

IN THE SUPREME COURT OF TONGA

R

v

Tsay anor

Supreme Court, Nuku'alofa
Ford J
CR 176-77/2004

7 and 8 December 2005; 13 December 2005

Criminal law – display of tobacco advertisement – penal Act -not all elements proved -acquitted

It was alleged that between June and December 2003 both accused permitted the display of a tobacco product advertisement contrary to section 3(a) of the Tobacco Control Act 2000. It was alleged that the words which constituted the "tobacco product advertisement" were printed on "other medium", namely, caps and packets of playing cards. The wording on the caps read "Kuonga New Age. The finest cigarette in the World" and the wording on the packets of playing cards read "Kuonga New Age". Each accused was charged with two identical offences under the Tobacco Control Act 2000.

Held:

1. The Tobacco Control Act was a penal Act and fell to be strictly construed. In a prosecution under the Act it was up to the Crown to establish all the essential elements of the offence beyond reasonable doubt. The prosecution could not rely upon the Court to draw inferences unless a sound factual substratum was established from which it could reliably be concluded that those inferences must inevitably follow.
2. The Court was not prepared simply to infer that "Kuonga" was a cigarette that fitted within the statutory definition of a "tobacco product" in the absence of any evidence on the subject.
3. The Court was not persuaded on the evidence that the defendants displayed or permitted the display of a tobacco product advertisement to the public.
4. Each accused was acquitted accordingly.

Statute considered:

Tobacco Control Act 2000

Counsel for the Crown: Ms Fukofuka
Counsel for the accused: Mr Tu'utafaiva

Judgment

Each accused is charged with two identical offences under the Tobacco Control Act 2000. It is alleged that between June and December 2003 they permitted the display of a tobacco product advertisement contrary to section 3(a) of the Act. A "tobacco product advertisement" is defined, relevantly, as any words "whether written, printed, spoken, broadcast or telecast, including on film, video recording or other medium, used to promote the sale of any tobacco product."

In this case it is alleged that the words which constituted the "tobacco product advertisement" were printed on "other medium", namely, caps and packets of playing cards. The wording on the caps read "Kuonga New Age. The finest cigarette in the World" and the wording on the packets of playing cards read "Kuonga New Age".

The wording of section 3(1)(a) of the Act which creates the offence is important and I set the section out in full:

"Any person who displays, exhibits, announces, broadcast or telecasts, or causes or permits to be displayed, exhibited, announced, broadcast, or telecast or authorises the display, exhibition, announcement, broadcast or telecast to the public of, a tobacco product advertisement commits an offence."

The charge in the indictments is that the accused permitted the display of a tobacco product advertisement and the particulars in relation to each count seem to suggest that the "display" complained about was the action of distributing the caps and packets of playing cards bearing the words referred to. I set out the particulars of count 1 in relation to the first accused in full to illustrate the point:

"Ming Sen Tsay of Halaleva, between the months of June to December 2003, at Tongatapu, as a director of the company International Metrople Corporation, you did permit the display of a tobacco product advertisement on caps which was (sic) distributed by the said company, and the said tobacco product advertisement read as "Kuonga New Age. The finest cigarette in the World", which was a promotion of the sale of the Kuonga cigarettes which the said company manufactures and sells."

In her helpful written opening statement, the Crown prosecutor summarised the facts upon which the Crown case was based. I will set the relevant passage out in full:

"On or about the months of July to August 2003, the second accused gave prizes to his employees of a cap which read "Kuonga New Age, the finest cigarette in the World" and a pack of playing cards which read "Kuonga New Age"

On or about the month of September 2003, the second accused gave to two customers, Li Bing Zi and Bi Gui Lin the same cap and playing cards as promotion of the sale of Kuonga cigarettes.

On or about the month of October 2003, one Siosifa Lakalaka was conducting a survey for British American Tobacco and found two shops selling playing cards which read "Kolonga New Age".

Also on or about October 2003, Police Officer Fifita bought a carton of Kuonga cigarettes from a delivery truck driven by Bi Gui Lin for his family shop when he was given a cap and playing cards as promotion of the Kuonga cigarettes.

In the same month of October 2003, Police Officers Kama and Finau were investigating a theft and questioned the second accused relating to this. Following this the second accused gave both officers one cap each which read "Kolonga New Age, the finest cigarette in the world."

Putting to one side the allegation that the caps and playing cards were given out as a promotion of Kuonga cigarettes (because this was not established by the evidence), I am prepared to hold that the evidence called by the Crown did establish beyond reasonable doubt the other facts relied upon in the passage I have just cited from the prosecutor's opening.

The defence, as was their entitlement, did not give or call evidence but Mr Tu'utafaiva made a number of submissions in support of his basic proposition that the Crown had been unable to establish a case against his clients.

First, defence counsel submitted that the Crown had failed to prove that any of the wording complained of constituted a tobacco product advertisement because "Kuonga" had not been proved to be a "tobacco product" as that term is defined in the Act. Tobacco product is defined as meaning any tobacco or cigarette. Tobacco in turn is defined as meaning, "any product obtained from the leaf of the Nicotiana tobacum plant or other related plants" and "cigarette" is defined as meaning:

"Any product which –

(a) consist (sic) wholly or partly of cut, shredded or manufactured tobacco, or of any tobacco derivative or substitute, rolled up in a single wrap of paper; and

(b) is capable of being immediately used for smoking."

Mr Tu'utafaiva made the point that no expert evidence was called by the Crown to prove Kuonga came within that definition.

In response to this particular submission, the prosecutor sought to rely upon the evidence of one of the police officers, Constable Fifita. Constable Fifita told the Court that, apart from his police work, he also operated a family shop and he sold Kuonga cigarettes. Crown counsel submitted that as no challenge had been made to that statement by the police constable, it followed that Kuonga could be taken to be a tobacco product within the meaning of the Act.

The Court was, in fact, told nothing about the Kuonga product. No Kuonga cigarettes or cigarette packets were produced in evidence or shown in the photographs exhibited. In the absence of any evidence on the subject, the Court is, therefore, being invited to infer that the Kuonga cigarettes Constable Fifita referred to came within the statutory definition.

The Tobacco Control Act is a penal Act and, as such, it falls to be strictly construed. In a prosecution under the Act it is up to the Crown to establish all the essential elements of the offence beyond reasonable doubt. The prosecution cannot rely upon the Court to draw inferences unless a sound factual substratum has been established from which it can reliably be concluded that those inferences must inevitably follow.

If a penal Act has a particular definition of a crucial term making up the offence then it is up to the Crown to prove that the definition in question applies in the case before the Court. Not infrequently, to save having to call expert evidence on such a point, Crown counsel will be able to reach agreement on the issue with defence counsel prior to the trial but that was not the position in the present case. In the absence, therefore, of any evidence whatsoever on the subject, I am not prepared simply to infer that "Kuonga" is a cigarette that fits within the statutory definition of a "tobacco product".

Mr Tu'utafaiva's second submission was that there was no evidence that the accused had displayed or permitted the display of a tobacco product advertisement to the public within the meaning of the Act. Counsel made the point noted earlier in this judgment that the act of distributing a limited number of caps and playing cards would be insufficient in itself to constitute a display to the public. I accept that submission and I also accept that, although the punctuation marks may give rise to some ambiguity, it is a fundamental requirement of an offence under section 3(1)(a) that the display, exhibition etc must be "to the public."

The "Shorter Oxford English Dictionary, fifth edition (2002) defines display as:

"The action or an act of displaying or exhibiting to view. The presentation of printed matter in such a way as to make it visually prominent."

During final submissions, the Court invited Crown Counsel to identify with precision the strongest evidence the Crown relied upon to support the proposition that there had been a display to the public. The prosecutor in response referred to the evidence of Constable Kama. Constable Kama told the Court that he and another police officer had gone to see the first accused, Mr Tsay, in October 2003 in the course of an investigation into the theft

of some sandalwood. His evidence was that on that occasion Mr Tsay had given the two police officers two caps and three packets of playing cards. The officer said: "He gave them to us as a gift because we were acquainted with this person." When asked to identify a cap in one of the photographs, the Constable replied, "this is the cap I wore."

It was this particular passage in the evidence that Crown Counsel identified as the strongest point in the prosecution case to show that the accused had permitted the display of a tobacco product advertisement to the public. There was absolutely no evidence, however, to show where or when the Constable wore the cap. The constable was not asked any questions, in fact, about whether he wore the cap. The comment the Crown relies upon was simply a throwaway line in response to an invitation to identify the item shown in the photograph.

On the evidence, I have not been persuaded that the defendants did display or permit the display of a tobacco product advertisement to the public.

There is another section in the Tobacco Control Act, section 3(1)(c), which makes it an offence to distribute or permit to be distributed to the public any leaflet or document that is a tobacco product advertisement. Crown counsel freely acknowledged that the word "distributes" would be a more appropriate description of the alleged activities of the defendants in giving away caps and packets of playing cards but she rightfully conceded that caps and playing cards could not be described as a "leaflet or document".

My findings on these two crucial aspects of the evidence really dispose of the case but Mr Tu'utafaiva also submitted that no evidence had been produced to show the status of the second defendant, International Metrople Corporation Ltd. In a statement to the police, Mr Tsay said that the printing on the caps and packets of playing cards was done without his knowledge by the "people in China". He referred to another director of the company who lived in Taipei, Taiwan, and he told the police that the work was carried out on that other director's instructions. Mr Tu'utafaiva stressed that no evidence had been called or produced to show that the second defendant had any legal status in the Kingdom.

In response, the prosecutor told the Court from the Bar that an officer from the Companies Office had been subpoenaed but was not called as a witness because he was unable to locate a file relating to the second defendant. I suspect that the Company would need to be registered in Tonga in order to carry on business in the Kingdom but given the references to China and Taiwan, it is conceivable, in the absence of any other evidence on the subject, that the second defendant may be based in one or other of those countries and again, therefore, I must uphold Mr Tu'utafaiva's submissions on this ground.

Finally, defence counsel referred to section 16 of the Tobacco Control Act which provides that if a body corporate commits an offence against the Act then each director or other person concerned in the management of the Company is also guilty unless the director or other person proves that he exercised reasonable diligence to prevent the commission of the offence. Mr Tu'utafaiva simply made the point that, as Mr Tsay had not been charged under that section, he was not subject to any statutory onus of proof.

That would appear to be a correct analysis of the position although given my other findings, it is unnecessary to express a final view on this issue.

For the reasons set out above, I am not satisfied that the charges have been established and each accused is acquitted accordingly.