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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS

v

IAN McCLURE

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Mr Philip Henry (instructed by the Departmental Solicitor) for the appellant
Mr Ciaran Roddy (instructed by McGale, Kelly & Co Solicitors) for the defendant

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Before: McCloskey LJ and Horner LJ

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INDEX

McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] The Department of Agriculture, Environment and Rural Affairs ("DAERA") prosecuted Ian McClure (the "defendant") summarily for the offence of knowingly or otherwise having discharged a polluting matter so that it entered a waterway, contrary to Article 7(1)(a) of the Water (NI) Order 1999 (the "1999 Order"). The defendant was acquitted by a district judge of the magistrates' courts who, subsequently, acceded to an application by DAERA to state a case for the opinion of this court. The question of law thus formulated is this:

> "Did I err in law by finding that the strict liability offence established by Article 7(1)(a) of the [1999 Order] cannot be proven beyond a reasonable doubt against a defendant who was not present at the time of discharge, in circumstances where (a) he owned and controlled a farm, (b) pollution was discharged into a waterway as a result of work undertaken on that farm and (c) that work was undertaken by individuals who were operating as his servants/agents."

Factual framework

[2] In the case stated it is indicated that the prosecution evidence was agreed. This is followed by a recitation of the following material facts:

(a) A report of dead fish on the Cooneen River, Fivemiletown prompted an inspection by a DAERA inspector which revealed that a concrete pipe from the defendant's farm was discharging into the waterway.

(b) The defendant was "just home from holiday." When cautioned he replied that slurry was being transferred from one tank to another the previous day, adding that he had not been present.

(c) Shortly afterwards the defendant informed the inspector that when a tank was being emptied there had been a spill onto the ground, soaking into the drain. This seepage into a pipe discharging to the river was observed by the inspector.

(d) The farm is jointly owned by the defendant and his son.

(e) The defendant was not at the farm at the time of commission of the offence.

(f) A sample of water taken from the river contained poisonous, polluting and noxious matter which would be potentially harmful to aquatic life.

The impugned acquittal

[3] The case stated rehearses the parties' competing contentions at first instance. The parties were agreed that the offence is one of strict liability. The district judge held that the prosecution had not proven beyond reasonable doubt that the defendant was "responsible for" the offending discharge.

[4] We consider that there are two questions of law to be addressed:

(i) Is the offence created by Article 7(1)(a) of the 1999 Order one of strict liability?

(ii) Can this offence be committed by an owner and occupier of premises who played no personal, physical part in the offending discharge of the relevant pollutant?

The strict liability issue

[5] The actus reus of the offence established by Article 7(1)(a) of the 1999 Order is the discharge or deposit of any poisonous, noxious or polluting matter so that it enters a waterway or water contained in any underground strata. The mens rea is specified as "knowingly or otherwise." The ordinary and natural meaning of the words "or otherwise" in this context is that proof of knowledge beyond reasonable doubt is not required in order to sustain a conviction. It follows that the offence is established where it is proven beyond reasonable doubt that the defendant committed the actus reus without knowledge. From this it follows that no specific state of mind is required.

[6] Having taken as our starting point the statutory language we turn to consider the doctrine of strict liability in criminal law. Blackstone offers the following exposition, at para A2.20:

> "The term 'strict liability' is sometimes loosely explained as meaning 'liability without fault' but this is misleading insofar as it suggests that no mental or fault element whatsoever is required. Strict liability offences are normally those where no fault element is required in relation to one (perhaps crucial) element of the 'actus reus' but where 'mens rea' is required in relation to other aspects."

The concepts of "strict liability", "absolute liability" and "liability without fault" are frequently used interchangeably. This court considers Article 7(1)(a) to be a paradigm illustration of the analysis that strict liability typically applies to a particular element or elements of the offence. Here the key element is discharging or depositing. It is this specific conduct which is clearly qualified by the immediately preceding words "knowingly or otherwise." The remainder of the clause is constituted by the words "any poisonous …. underground strata." Article 7(1)(a) is rendered unintelligible if one attempts to qualify these words with "knowingly or otherwise."

[7] Thus the presumption that Parliament does not intend to punish a blameless person, which resonates strongly in the leading authority of *Sweet v Parsley* [1970] AC 132, has no application where the contrary is clear from the statutory language. The importance of the statutory words actually used is a key feature of one of the leading decisions in this sphere, *Alphacell v Woodward* [1972] AC 824. One of the interesting features of this decision is that the statutory offence concerned, polluting a river contrary to section 2(1) of the Rivers (Prevention of Pollution) Act 1952, is

clearly identifiable as one of the statutory antecedents of Article 7(1)(a) of the 1999 Order. There the statutory language was "… If he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter …" The word "knowingly" stands in stark contrast to the words "knowingly or otherwise." In Alphacell, the debate revolved around the qualification of "permits" by "knowingly" and the absence of this qualification from "causes."

[8] The House of Lords held that there was no warrant for importing or implying "knowingly" into the "causes" limb of section 2(1)(a). In construing section 2(1)(a) the House had regard to the nature of the statute, the mischief to which it was addressed and the category to which the statute belonged, namely (per Viscount Dilhorne at 841A/B):

> "The function of the courts is to interpret an Act "according to the intent of them that made it": Coke, 4 Institutes (1817), p. 330. If the language of a penal statute is capable of two interpretations, then that most favourable to the subject is to be applied. Having regard to the nature of the Rivers (Prevention of Pollution) Act 1951, the mischief with which it was intended to deal and the fact that it comes within the category of Acts to which my noble and learned friends, Lord Reid and Lord Diplock, referred in Sweet v. Parsley [1970] A.C. 132 I do not think that the subsection is capable of two interpretations or that it was intended to be interpreted or should be interpreted as making the causing of pollution only an offence if the accused intended to pollute."

The robust approach of Lord Wilberforce was this:

> "In my opinion, complication of this case by infusion of the concept of mens rea, and its exceptions, is unnecessary and undesirable. The section is clear, its application plain."

(At 834H/835A.)

All of their Lordships espoused a straightforward, uncomplicated approach to the meaning of "causes." Thus Lord Salmon emphasised, at 847D:

> "It seems to me that, giving the word 'cause' its ordinary and natural meaning, anyone may cause something to happen intentionally or negligently or inadvertently without negligence and without intention."

The unanimous opinion of the House was that the offence was one of strict liability.

[9] One of the themes of the speeches in *Alphacell* is that at least three members of the House contemplated the possibility that liability would not be strict if the offending act of pollution had been caused by an act of God or (per Lord Cross at 847B) "some other event which could fairly be regarded as being beyond their ability to foresee or control" or (per Lord Salmon at 138E) the "intervening act of a third party …" The latter possibility was also addressed briefly by Lord Wilberforce, at 834F:

> "In my opinion, 'causing' here must be given a common sense meaning and I deprecate the introduction of refinements …
>
> **There may be difficulties where acts of third persons or natural forces are concerned …**"
> [Emphasis added.]

Pausing, none of these scenarios applies in this case.

[10] The further relevance of the decision in *Alphacell* is the public policy underpinning the legislation which the House identified. This is stated with particular clarity by Lord Salmon at 848G – 849A:

> "If this appeal succeeded and it were held to be the law that no conviction could be obtained under the Act of 1951 unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness. The legislature no doubt recognised that **as a matter of public policy** this would be most unfortunate. Hence section 2 (1) (a) which encourages riparian factory owners not only to take reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it."
> [emphasis added]

We consider that the application of this analysis to Article 7(1)(a) of the 1999 Order is indicated not only by the statutory language employed (see above) but essentially the same public policy, coupled with the public interest clearly in play.

Issue 2: No personal/physical involvement

[11] While we have dwelt at a little length on the subject of strict liability, we consider the key issue raised by this case stated to be whether a person commits an offence contrary to Article 7(1)(a) where that person does not personally carry out the offending act of discharge or deposit. The focus here is on the statutory words "**he** discharges or deposits …" (**our emphasis**). The general principle is expressed by Lord Morris in *Tesco Supermarkets v Nattrass* [1972] AC 153 at 179F:

> "In general criminal liability only results from personal fault. We do not punish people in criminal courts for the misdeeds of others. The principle of **respondeat superior** is applicable in our civil courts but not generally in our criminal courts."

The question of whether this principle applies to any given offence depends upon the terms of the relevant statutory provision. This was emphasised by Viscount Reading CJ in *Mousell v London and North West Railway* [2KB] 836 at 844:

> "Prima facie a master is not to be made criminally responsible for the acts of his servant to which the master is not party. But it may be the intention of the legislature in order to guard against the happening of the forbidden thing to impose a liability upon a principal even though he does not know of, and is not party to, the forbidden act done by his servant. Many statutes are passed with this object."

In Blackstone at para A6.9 another general principle is formulated:

> "Other than where D has aided, abetted, counselled or procured the act of another, the general principle is that one cannot be held criminally responsible as a result of the act of another."

However, as the ensuing passages demonstrate, this principle is subject to certain exceptions, one of which is:

> "… where the words of the statute are apt to describe not only the physical perpetrator of an act but also some other person, typically the perpetrator's employer ..."

[12] The further assistance to be derived from *Mousell* is the formulation of the following test by Atkin J, at 845:

> "Whether the duty imposed by statute is vicarious or personal depends upon the object of the statute, the words

> used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed and the person upon whom the penalty is imposed."

Pausing, in this case the prosecution did not seek to prove – and could not have proved – beyond reasonable doubt that the defendant was the statutory "he" ie the person who physically committed the offending act of discharge/deposit. Thus, the question which arises is whether the statutory language embraces not only the actual perpetrator (who was unidentified) but the defendant qua joint owner of the farm and principal/employer vis-à-vis the servant/agent perpetrator.

[13] The decision of the English Court of Appeal in *Gateway Food Markets Limited* [1997] 2 Cr App R 40 formed the centrepiece of the submissions of Mr Henry on behalf of DAERA. This concerned the prosecution of a supermarket company for the offence specified in section 2(1) of the Health and Safety at Work Act 1974, which provides:

> "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."

In this case the offending conduct giving rise to the death of an employee, the duty manager, was that of a store manager and section managers. The question was whether the company was guilty of an offence under section 2(1) in these circumstances. Invoking the decision in *Nattrass* (supra), the Divisional Court supplied an affirmative answer, reasoning at 45:

> "Parliament can be assumed to have balanced the need for regulation, achieved by making the employer liable, against the injustice of convicting a person who is blameless …
>
> The general considerations referred to in the authorities, including the purpose and object of the legislation, make it overwhelming clear that section 2(1) … should be interpreted so as to impose liability on the employer whenever the relevant event occurs, namely a failure to ensure the health etc of an employee."

Evans LJ, giving the judgment of the court, added that there is nothing absurd about this construction of the legislation. The overarching conclusion was that while all reasonable precautions to avoid the risk of the fatality had been taken at senior management/head office level, there was a failure at store management level rendering the company criminally liable under section 2(1).

[14] In *Sweet v Parsley* (supra) Lord Diplock stated at 163:

> "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 as to 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 upon 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. The Queen [1963] A.C. 160, 174)."

Sweet v Parsley was, of course, concerned with a strict liability issue. The statement of Lord Diplock in *Alphacell* – para [8] above – must equally be viewed through the same lens. However, we consider that the public policy considerations identified in both passages, by reasonable and logical analogy, apply fully to the second question of law formulated above. They support the conclusion that the defendant is guilty of the offence charged. To this extent and in this sense the two issues to be decided by this court are overlapping.

[15] It is a fact that the defendant did not personally commit the offending act. It is also a fact that there was no evidence to establish who did so. However, the irresistible inference from the facts agreed and/or found is that the operation giving rise to the offending discharge (a) formed part of normal and regular farm operations which (b) must have been carried out by a servant or agent of the defendant. The contrary has at no time been suggested. There was no suggestion of act of God or third party intervention or conduct beyond the reasonable control of the defendant. Given the nature and potency of the public policy underpinning Article 7(1) of the 1999 Order and the associated public interest which this statutory

provision is designed to protect, we are satisfied that the statutory "he" embraces the conduct of the landowner's (ie the defendant's) servants or agents which, incontestably, gave rise to the offending discharge of pollution. The potent public policy and public interests in play, namely the protection of human health, the preservation of fish stocks and the protection of the environment, coupled with the practical realities of identifying individual perpetrators, point firmly in favour of this conclusion.

Conclusion

[16] Giving effect to the preceding analysis and reasoning, we conclude that in acquitting the defendant the district judge erred in law. The question posed in the case stated (supra), which should be considered in conjunction with para [4] (ii) above, invites an affirmative answer. The appropriate disposal is to exercise our powers under section 38(1)(a) and (b) of the Judicature (NI) Act 1978 to reverse the impugned decision and remit the case to the magistrates' court with a direction to convict. There is no reason why the ensuing completion of the criminal process, which will entail the sentencing of the defendant, should not be undertaken by the same district judge.

[17] In accordance with the parties' agreement, there shall be no order as to costs inter–partes above or below.