it] is difficult to see how a by-law prohibiting the introduction or sale of contaminated food could be satisfactorily enforced without imposing strict liability. In many instances the contamination would not be apparent upon visual examination, and if mens rea was a requisite the prohibition could easily be evaded by a denial of knowledge that the food was diseased, unsound, unwholesome or otherwise unfit for human consumption."

Not so, however, if the prohibition could be contravened negligently. In that event the accused would not escape conviction if he ought to have been aware of the contamination or should have foreseen

the possibility of its occurrence and failed to take reasonable precautions to prevent it. A high degree of circumspection could be expected in view of the object of the legislation and, taking into account the extensive powers vesting in the inspectorate provided for, there is no reason for taking a pessimistic view of the ease of evading conviction.

With this in mind a further point made at 565 A-B of the judgment may now be examined. The relevant passage reads as follows:

> " What is significant is that the by-law is not of general application. Only persons who carry on the businesses specified are subject to the prohibition and liable to punishment for contraventions. This is a strong indication that the lawgiver intended to impose strict liability. (See Ismail's case supra, at 610.) If mens rea were required the prohibition could not be enforced in any case where the person carrying on the business was ignorant that the food or drink in question was contaminated, even though his servants who actually prepared, handled or sold it had such knowledge. ... In cases where the person carrying on the business employed others to manufacture, prepare, store, handle or distribute the food it would be even

> more difficult to enforce the prohibition. Indeed, if the by-law is not to be construed as imposing strict liability its object of protecting the public health would probably be defeated."

Again, there would be no reason for undue pessimism if the prohibition could be contravened negligently. A member of the affected class who ought to have foreseen the possibility of the distribution of contaminated food by a servant would not escape liability and the object of protecting the public health (a matter still to be discussed) need not be defeated. But there is a more fundamental objection to the court's reasoning.

The distinction between provisions of general application, on the one hand, and those only affecting members of a specified class, on the other, derives from decisions of the courts in England and was applied in several South African cases including Ex parte Minister of Justice: In re Rex v Nanabhai

1939 AD 427, Rex v Ebrahim and Heskiah 1921 T P D 305 and Rex v Melzer and Another 1946 T P D 597. Some of the remarks in the judgments in these cases seem to suggest that the underlying reason for drawing such a distinction is merely the utter unreasonableness of a prohibition of universal application compared with one applying only to persons who are voluntarily involved in an activity from which they reap financial benefit. In Rex v Wunderlich 1912 T P D 1118 and Rex v Dywili and Another 1944 T P D 461 it was applied for a different reason: the offences in these cases could only be committed by members of the affected class (eg the holders of liquor licences) and not by their servants; which led DE VILLIERS JP to remark in Wunderlich at 1124 that

> "... it would render the law inoperative if the barman could do with impunity what the licensee could not do, and for which the licensee is not liable."

This appears to be in line with the court a quo's reasoning in the present case: by-law 18(c) is directed at persons carrying on the specified businesses whilst their servants or employees are not precluded from distributing contaminated food even though they may be aware of the contamination. But there is the material difference that Wunderlich was convicted on the basis of vicarious liability. Compared with strict liability vicarious liability is the lesser of two evils; it is not, as the court a quo said at 565 G, "a concomitant of strict liability" although the two terms are sometimes used indiscriminately. I am aware of the remark in Mathebula's case supra at 500 G to the effect that, where mens rea is found to be an element of a statutory offence "there would seem to be little room" for implying an intention to impose vicarious liability. But such a possibility cannot be

discounted since the two concepts can plainly be incorporated in the same offence (vide R v Combrink 1939 T P D 213 at 215-216 and the cases cited there). Where it is clear that either strict or vicarious liability must be implied in order not to defeat the object of the legislation, careful consideration should accordingly be given to both before an interpretative election can be made. In case of doubt the lesser evil would probably be preferred and there would be every reason to do so where the nature of the regulated activity is such that the employment of managers, servants and the like can be anticipated. I mentioned earlier that there is a section of the Food By-laws dealing specifically with housing for employees. This, coupled with the inherent nature of the food manufacturing and distribution industry and the nature of the actus reus, plainly reveals the legislature's contemplation

that members of the affected class would not always be personally involved. My prima facie view is that members of the class would indeed be vicariously liable for the acts and omissions of their employees and would not necessarily be able to escape liability under by-law 18(c) in the case postulated by the court a quo. But this is not the issue before us and I refrain from expressing a definite opinion thereon. Suffice it to say that the possibility of vicarious liability is sufficiently strong to cast serious doubt on the conclusion that strict liability was intended.

The significance of the application of a statute to persons engaged in a specified activity must in any event, and precisely like the scope and object of the legislation, be viewed in its proper perspective. In Sweet v Parsley [1969] 1 All E R 347 (HL) at 362 Lord Diplock described it thus:

" ...Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sanctions, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which plays a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see Lim Chin Aik v Reginam (1963) 1 All E R 223)."

This passage (which was quoted with approval in

Gammon (Hong Kong) Ltd and Others v Attorney General of Hong Kong [1984] 2 All E R 503 (PC) at 508) neatly expresses just about everything that needs to be said. I would only add that care should be taken not to rely upon the objects of the legislation as a "convenient umbrella beneath which to seek refuge when excluding the basic principle of criminal liability" (Edwards: Mens rea in statutory offences 114). Although it is obviously an important consideration, the fact that the prohibition in question regulates an activity involving potential danger to the public should not be overrated; most penal statutes are, after all, conceived in the public interest (S v Pretorius 1964(1) SA 735 (C) at 740 pr). Its true significance must be judged in conjunction with other determinants like the ease with which liability may be evaded if mens rea were required. I have indicated that liability for

contravening the present prohibition will not be easily evaded if mens rea in the form of culpa were required.

Summarizing what has hitherto been said we have, on the one hand, an actus reus which logically implies knowledge of the contamination of the food and is at least more consistent with the presence than the absence of mens rea in that form. On the other hand we have the scope and object of the legislation. But we have seen that this object may generally be attained if mens rea in the form of culpa were to be an essential ingredient of the offence, and moreover that members of the affected class will not necessarily escape liability for the acts and omissions of their employees. The prescribed penalty is admittedly not a heavy one but, nevertheless, I find myself unable to say that there are sufficiently clear and convincing indications

that the legislature intended to dispense with mens rea.

This conclusion brings about that the question of negligence which neither the trial court nor the court a quo considered must now be decided. Only a brief discussion is required.

It was mentioned earlier that evidence was led to the effect that the bottle of mineral water had passed through the appellant's plant without the presence therein of the offending insect being discovered. It also emerged that the appellant had installed costly electronic devices, and generally conducted its cleaning and bottling process, with a view to avoiding the presence of any foreign objects in its products; and that the filled and capped bottles passed two trained inspectors for final visual inspection at the end of the conveyor where they were stationed. Despite these precautions

foreign objects still found their way into bottles on rare occasions.

There is, in my view, one obvious reason why it happened. It is the speed of the last stage of the process. At the final inspection stage the filled and capped bottles passed the inspectors at the rate of 360 per minute or 6 every second. This is plainly expecting far too much of the human eye, no matter how practised it may be. Any reasonable person ought to have foreseen that objects - particularly small ones - may pass unnoticed. Moreover, contamination of this kind did occur. Rare though these occasions might have been the officials forming the appellant's directing mind must have been aware of them. Yet they allowed the process to continue. They were plainly negligent.

The result is that the appeal is dismissed.

J J F HEFER JA

EKSTEEN JA)

- Concur

KRIEGLER AJA)

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HEARD: 9 SEPTEMBER 1993

DELIVERED: 22 FEBRUARY 1994

JUDGMENT

BOTHA JA:-

I have had the advantage of reading the judgment of HEFER JA, to which I shall refer as "the majority judgment". It holds (a) that mens rea is an element of the offence with which the appellant was charged; (b) that negligence is sufficient to constitute the requisite mens rea; (c) that the appellant was proved to have been negligent; and (d) that the appeal fails. With respect, I disagree on (a); therefore I agree on (d); and consequently (b) does not arise and I need not decide (c).

My disagreement on the main issue of mens rea stems from my divergent assessment of the weight to be accorded to the various factors which are discussed in the majority judgment as being relevant to the decision on the issue.

In my judgment the factor which is of decisive weight is the subject-matter of the by-law in question. In essence it prohibits food traders

from dealing in contaminated food. It does so with the object of safeguarding the health of the public, which is obviously a matter of great importance to the lawgiver. (Its importance is perhaps not as well illustrated by the picture of a bee in a bottle as by the idea of typhoid germs in a batch of meat pies.) It is accordingly inherently probable that the law-maker intended its prohibition to be as effectively enforceable as possible. Most statutory prohibitions are conceived in the public interest, to be sure (see S v Pretorius 1964 (1) SA 735 (C) at 740A, cited in the majority judgment); but not all of them clamour for strict enforcement with the same degree of urgency. A prohibition against any person selling bread at a price less than a prescribed minimum price does not stand on the same footing as a prohibition against persons who do business as bakeries from making and distributing bread which contains noxious

substances. (The example is derived from the remarks of MURRAY J in R v Meltzer and Another 1946 TPD 597 - cited in the majority judgment - at 600.)

Two features of the subject-matter of the by-law emerge as pointing strongly, in my view, to the intention of the lawmaker to impose strict liability. Firstly, contraventions of the prohibition endanger and may have disastrous effects on public health, which it is the concern of the lawmaker to protect. Secondly, the prohibition is directed only at that specific class of persons who are engaged in the business of dealing in food. I fully agree with the significance which is ascribed to these two considerations in the judgment of the Court a quo. The first is dealt with in its reported judgment (1992 (3) SA 562) at 565H-566F and 367C; the first-mentioned passage contains quotations of the very apposite observations of LORD EVERSHED in

Lim Chin Aik v Reginam [1963] 1 All ER 223 (PC) at 228-9. This point does not require further elaboration. The second consideration is dealt with in the reported judgment at 565A and 567D. It calls for further discussion, in view of what is said about it in the majority judgment.

The importance in the present context of the distinction between prohibitions of universal application, directed at every member of the community, and prohibitions directed only at members of a special class, is well established in our case law, as appears from the cases cited in the majority judgment. So, in Ex parte Minister of Justice : In re Rex v Nanabhai 1939 AD 427 and in Meltzer's case supra prohibitions in general terms were held not to have excluded mens rea, while in Rex v Wunderlich 1912 TPD 1118 and Rex v Dywili and Another 1944 TPD 461 prohibitions against a specific class were held

to have imposed strict liability. If the reasoning in the first-mentioned two cases suggests "the utter unreasonableness" of an absolute prohibition of universal application (which is the phrase used in the majority judgment), the reasoning in the latter two cases points indisputably to the reasonableness of such a prohibition where it applies only to persons who are voluntarily engaged in an activity from which they reap financial benefit. I disagree, with respect, with the view expressed in the majority judgment that in the latter two cases the distinction was applied for "a different reason", viz that the offences in question could only be committed by members of the affected class and not by their servants. In Wunderlich's case the tenor of the reasoning of DE VILLIERS JP at 1121-4 as a whole shows, in my opinion, that the point of the distinction was to explain why some prohibitions exclude

mens rea and others not; the learned Judge-President's observation at 1124 that "it would render the law inoperative if the barman could do with impunity what the licensee could not do" was no more than a supplementary reason for justifying the finding that mens rea was not an element of the offence in question there. In Dywili's case the servant could not only commit the offence himself; he actually did, and was charged and convicted together with his employer. The offence in question was the contravention of a prohibition contained in a War Measure against the supply of petrol by a reseller to any person without the latter delivering petrol rationing coupons for it to the former. Both the owner of a filling station and his employee had been convicted of a contravention of the prohibition. In an appeal, the sentence of the employee was in issue, but not the conviction, and the main issue for decision was

the correctness or otherwise of the conviction of the employer. In his judgment dismissing the appeal MALAN J at 462-4 discussed inter alia the cases of Nanabhai and Wunderlich supra, pointing out in respect of the latter that it was important that very strong reliance was placed in that case on the fact that in the section of the legislation in issue there "a special class or section was intended to be struck"; and after reference to further cases, including Meltzer's case supra, the judgment continued (at 464-5):

> "Accepting these principles and in the absence of an absolute prohibition in express terms in the regulations, can it be said that the necessary inference to be drawn from all the circumstances is that it was intended to be an absolute prohibition and thus to constitute a crime for an employer to sell through his servant even though he was not aware of it and it was done without his authority? It is clear, in the present case, that the selling of the petrol had been entrusted to the servant so what he did was within the scope of his authority and certainly was for the

benefit of his employer.

The question which arises is whether the public in general is affected or whether a limited class merely is intended to be struck. It is quite clear that it was intended to hit a limited class only, the limited class being the resellers of petrol as defined in reg. 1. The mischief aimed at is to prevent petrol being sold without proper control. The conservation of petrol and ensuring that stocks are obtained through the proper channels and distributed according to regulation are of the utmost public importance because any shortage of this commodity may result in paralysing all transport communication between various parts of the country. The evil of maldistribution had therefore to be drastically kept under control.

The next question is whether the mischief could be successfully checked by holding merely the person who actually sells responsible or whether it was necessary to go further and make the employer equally liable for a contravention of this section. It is common cause that there is a large number of petrol filling-stations in the country and that commonly native servants are in attendance to supply petrol to the general public. It will, therefore, be an extremely difficult if not an impossible task to control the sale of petrol by the natives in these circumstances. It will be almost impossible, unless inspectors are placed at practically all the garages and filling-stations, to keep the

> sale under control. It is suggested that the fact that the very high penalty attached to a contravention would be a sufficient deterrent and make it unnecessary to hold the employer personally responsible as well. In my view the severity of the penalty alone will not be effective as a deterrent because the sale of petrol may be continued illegally and almost uninterruptedly by a frequent change of sellers. It does not follow that a very severe penalty will necessarily be inflicted upon the native nor does it follow that on every occasion on which a sale in contravention of the regulations the servant will be caught. It becomes necessary in order to secure effective control over the supply of petrol to adopt drastic measures to combat the danger of illegal disposal."

In his concurring judgment BLACKWELL J said (at 466):

> "The second appellant's appeal raises a question of law. He has raised the question whether under the regulations as framed he can be vicariously liable in a criminal sense for the actions of his native employee. Sec. 9(1) provides for the conduct of the business of the sale of petrol. It lays certain prohibitions upon a reseller of petrol and it lays certain prohibitions also upon the person who acquired petrol from a reseller. The

prohibitions in each case are naturally different but they are all contained in the same section. It would have been quite possible for the draftsman to have drafted two different sections, one setting out the duties of the reseller and another setting out the duty of a person who acquires petrol from the reseller, but in fact he has put them both in the same section. But there is a world of difference between the two classes. A reseller of petrol is defined in the Act as a person who sells petrol by retail in the course of or as part of any business carried on by him. Therefore, a reseller of petrol is a member of a small and limited class, the class of persons who sell petrol as a business. A person who acquires petrol includes naturally the whole petrol buying community, that is the potentially whole population of the Union. This brings into sharp opposition the difference between a prohibition applying to the whole community, in which case there can be no vicarious liability, and a prohibition applying solely to a limited class in which case the Court is entitled to infer that there may be vicarious liability and the very definition of reseller that I have quoted shows that it is contemplated that a reseller of petrol will employ agents and servants to assist him in the carrying out of his business."

In my view the importance of the distinc-

tion evident from the above cases is in no way detracted from by the fact that in Wunderlich and Dywili supra the Court was directing attention to the question of the vicarious liability of the employer for the acts of his employee. The discussion of vicarious liability was inseparably part and parcel of the enquiry into the overriding question as to whether mens rea constituted an element of the offence. And it surely cannot be otherwise. In criminal law a master is ordinarily not vicariously liable for the acts of his servant, precisely because the general rule is that a person is not criminally liable unless he has mens rea (cf Nanabhai's case supra at 429). In general, and subject to contrary indications in the wording of the particular legislative provision which is under consideration, if mens rea (be it dolus or culpa) is held to be an ingredient of the offence, there can be no vicarious

liability. Conversely, if it is held that a person is vicariously liable for the contravention of the prohibition by his servant, it can only be on the footing that his mens rea is excluded and strict liability imposed by the prohibition. Speaking generally, therefore, in my opinion vicarious liability is not an alternative to strict liability; it is merely one form of the manifestation of it. (I shall revert to the question of vicarious liability.)

The importance of the distinction is underlined by the rationale which underlies it, and which was explained by LORD DIPLOCK in Sweet v Parsley [1969] 1 All ER 347 (HL) at 362. The passage is quoted in the majority judgment, but for its clarity and cogency I must quote it again:

> "Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard

> of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sanctions, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see Lim Chin Aik v. Reginam ([1963] 1 All ER 223 at 228, [1963] AC 160 at 174))."

(In passing I may say that I consider the concluding observations in this passage to be an effective

answer to the argument frequently advanced by the opponents of strict liability that it can have no deterrent effect.)

Against the strong pointers to strict liability discussed above, consideration must now be given to the factors which are regarded in the majority judgment as pointing in the other direction. There are two of them: the lawmaker's use of the words "cause or permit" in the by-law, and the lack of ease with which the prohibition may be contravened if negligence is held to be a constituent element of the offence. I shall deal with each of these in turn.

In regard to the words "cause" and "permit", I do not consider that either has an immutable connotation which must be applied irrespective of the context in which it is used. At first sight "permit" may suggest knowledge of that which is permitted, and

some of the cases cited in the majority judgment can be said to have been decided on the basis of the simple proposition that a person can only be said to permit an act if he has knowledge of its commission. But that simple proposition is decidedly not universally applied, as is manifest from many of the cases cited in the majority judgment. I shall refer to a few of them. In S v Kritzinger en 'n Ander 1973 (1) SA 596 (C) at 598E the proposition that permission implies knowledge of the relevant act, coupled with consent or acquiescence, is qualified by the statement that the knowledge can be actual or constructive. The notion of constructive knowledge immediately detracts from the apparent logic of the simple proposition without the qualification. The cases, both South African and English, which are reviewed in Kritzinger's case at 598H-600C show that the concept of constructive knowledge in this context

has been interpreted in a large variety of ways. For example, in R v Webb 1911 TPD 280 at 282-3 we find that the words used are "either knows of it or ought to have known of it", the latter apparently in the sense of negligence. But in Davidson v Rex 1910 TPD 1236 at 1240 there is no mention of negligence in relation to the statement that permission can be found to exist in the power to prevent an act and the omission to do so. In the majority judgment it is said in this regard that logically knowledge is still required, because a man cannot truly be said to have the power to prevent something of which he has no knowledge. But that was not the way the notion of "power to prevent" was applied on the facts of that case, as I understand the judgment of DE VILLIERS JP. Nor did knowledge play any part in subsequent cases in which the notion of "power to prevent" was applied, as in the concurring judgment of CURLEWIS J

in Wunderlich's case supra at 1126-7, and in Rex v Combrink 1939 TPD 213 (which is referred to in the majority judgment in a different context).

The last-mentioned case merits further discussion. The appellant had been convicted of a contravention of section 9(4) of Act 39 of 1930, which made it an offence for the holder of a motor carrier certificate issued under the Act to contravene any condition of such certificate. The appellant was the holder of a certificate, clause (e) of which read: "The owner and his servants shall not permit any person to enter or be carried upon the motor vehicle ... in excess of the number authorised ....". A servant of the appellant in charge of the motor vehicle concerned had allowed it to be overloaded, thus breaching the condition of the certificate. The evidence was that the appellant had taken steps to prevent overloading, inter alia by means of

express instructions to his servant and by the employment of inspectors on the route. The appeal against the conviction was dismissed. GREENBERG JP, delivering the judgment of the Court, discussed Wunderlich's case supra and other cases, and proceeded to say (at 216):

> "It would appear, therefore, that even if there is a prohibition against the holder of a certificate permitting certain things to be done, and merely against the holder, he will be responsible if the person to whom he delegates the authority - the person whom he puts in the position of permitting or not permitting - does permit, even though it is against the holder's instructions or without his knowledge. Consequently, even if sec. (e) of these provisions did not contain the words 'and his servants,' it appears to me that the owner of the vehicle would be responsible if the person whom he has placed in charge permits a contravention of the section."

It is clear that the offence was treated as one of strict liability, despite the presence of the word "permit" in the certificate. With this case may be

contrasted the remarks made in S v Mathebula 1972 (1) SA 495 (T) at 497C, which are quoted in the majority judgment. They are to the effect that, in relation to the offence of carrying on motor carrier transportation without a certificate, which is created by section 9(1) of the same Act (39 of 1930), the use of the word "permitted" in section 11(1)(a) (which created a presumption in respect of that offence) was more consistent with an intention that mens rea was to be an element of the offence. Supposing that those remarks were correct, there is yet no conflict between the two cases. The point of distinction is very important. In Mathebula's case the prohibition in section 9(1) was directed at "any person", and section 11(1)(a) is similarly worded; in Combrink's case the legislative precept was directed only at persons who were the holders of certificates (cf the further remarks in Mathebula's case at 499F-500B).

So we are brought right back to square one: the importance of the distinction between prohibitions of general application and those applying only to the members of a specified class.

The conclusion to be drawn from the above discussion is, I think, that it is unsafe to attempt to draw general conclusions from the cases as to the meaning of the words such as "cause" or "permit" in any particular statutory provision. The only safe course is to consider the context in which the words are used, with a view to ascertaining the probable intention of the legislature. In the present case, for the reasons which appear from what has been said above, I do not consider that the context of the by-law requires the words "cause or permit" to be interpreted as importing mens rea. In the majority judgment it is emphasized that the by-law prohibits the distribution of contaminated food, and it is argued

that one cannot logically be said to cause or permit the distribution of such food without knowledge of the contamination. However, the cases show that the perceived logic is not the determining factor in establishing the intention of the lawmaker. This is well illustrated by the case of Gammon (Hong Kong) Ltd and Others v Attorney General of Hong Kong [1984] 2 All ER 503 (PC), which is cited in the majority judgment. The issue was whether mens rea was an element of the offences created by sub-sections (2A)(b) and (2B)(b) of a certain Buildings Ordinance. Sub-section (2B) provided as follows:

> "Any person ... directly concerned with any site formation works ... or other form of building works who - (a) .... (b) carries out ... such works, or authorizes or permits or has authorized or permitted such works to be carried out, in such manner as is likely to cause risk of injury to any person or damage to any property, shall be guilty of an offence ...."

LORD SCARMAN said, at 511h-512a:

"The construction of sub-s (2B)(b) is more difficult, but their Lordships are satisfied that it imposes strict liability for substantially the same reasons as those which have led them to this conclusion in respect of sub-s (2A)(b). The offence created clearly requires a degree of mens rea. A person cannot carry out works or authorise or permit them to be carried out in a certain manner unless he knows the manner which he is employing, authorising or permitting. The appellants laid great emphasis on the reference to 'permitting' as an indication of full mens rea. They referred their Lordships to James & Son Ltd v Smee [1954] 3 All ER 273, [1955] 1 QB 78. But their Lordships agree with the answer of the Court of Appeal to this point:

> 'We would therefore hold that the word 'permitting' in s 40(2B)(b) does not by itself import mens rea in the sense of intention to cause a likelihood of risk of injury or knowledge that such likelihood would result but does require that the defendant shall have had a power to control whether the actus reus (the carrying out of the works in the manner which in fact causes a likelihood of risk of injury) shall be committed or not.'"

In the present case, it may be assumed that

an accused must have knowledge of the fact that food is being distributed etc; but knowledge of the fact that it is contaminated is not a necessary corollary of the words "cause or permit". The accused "ought to know" of the contamination (cf the remarks of LORD SCARMAN at 511 f-g), not in the sense of negligence related to a particular incident, but in the general sense that as a member of the class he is under an absolute obligation to make it his business to know.

I turn to the question of the ease with which the by-law could be contravened if mens rea were held to be an element of the offence. I respectfully disagree with the view taken in the majority judgment that the prohibition will not be easily evaded if mens rea in the form of culpa were required. My view accords with that expressed by the Court a quo in the passages of its judgment at 564G and 565B-C, which are quoted in the majority judg-

ment. The force of the reasoning in those passages is not materially diminished by the postulate of negligence as the requisite form of mens rea. As it was pointed out, the contamination would in many instances not be apparent upon visual examination. In my opinion it would not make the by-law materially less difficult to enforce if, instead of requiring proof of knowledge by the accused of the contamination, it is regarded as enough if he ought to have been aware of it, or should have foreseen the possibility of its occurring and failed to take all reasonable precautions to prevent it. The nature of the activity which is prohibited is such that contraventions of the by-law can be committed in a multitude of ways which would render it exceedingly difficult, and in many instances impossible, to bring home a charge on the basis of negligence. I can think of many examples, but let us take the facts of

the present case as an illustration. The bee in the bottle was distinctly visible, but the appellant cannot be blamed for not having been aware of its presence there. It should have foreseen the possibility of such a thing happening, because of its past experience, but could it have prevented it by taking reasonable precautions? The evidence for the appellant was that its equipment and the measures it takes to prevent contamination are so elaborate, sophisticated and expensive that it was "commercially impossible" to do more or to achieve a 100% elimination of the possibility of foreign bodies getting into the bottles. The details given in the evidence lay peculiarly within the knowledge of the appellant. Such evidence is ordinarily very difficult to challenge, and in fact the prosecutor in this instance did not really attempt to do so (he sought rather to show negligence on the part of the appellant's ser-

vants, a matter which will be referred to presently). In the majority judgment it is found possible to hold that the appellant was negligent in respect of the speed at which bottles passed the inspectors at the final inspection stage. The appellant's witness was not challenged, in the face of his evidence as to the "commercial impossibility" of taking further steps, on the point as to whether it would have been a reasonable precaution to slow down the passage of the bottles in the plant. However that may be, the facts of this case demonstrate how difficult it must frequently be for the prosecution to establish negligence in respect of a contravention of the by-law. And if the prosecution cannot prove negligence and the accused consequently goes free, the remarks in the concluding part of the passage of LORD DIPLOCK's judgment in Sweet v Parsley supra, quoted earlier, lose much of their force; and so, in my view, does

the by-law.

It is necessary in this context to revert to the question of vicarious liability. It is seen in the majority judgment as a lesser evil than strict liability. Again, with respect, I am unable to agree. As I have indicated, I regard vicarious liability as but one form of strict liability. Notionally it may be possible to separate strict liability in the form of vicarious liability from the remaining field of strict liability (i e where the acts of employees are not involved), but I can perceive no practical profit in doing so. It does not appear from the majority judgment whether vicarious liability is postulated on the premise that there must be mens rea on the part of the servant. If it is, the same difficulties of proving negligence on the part of the servant will certainly be encountered as in the case of the employer. Let us take again

the facts of the present case. The prosecutor did attempt to show, by cross-examination of the appellant's witness, that its inspectors might have been negligent in not having kept a proper look-out, as it were, but the inspectors concerned were not called as witnesses, and in the absence of evidence by them the prospect of proving negligence on their part was remote, bearing in mind also the comments in the majority judgment about expecting too much of the human eye. (In passing, it may be noted that the references in the judgment of the Court a quo at 567A and 567C to the negligence of the appellant's servants were no more than general considerations advanced in support of the view that mens rea on the part of the appellant was not an element of the offence; they were obviously not meant to constitute a finding of negligence on the part of the servants on the particular facts of this case.) In any event,

if negligence on the part of a servant can be established, that still does not prove mens rea on the part of the employer. If vicarious liability is postulated on the premise that negligence of the servant need not be shown, then also, a fortiori, it is a case of strict liability. There is no doubt that strict liability can only be found to exist where there are strong and clear indications of the legislature's intention to exclude the general principle that there can be no criminal liability without mens rea. If such indications are found to be present, it means that there are good and sufficient reasons for holding an accused strictly liable. When once that point is reached, in my view, it is not evil to give effect to the legislature's intention, but good. There is then no reason for doing so half-heartedly.

One must, of course, face up to the fact

that strict liability can occasionally produce undesirable results. If a retailer acquires a tin of food from a wholesaler with contamination hidden inside it and sells it, it is undesirable that he should be convicted of an offence. But in cases of that kind it is highly unlikely that those in charge of enforcing the by-law will lay a charge against the middle-man instead of going to the source of the contamination, the manufacturer. And if perchance the retailer is prosecuted and convicted, there is little doubt that no greater harm will befall him than a caution and discharge or perhaps a nominal fine. In my judgment the undesirable results that may come about in such exceptional cases are mild in comparison to the much greater potential harm that may eventuate from holding that mens rea is an element of the offence and thus depriving the by-law of much of its effectiveness.

In conclusion I would add this. I am aware that many voices are raised against the concept of criminal liability without mens rea. I have studied the article of prof C R Snyman in 1993 Tydskrif vir Hed R-H Reg at 132, in which the judgment of the Court a quo in this case is criticized. I have tried in this judgment to address and to answer the author's points of criticism. My view is that strict liability should only be found in cases where there are compelling reasons to do so, but that the circumstances of this case proclaim the need to recognize that rare exceptions to the general rule of mens rea must be allowed, for the sake of the proper, practical administration of criminal justice. Indeed, if strict liability is not accepted on the facts of this case, I have difficulty in visualizing any case at all where strict liability can be found to exist, apart from express provisions which are plainly to

that effect. Such a result will no doubt gladden the hearts of the purists, but speaking for myself, I am saddened by it, for I am convinced that it leaves our law the poorer.

In the result I hold that mens rea is not an element of the offence with which the appellant was charged, and on that ground I concur in the order that the appeal be dismissed.

A S BOTHA JA

NIENABER JA CONCURS