

**Director of Public Prosecutions v United Telecasters
Sydney Ltd ("Cigarette Advertising case") [1990] HCA 5;
(1990) 168 CLR 594 (15 February 1990)**

HIGH COURT OF AUSTRALIA

DIRECTOR OF PUBLIC PROSECUTIONS v. UNITED TELECASTERS SYDNEY LTD
[\[1990\] HCA 5](#); (1990) 168 CLR 594
F.C. 90/005

Evidence - Broadcasting and Television - High Court

High Court of Australia
Brennan(1), Dawson(1), Toohey(2), Gaudron(1) and McHugh(2) JJ.

CATCHWORDS

Evidence - Criminal trial - Offence of televising advertisement for cigarettes - Extrinsic evidence - Admissibility - Broadcasting and Television Act 1942 (Cth), s 100(5A), (10).

Broadcasting and Television - Offence of televising advertisement for cigarettes - Exclusion of incidental accompaniment of televising another matter - Onus as to exclusion - Broadcasting and Television Act 1942 (Cth), s. 100(5A), (10).

High Court - Appeal - Special leave - Prosecution granted special leave to appeal against quashing of conviction - Application by accused for special leave to cross-appeal - Relevant considerations - [Judiciary Act 1903](#) (Cth), [s. 35A](#).

HEARING

1989, September 12; 1990, February 15. 15:2:1990
APPEAL AND APPLICATION for special leave to cross-appeal from the Supreme Court of New South Wales.

DECISION

BRENNAN, DAWSON AND GAUDRON JJ. The grand final of the rugby league competition in New South Wales is played for the Winfield Cup. "Winfield" is the name of a brand of cigarettes and the manufacturer of that brand in one way or another sponsors the competition or, at all events, the grand final. On the day of the grand final in 1984, the match and the events preceding it were televised by the respondent, which held a licence under the Broadcasting and Television Act 1942 (Cth) (now called the Broadcasting Act). A segment of the television broadcast led to the conviction of the respondent of an offence under s.100(5A) of that Act. That sub-section provided:

"A licensee shall not broadcast or televise an advertisement for, or for the smoking of, cigarettes or cigarette tobacco."

sub-s.(5A) the televising of matter of an advertising character "as an accidental or incidental accompaniment of the broadcasting or televising of other matter in circumstances in which the licensee does not receive payment or other valuable consideration for broadcasting or televising the advertising matter".

2. The segment in question was introduced as "the Winfield Spectacular" and preceded the televising of the football match. An announcer stated: "Winfield presents the 1984 big game buildup." That was followed by a performance of eurhythmics by a group of dancers, some dressed in red and some dressed in white costumes. At one point there was a brief display of a banner carried by them on which the words "Winfield Cup 1984" were plainly visible to the viewer. The telecast also showed for a moment in the background an A-frame situated at the perimeter of the football ground which carried an advertisement for Winfield cigarettes. The segment ended with the release of a number of yellow and green balloons.

3. The respondent was tried by a jury. In addition to evidence of the telecast which we have just described, evidence was admitted in the form of a packet of Winfield cigarettes and a colour photograph of an advertising hoarding which showed an open packet of Winfield cigarettes with the words "Five smokes ahead of the rest" and "... anyhow* have a Winfield 25's". Both exhibits showed the name Winfield upon a packet of cigarettes and showed the packet to be coloured red and white. There was also evidence that the manufacturers of Winfield cigarettes marketed no other products under the name "Winfield".

4. The respondent was, as we have said, convicted and it appealed to the Court of Criminal Appeal. The appeal was upheld upon the basis that the cigarette packet and the photograph of the hoarding had been wrongly admitted. The Court of Criminal Appeal appears to have taken the view that, since the question whether the telecast was an advertisement for cigarettes was (as it obviously was) a question for the jury, the admission in evidence of the cigarette packet and the photograph of the hoarding somehow usurped the jury's function. As the Chief Justice put it:

"Plainly enough, there were matters upon which it was necessary for them to be directed upon what they should consider in deciding whether the segment was an advertisement. But the ultimate factual decision was whether this was an advertisement for cigarettes to be made by them upon their understanding as ordinary members of the community, not upon the basis of extraneous evidence explanatory or interpretative of the basic material relied upon by the Crown."

This view involves, we think, some confusion of thought.

5. Plainly it was for the jury to decide whether the television segment did or did not constitute an advertisement within the meaning of the Act. That was a question which lay within their ordinary experience and was not something which was the subject of special knowledge requiring special study. It was a matter which the jury were capable of assessing for themselves and upon which they needed to form their own judgment. They were required to carry out their task by reference to admissible evidence of relevant facts. See *Transport Publishing Co. Pty. Ltd. v. The Literature Board of Review* [\[1956\] HCA 73](#); (1956) 99 CLR 111 at pp 118-119.

6. It was quite permissible for the Crown to have called evidence of facts tending to establish that the television segment was an advertisement. The evidence in question was of such a kind. Material which is designed or calculated to draw public attention to a product or to promote its use may constitute an advertisement: *Deputy Commissioner of Taxation of the Commonwealth v. Rotary Offset Press Pty. Ltd.* (1971) 45 ALJR 518 affirmed on appeal (1972) 46 ALJR 609; *Rothmans of Pall Mall (Australia) Limited v. The Australian Broadcasting Tribunal* [\[1985\] FCA 91](#); (1985) 5 FCR 330 at p 343. Evidence tending to establish a connection between the performance televised and the product which the performance was alleged to promote was relevant. The existence of that product and the fact that it was sold in red and white packets bearing the name "Winfield" were not matters of which judicial notice could have been or was taken. Knowledge of those facts may have been widespread but they could not have been said to be notorious or even matters of common knowledge. They were, therefore, facts to be proved in the ordinary way. Clearly a juror who was not familiar with a Winfield packet of cigarettes would not have been in a position to assess whether the television segment constituted an advertisement for that product without evidence of the product and the form in which it was marketed. The main thrust of the prosecution case was that the colours which predominated during the televised performance were calculated or designed to connect that performance with a packet of Winfield cigarettes. Although this would not have been apparent to the jury if they were unaware of the appearance of a packet of Winfield cigarettes, it does not follow that the material televised was not of an advertising character. Indeed, it is possible to conceive of the advertisement of a completely unknown product being launched upon the market for the first time. Clearly in that case evidence of the existence of the product and of its characteristics would be relevant to prove the fact of the advertisement. Evidence of that kind was no less relevant in this case, notwithstanding that the product appears to have been widely known.

7. It was also submitted that the evidence in question should have been rejected by the trial judge in the exercise of his discretion because its prejudicial effect outweighed its probative value. The prejudice was said to have arisen from the fact that the cigarette packet bore a warning that smoking is a health hazard and from the fact that the evidence was in the form of exhibits which were available to the jury in the jury room when they were considering their verdict. For our part, we doubt whether the warning appearing upon the packet could be said to carry with it any prejudice against the respondent. If it could be said to suggest that those who promote or manufacture and market cigarettes bear some responsibility for the possible damage to the health of those who consume them, it was not a responsibility which was peculiar to the respondent and was unrelated to the question which the jury were required to determine. But if there was any prejudice flowing from the warning it was clearly insignificant in relation to the value of the evidence of the cigarette packet in proving a connection between the television segment and the product in question. Nor is there any reason to think that the availability to the jury in the jury

room of the cigarette packet and the photograph of the hoarding gave undue prominence to the evidence constituted by those exhibits. They were, after all, objects of a familiar kind to which the jury were entitled to have regard for a legitimate purpose and were hardly likely to have precluded the jury from giving proper consideration to the whole of the evidence.

8. For these reasons, we think that special leave to appeal having been granted to the appellant, the appeal should be allowed. However, the respondent opposes the restoration of its conviction by seeking special leave to cross-appeal upon the ground that the Court of Criminal Appeal ought to have found that the television segment was incapable as a matter of law of being an advertisement for cigarettes within the meaning of s.100(5A) and (10) of the Broadcasting and Television Act. In order to make its application for special leave to cross-appeal the respondent requires an extension of the time fixed by O.70, r.6(1) of the Rules of Court for the filing of a notice of cross- appeal.

9. As a matter of convenience to the Court the respondent was permitted to put the substance of its argument. Since the question whether the television segment was an advertisement within the meaning of the statute was, as we have said, a question of fact for the jury, that argument necessarily took the form of a submission that there was no evidence upon which the jury could conclude that the respondent had televised an advertisement for cigarettes. In our view, that submission was bound to fail.

10. Clearly, material may be designed or calculated to draw public attention to a product or to promote its use without explicit description or exhortation. Indeed, an advertisement may be of a subliminal character. Short of that, there are many means, subtle or otherwise, of drawing public attention to a product. The jury were entitled to conclude that the colours in which the dancers were clothed were not an accidental choice and were designed or calculated to draw attention to or to promote Winfield cigarettes when combined, however briefly, with the word "Winfield" appearing on the banner and in the advertisement on the A-frame.

11. Having concluded that the television segment constituted matter of an advertising character, the jury were, we think, entitled to reach the further conclusion that it was not, within the meaning of s.100(10), an accidental or incidental accompaniment of the televising of other matters. It was common ground that the respondent received no payment or other valuable consideration for televising the segment in question and the learned trial judge directed the jury that the prosecution bore the onus of establishing that it was not an accidental or incidental accompaniment of the other matter shown. That direction was, we think, correct.

12. The rule laid down in *Woolmington v. The Director of Public Prosecutions* [[1935 UKHL 1](#); (1935) AC 462 at pp 481-482, that the burden of proving every element of an offence charged rests at all times upon the prosecution, was expressed to be "subject to ... the defence of insanity and subject also to any statutory exception". It is made clear in *Reg. v. Edwards* (1975) QB 27 and *Reg. v. Hunt* (1987) AC 352 that the statutory exceptions referred to are not confined to those which expressly cast the burden of proof upon the accused (see, for example, [Crimes Act 1900](#) (N.S.W.), [s.417](#)), but extend to cases in which an intention to do so is necessarily implied. Such cases will ordinarily occur where an offence created by statute is subjected to a proviso or exception which, by reason of the manner in which it is expressed or its subject matter, discloses

a legislative intention to impose upon the accused the ultimate burden of bringing himself within it. That burden may, of course, be discharged upon the balance of probabilities. Whilst it is convenient to speak in terms of provisos or exceptions, the legislative intent cannot be ascertained as a mere matter of form. The Court of Appeal in *Reg. v. Edwards* at p 40, viewed the statutory exceptions as limited to:

"offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities."

In *Reg. v. Hunt*, at p 375, even this formulation was said by the House of Lords not to be exhaustive. Each case must turn upon the construction of the particular enactment.

13. But it is clear that in this case the exemption contained in s.100(10) of the Broadcasting and Television Act was not intended to cast any burden upon an accused charged under s.100(5A). Sub-section (10), as it then was, reads:

"A reference in sub-section ... (5A) ... to the ... televising of ... an advertisement shall be read as not including a reference to the ... televising of matter of an advertising character as an accidental or incidental accompaniment of the ... televising of other matter ..."

Whilst sub-s.(10) cuts down the scope of sub-s.(5A) it does so by way of definition rather than by way of proviso, exception or saving and there is no reason to suppose that in so limiting sub-s.(5A) the legislature intended that the sub-section should operate without limitation unless an accused brought himself within the terms of sub-s.(10).

14. However, it is clear to our minds that the jury were entitled to find that the televising of the performance which preceded the televising of the football match was not only advertising matter but was not an accidental or incidental accompaniment of the televising of other matter. It was plainly not accidental and the only matter to which it was alleged to be incidental was the football match. But the segment in question was discrete and occupied an appreciable length of time. The only parts of the segment which could be connected with the televising of the football match were the identification of the competition and the announcement that the final match was about to commence. The segment went far beyond that and was otherwise unconnected with what followed.

15. In our view, the submissions which the respondent sought to put by way of cross-appeal could not conceivably succeed. In any event, they involve no point of general importance. The grant of special leave to appeal is discretionary, but we do not regard it as a sufficient ground for granting special leave that, in the case of a cross-appeal, the matter can be heard without inconvenience because special leave to appeal has been granted to the other side. It is, we think,

nonetheless incumbent upon an applicant for special leave to cross-appeal to show that the cross-appeal raises some question of a special nature requiring the attention of this Court or that it would do injustice to determine the appeal alone. That is not the case in these proceedings. In the circumstances it is appropriate to grant the extension of time sought by the respondent and refuse special leave to cross-appeal. The conviction of the respondent should be restored.

TOOHEY AND McHUGH JJ. The question in this appeal is whether, in a prosecution for televising "an advertisement for ... cigarettes" contrary to s.100(5A) of the Broadcasting and Television Act 1942 (Cth) ("the Act"), extrinsic evidence is admissible for the purpose of explaining the words and images which are the subject of the telecast.

2. The appeal is brought by the Director of Public Prosecutions ("the prosecutor") against an order of the Court of Criminal Appeal of New South Wales which set aside a conviction of the respondent for contravening the Act by televising an advertisement for Winfield cigarettes. The Court of Criminal Appeal held that evidence that the name "Winfield" was used solely as a brand name for cigarettes and evidence which proved the nature of the "get-up" of Winfield cigarettes were wrongly admitted. The Court ordered a new trial of the charge.

The Background

3. The respondent is the licensee of a commercial television station. The prosecutor alleged that on 23 September 1984 at Sydney the respondent ("the licensee") contravened s.100(5A) of the Act in that, being the holder of a licence for a commercial television station, it televised "an advertisement for ... cigarettes". Section 100, so far as is relevant, provided:

"(5A) A licensee shall not broadcast or televise an advertisement for, or for the smoking of, cigarettes or cigarette tobacco.

...

(10) A reference in sub-section ... (5A) ... to the broadcasting or televising ... of an advertisement shall be read as not including a reference to the broadcasting or televising of matter of an advertising character as an accidental or incidental accompaniment of the broadcasting or televising of other matter in circumstances in which the licensee does not receive payment or other valuable consideration for broadcasting or televising the advertising matter."

4. The charge arose out of a telecast which took place on Grand Final day of the New South Wales Rugby League Football competition. The prosecutor asserted that a portion of the telecast, which was introduced by a commentator as "the Winfield Spectacular" and which finished with

an aerial view of the whole field, was an advertisement for Winfield cigarettes. The segment, which occurred just before the televising of the Grand Final, began with the announcer stating: "Winfield presents the 1984 big game buildup." Then for about ten minutes a group of young women, some dressed in red and some dressed in white, danced and presented various configurations to the sound of recorded music. During the course of the performance a large banner was unfolded. On it were the words, "Winfield Cup 1984". The words on the banner were plainly visible to a viewer. The telecast of the Spectacular also showed a brief, background glimpse of what the trial judge told the jury was "an A-frame around the perimeter of the ground, advertising for Winfield in terms of 'Have a Winfield' or something like that". The Spectacular ended with the release of a large number of green and yellow balloons as the dancers left the field. However, the prosecutor asserted that the relevant portion of the telecast, the subject of the charge, continued for a short period after that time. But this additional period does not seem to add anything to the prosecutor's case.

5. The prosecutor led evidence that Rothmans of Pall Mall (Australia) Limited was the proprietor of the name "Winfield" and that the name was used solely as a brand name for cigarettes. Also admitted into evidence were a specimen packet of Winfield cigarettes and a photograph of one of a number of roadside hoardings in the Sydney area. The hoarding showed an opened packet of Winfield cigarettes together with the captions "Five smokes ahead of the rest" and "... anyhow* have a Winfield 25's". The specimen packet of cigarettes and the photograph of the roadside hoarding tended to prove that Winfield cigarettes were packaged in red and white colours.

6. The basis upon which the trial judge admitted the evidence can be discerned from the terms of his summing up to the jury. His Honour directed the jury that:

"(A) presentation on television which draws the attention of the public or a segment of the public to a particular product is an advertisement. In this case you may well think the segment of the public was those people sitting at home watching grand final day 1984 on television. The product, of course, is cigarettes."

Later his Honour directed the jury that, in determining whether the telecast was an advertisement, they had "to assess the effect, or the impact of that particular part of the programme, to assess what effect or impact it would have on the mind of the ordinary viewer of television of average intelligence". The learned judge instructed the jury that an advertisement need not specifically refer to a product, for the product could be inferred from the content of the telecast and the "surrounding circumstances". His Honour went on to say:

"Therefore, the Crown would say that fact, that the only thing the Winfield company does is to market cigarettes, is a surrounding circumstance of which the ordinary average viewer might well be aware, and so the very name of Winfield would be significant. In assessing that, of course, you take yourself

back always to the mind of the average TV viewer, and on the evidence you have heard you are entitled to say what effect that would have. Would the average TV viewer be aware of that? Would it affect his appreciation of what message he drew from that segment of television?

And likewise, there is other evidence of surrounding circumstances, the advertisement on hoardings over the last few years of which evidence was given. The Crown would say the cigarette packet itself being red and white, and the Crown would say the glimpse that was seen on television earlier in which there was visible one of the hoardings advertising for - not a hoarding, an A-frame around the perimeter of the ground, advertising for Winfield in terms of 'Have a Winfield' or something like that, it is there for you to see, and the Crown says 'Well, look at all those things' what the lawyers call surrounding circumstances - 'your average viewer of average intelligence in 1982 (sic) must have seen them, must have heard them, and that that would also condition his mind to read out of the particular performance, which is the subject of the charge, an advertisement'."

The Reasons of the Court of Criminal Appeal

7. The Court of Criminal Appeal held that the extrinsic evidence was inadmissible. Street C.J. said that the "proper course" of the trial required the jury to view the segment and to determine for themselves whether it was an advertisement of cigarettes. His Honour said that the jury had to determine the matter "on the face of the material unaided by explanatory material adduced by the prosecution". Lee J. said that "whether an advertisement is an advertisement for cigarettes is dependent solely upon the content of what is alleged to be in the advertisement". Hunt J. said that the only material which was relevant to the issue was the telecast itself together with any matters which were within the general knowledge of the community and that evidence of what was within the general knowledge of the community was neither necessary nor permitted.

Court of Criminal Appeal was in Error

8. Notwithstanding the finding of the Court of Criminal Appeal, Mr Nicholas Q.C., for the licensee, conceded in this Court that it was open to the prosecutor to adduce evidence that Winfield was a brand name for cigarettes. He maintained, however, that the specimen packet of cigarettes and the photograph of the hoarding were inadmissible. In our opinion, however, evidence was admissible to prove that Winfield cigarettes were sold in packages with the

colours, red and white. The specimen packet and the photograph of the hoarding were therefore admissible. Any inference to be drawn as a result of their admission was a matter for the jury.

9. For the purposes of s.100 of the Act, an advertisement consists of the broadcasting or televising of matter designed or calculated to promote the sale, distribution or use of cigarettes or to promote the practice of cigarette smoking: cf. *Rothmans of Pall Mall (Australia) Limited v. The Australian Broadcasting Tribunal* [1985] FCA 91; (1985) 5 FCR 330 at p 339. Moreover, a broadcast or telecast may constitute an advertisement even though it serves a purpose other than that of advertising. The object of a broadcast or telecast may be to inform or to entertain, for example, yet it may be an advertisement: *Deputy Commissioner of Taxation of the Commonwealth v. Rotary Offset Press Pty. Ltd.* (1971) 45 ALJR 518 per Gibbs J. at p 522, affirmed on appeal (1972) 46 ALJR 609; *Rothmans of Pall Mall (Australia) Limited*, at p 339. Hence the broadcast or telecast may constitute an advertisement even though little of the content refers to the product "advertised". Furthermore, as the Full Court of the Federal Court pointed out in *Rothmans of Pall Mall (Australia) Limited* (at p 339), a broadcast or telecast may be an advertisement for cigarettes even though it does not mention the word "cigarette" or contain any picture of a cigarette. As the Full Court said in that case (at pp 339-340):

"(M)ethods of human communication are almost infinitely various, and often extremely subtle. A word, a picture, or a fragment of music may be capable of conveying a message, through association of ideas, to an informed audience. For example, an advertising jingle may have become so well-known to the people of a particular place, or perhaps of a particular generation, that its presentation to those people - even without words or pictorial matter - is likely to cause all or many of those people instantly to bring to mind the product with which it has become associated."

10. With the greatest respect to the members of the Court of Criminal Appeal, that Court erred in holding that, in the context of a prosecution under s.100 of the Act, evidence is not admissible to show that the televised matter was designed or calculated to be understood by one or more members of the public as an advertisement for cigarettes. Whether or not the televised material was so designed or calculated is a question of fact. Like any question of fact, in the absence of admission or judicial notice it must be established by evidence. If, by reason of extrinsic material, matter which is televised or broadcast constitutes an advertisement, the extrinsic material can be proved. To hold to the contrary would mean in many cases that a licensee could not be prosecuted for what was in fact an advertisement for cigarettes.

11. In a prosecution under s.100(5A), therefore, evidence of extrinsic facts is admissible to prove that the words, symbols or images televised or broadcast were designed or calculated to promote the sale, distribution or use of cigarettes or to promote the practice of smoking. Hence, as Mr

Nicholas conceded, evidence is admissible to show that a name used in a telecast refers to a particular brand of cigarettes. Likewise, evidence is admissible to show that action or conduct which is the subject of a broadcast or telecast was designed or calculated to cause listeners or viewers to identify and react favourably to a particular brand of cigarettes even though the action or conduct makes no explicit reference to cigarettes.

12. All members of the Court of Criminal Appeal stated that extrinsic evidence was not admissible. However, Hunt J. said that, in addition to the telecast, the jury could consider "matters" within the general knowledge of the community. It is plain that, by "matters" within the general knowledge of the community, his Honour had questions of fact in mind, for he said that whether "Winfield" was regarded by the community generally as synonymous with cigarettes "was very much a question of fact for the jury, to be determined by reference to the jury's understanding of what is within the general knowledge of the community, without specific evidence". But with great respect to his Honour, the jury was not entitled, in the absence of evidence, to determine whether "Winfield" was "synonymous with cigarettes". Juries are entitled "to refer to their general knowledge upon matters notorious and unquestioned": Wigmore On Evidence, 3rd ed. (1940), vol.9, 2570, p 543. But, as the learned author of that work points out, "the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life": *ibid*, p 544. Where the existence of a fact is in dispute, it must be proved unless the judge directs the jury that it is so notorious that they can take notice of it. A fact is either so generally known that everyone is presumed to be aware of it or it is not so generally known. If the trial judge rules that a fact is so generally known, then the jury may be instructed to take it into account in deciding an issue without any evidence concerning it. But if it is not so generally known, the jury cannot consider it unless its existence is proved by evidence or admission. To invite a jury to determine whether a fact is within the general knowledge of the community is to invite it to enlarge the evidentiary materials which have been tendered in evidence. In appropriate cases juries may be, and often are, required to apply their own knowledge as to community standards such as honesty, reasonableness, obscenity, etc.: cf. *Crowe v. Graham* [1968] HCA 6; (1968) 121 CLR 375 at p 399. But cases involving the application of community standards provide no support for the suggestion that a jury without evidence may determine whether a particular fact is within the general knowledge of the community. Since the end of the seventeenth century, a jury has not been entitled to use its general knowledge to determine the facts of the case.

13. One other matter needs to be noted. Although extrinsic evidence is admissible to prove that the subject-matter of the broadcast or telecast was designed or calculated to induce one or more members of the community to associate it with cigarette products or smoking, it is a mistake to think that such matter cannot constitute an advertisement for the purposes of s.100 unless one or more of the viewers, by reason of knowledge of those extrinsic facts, would associate that matter with cigarettes or smoking at the time of seeing the telecast. It is conceivable that, in the case of a new product, a telecast would constitute an advertisement for cigarettes although it contained no reference to cigarettes and no viewer, when he or she saw the material, would associate the televised material with cigarettes, cigarette tobacco or smoking. If the telecast was in fact designed or calculated to promote the sale of a particular brand of cigarettes, it would be an advertisement for cigarettes notwithstanding that nobody who saw the telecast then so understood it. An advertisement which informs viewers that an unidentified product,

tantalisingly referred to only by its brand name, will soon be on sale is an advertisement for that product whether or not any viewer is conscious of what the product is. It is an advertisement because it is designed or calculated to promote the future sale of the product.

14. In the present case it was open to the prosecutor, for the purpose of demonstrating a connection between the Winfield Spectacular and Winfield cigarettes, to prove that Winfield cigarettes were sold in red and white packets. The specimen cigarette packet and the photograph of the hoarding were evidence which tended to prove that viewers would associate the red and white "get-up" of the dancers, the name "Winfield" and the background A-frame displaying the words "Have a Winfield" with the red and white packets of Winfield cigarettes, which were advertised and on sale in the suburbs of Sydney. Moreover, evidence of the "get-up" of Winfield packets of cigarettes proved more than that Winfield was a brand name for cigarettes. By drawing attention to the "get-up" of Winfield cigarettes, the specimen packet and the photograph of the hoarding made it easier to conclude that the red and white colours of the dancers, in conjunction with the name Winfield, were designed or calculated to remind viewers of Winfield cigarettes than would be the case if they knew only that Winfield was a brand name for cigarettes.

15. It was, of course, not enough to prove an association in the minds of potential viewers between the matter televised and Winfield cigarettes. To constitute an advertisement for cigarettes for the purpose of s.100(5A), the matter televised or broadcast must be designed to promote the use or distribution of cigarettes or cigarette smoking. But once the jury concluded that the telecast was designed or calculated to associate Winfield cigarettes with the Winfield Spectacular, it was open to them to take the further step of concluding that the telecast was also designed or calculated to associate Winfield cigarettes with the pleasurable feelings derived from watching the Spectacular. Much modern advertising is concerned with nothing more than associating feelings of warmth, pleasure or joy with the use of a named commercial product. The picture of an attractive couple in a glamorous setting smoking or drinking alcohol or both, together with a brand name, is a common enough advertising technique.

16. In the present case, the learned trial judge was correct in holding that the specimen cigarette packet and the photograph of the hoarding were relevant and admissible.

17. However, Mr Nicholas submitted that the trial judge, in the exercise of his discretion, should have rejected the evidence on the ground that its prejudicial effect outweighed its probative force. The first objection of Mr Nicholas was that the cigarette packet contained a warning that smoking is a health hazard and that this warning was prejudicial to the licensee. But it is difficult to believe that, in a case concerned with an Act which prohibits advertisements for cigarettes, the presence of a health warning on the cigarette packet would more readily lead to a conviction for the offence. In any event, the probative value of the specimen cigarette packet, which was central to the prosecution case, far outweighed any conceivable prejudice which the licensee might suffer from the tender of the evidence.

18. Mr Nicholas' second objection was that the licensee was prejudiced because the jury would have the specimen packet and the photograph of the hoarding in the jury room and would construe the telecast "in the light of the objects that are with them in the jury room". He asserted

that this was prejudicial to the licensee because a viewer watching the telecast would not have those objects with him or her and would not have his or her consciousness of Winfield cigarettes raised in the same way as that of the jurors. But the possibility of this occurring did not require the rejection of the evidence. The specimen packet and the photograph of the hoarding were central to the prosecution's case. If there was a possibility of prejudice to the licensee because the jury might forget the different position of a likely viewer, it could have been eliminated by an appropriate direction reminding the jury that a viewer would be unlikely to have both a packet of, and a picture of a hoarding advertising, Winfield cigarettes before him or her. But no such direction was sought at the trial. Moreover, one may be sceptical as to whether the contrast between the jury room and a viewer's room was as great as the argument assumed. It would be surprising if a substantial number of viewers did not have packets of Winfield cigarettes near them while they watched the telecast. Moreover, despite the way the case was left to the jury, the question was not whether viewers did regard the televised matter as an advertisement for Winfield cigarettes. It was whether, by reason of Winfield being the brand name of a cigarette product which was sold in red and white "get-up", the telecast was designed or calculated to promote the sale, distribution or use of Winfield cigarettes.

19. The evidence to which the licensee objects was correctly admitted. The appeal must be allowed, and the order for a new trial set aside. However, it does not follow that the conviction should automatically be restored. The licensee has sought special leave to cross-appeal on the ground that as a matter of law there was no evidence to support the charge. To that application, we now turn.

The Licensee's Application

20. Special leave to appeal was granted to the prosecutor because the judgments of the Court of Criminal Appeal raised questions of general importance concerning proof of a charge under s.100(5A) of the Act. No such question of general importance can be discerned in the licensee's application for special leave to cross-appeal. It merely raises the question whether a particular telecast was an advertisement for cigarettes.

21. For the purpose of hearing the appeal, however, the Court watched the telecast and was, of course, referred to the evidence which the Court of Criminal Appeal held was inadmissible. Apart from some formal admissions made by the licensee, the extrinsic evidence and the telecast constituted the whole of the evidence tendered at the trial. In these circumstances, if this Court were of the opinion that there was no evidence to support the conviction, it would be both proper and just to grant special leave to cross-appeal and quash the conviction.

22. Although the case for the prosecutor was not particularly strong, we think that it was open to a reasonable jury to conclude that the telecast constituted an advertisement for cigarettes in the ordinary understanding of those words. The colours of the dancers, the references to Winfield, and the glimpse, brief though it was, of the A-frame with the words "Have a Winfield", when understood against the background of the extrinsic evidence, were sufficient to enable the jury to conclude beyond reasonable doubt that the telecast was an advertisement for cigarettes in the ordinary understanding of those words. The jury could reasonably conclude that the telecast was calculated to promote the sale or use of cigarettes because the reference to the name "Winfield", the nature of the colours, and the brief glimpse of the words "Have a Winfield" drew attention to

Winfield cigarettes in circumstances calculated to associate those cigarettes with the pleasurable spectacle of the Winfield Spectacular. None of these elements on its own was sufficient to constitute an advertisement for cigarettes. But in combination a jury could reasonably hold that they did constitute an advertisement for cigarettes.

23. A more difficult question is whether the jury could conclude beyond reasonable doubt that the telecast was not "matter of an advertising character as an ... incidental accompaniment of the ... televising of other matter ...": s.100(10). Unless the jury could conclude beyond reasonable doubt that the prosecutor had negated that proposition, there was no "advertisement for ... cigarettes" for the purpose of s.100(5A), for it was not enough that the jury might conclude that there was an "advertisement for cigarettes" within the ordinary meaning of that phrase. The terms of s.100(10) make it clear that, for the purpose of s.100(5A), there is no advertisement for cigarettes if the matter televised contains material of an advertising character which is an incidental accompaniment of the televising of other matter and the licensee has not received any valuable consideration for televising that advertising matter. It is common ground in this case that, if the telecast contained matter of an advertising character, the licensee received no valuable consideration for televising it.

24. The learned trial judge instructed the jury, correctly in our opinion, that the onus was on the prosecution to negative the matters raised in s.100(10). But in this Court, Sir Maurice Byers Q.C., for the prosecutor, submitted that the onus was on the licensee to bring itself within the "defence" raised by s.100(10).

25. When a statute imposes an obligation which is the subject of a qualification, exception or proviso, the burden of proof concerning that qualification, exception or proviso turns on whether it is part of the total statement of the obligation. If it is, the onus in respect of the qualification, exception or proviso is on the party asserting a breach of the obligation. If it is not, the party relying on the qualification, exception or proviso must prove that he or she has complied with its terms. See *Vines v. Djordjevitch* [1955] HCA 19; (1955) 91 CLR 512; *Roddy v. Perry* (No. 2) (1957) 58 SR (NSW) 41. In the present case, the matters mentioned in s.100(10) are part of the statement of the obligation imposed by s.100(5A) for they declare what is not to be treated as an advertisement for the purpose of s.100(5A). They are not a qualification, proviso or exception to the obligation imposed by s.100(5A); they are part of its definition. Consequently, to prove a breach of s.100(5A) the prosecutor must negative the matters set out in s.100(10).

26. So the question is, could the jury conclude beyond reasonable doubt that the televising of matter of an advertising character was not an "incidental accompaniment" of the "televising of other matter"?

27. At the trial the telecast of the Grand Final was treated as the "other matter" and the telecast of the Winfield Spectacular was treated as the "matter of an advertising character". Upon that hypothesis, the conviction of the licensee might fairly be regarded as inevitable once the jury found that the Winfield Spectacular was an advertisement in the ordinary meaning of the word.

28. In the context of s.100(10) of the Act, the word "accompaniment" seems to refer to matter of an advertising character which occurs "in company with" the broadcasting or televising of "other

matter". Hence "matter of an advertising character" will not be an "accidental or incidental accompaniment" unless it is broadcast or televised contemporaneously with the "other matter". In that setting, the adjective "incidental" must mean "happening ... in fortuitous or subordinate conjunction" with the "other matter": The Macquarie Dictionary, 2nd ed. (1987) p 881.

29. The Winfield Spectacular segment, however, was a self-contained entity which was not part of, and could not reasonably be regarded as an incidental accompaniment to the televising of, the Grand Final. Hence, having regard to the conduct of the case, the jury were entitled to hold that the licensee was not exculpated by s.100(10).

30. However, despite the way the case was left to the jury, the licensee was entitled to be acquitted if, upon the correct analysis of the facts of the case, there was no evidence upon which the jury could be satisfied beyond reasonable doubt that the matter of an advertising character was not an "incidental accompaniment of the ... televising of other matter".

31. As we have pointed out, the trial was conducted on the basis that, for the purpose of s.100(10), the telecast of the Winfield Spectacular was the matter of an advertising character and the Grand Final was the "other matter". But it was also open to the jury to conclude that the name "Winfield", the red and white colours, and the A-frame with the instruction "Have a Winfield" were the "matter of an advertising character" and that the Winfield Spectacular consisting of the music, dancing and configurations was the "other matter". On that basis it was open to the jury to conclude that the televising of this "matter of an advertising character" was incidental to the televising of the Spectacular. But that case was never put to the jury. Nevertheless, if the jury could not reasonably be satisfied that the matter of an advertising character went beyond the name, the colours and the A-frame, there would be a strong case for directing an acquittal. If the matter of an advertising character was confined to those three aspects, we doubt that the jury could be reasonably satisfied beyond reasonable doubt that that advertising matter was not incidental to the televising of the Spectacular. However, it was open to the jury to conclude that the whole of the Winfield Spectacular was matter of an advertising character or at all events that the matter of an advertising character dominated and was not incidental to the televising of the Spectacular. Having regard to the conduct of the case, there is no ground for doubting the correctness of the jury's verdict. The licensee's application for special leave to cross-appeal should be refused.

Proposed Order

32. The appeal is allowed. The orders of the Court of Criminal Appeal are set aside. In lieu thereof, order that the appeal to that Court be dismissed. The application by the licensee for an extension of time in which to file a notice of cross-appeal should be allowed. But the application for special leave to cross-appeal against conviction is refused.

ORDER

Appeal allowed.

Application for extension of time to file notice of cross-appeal refused.

Set aside the orders of the Court of Criminal Appeal of New South Wales and in lieu thereof order that the appeal to that Court be dismissed.

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