IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2006-404-00411

RAKESH CHAND LAL
Applicant

v

MINISTRY OF HEALTH
Respondent

Hearing: 30 April 2007

Appearances: D Singh for Appellant
M Thomas for Crown

Judgment: 30 April 2007 at 12:55pm

(ORAL) JUDGMENT OF ANDREWS J
[on appeal against conviction]

Solicitors:
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Meredith Connell, PO Box 2213, Auckland

[1] This appeal is against conviction.

Background

[2] On 11 June 2005 as part of a controlled purchase operation for chewing tobacco conducted by the Ministry of Health, an employee of the Ministry was sold two packets of a product labelled "Gutkha", by the appellant at the Era Superette in Dominion Road, Auckland.

[3] On 16 October 2006 the appellant was convicted following a defended hearing on one charge under s 29(2) of the Smoke-Free Environments Act 1990 which provides:

> (2) No person shall import for sale, sell, pack, or distribute any tobacco product labelled or otherwise described as suitable for chewing, or for any other oral use (other than smoking).

[4] The appellant was ordered to come up for sentence if called upon within 12 months and to pay $1,130 towards the costs of prosecution.

District Court decision

[5] His Honour Judge J D Hole found that:

a) The defendant sold two packets of Gutkha to the employee;

b) There was a sale in terms of s 29(2) of the Act;

c) The expert evidence established that the left type substance contained in the product was tobacco although the amount contained in the product was small;

d) Exhibit 1 produced by the prosecution at the hearing was the product sold by the appellant;

e) The product labelled Gutkha was a tobacco product described as suitable for chewing.

Principles on appeal

[6] The general right of appeal is by way of rehearing but the onus rests on the appellant to show that the decision under appeal is wrong. I refer to *Herewini v Ministry of Transport*[1]. This Court will be astute to see that any inference taken fairly establishes the essential elements of the offence: *R v Ramage*[2] and *R v Hart*[3]. This Court will however, be slow to differ from the trial Judge's findings of fact and credibility: *Tetau v MacPherson*[4] and *Rae v International Insurance Brokers (Nelson-Marlborough) Limited*[5].

Arguments on appeal

[7] I record that notwithstanding that this appeal was stated to be against conviction and sentence, Mr Singh's submissions on behalf of the appellant addressed conviction only. The submissions on appeal may be summarised as being:

a) The District Court Judge made no finding that the item produced in Court by the prosecution as Exhibit 1 was in fact the item sold by the appellant, rather than a similar item produced by the appellant in the District Court as Exhibit A.

b) There was no evidence that Exhibit 1 was a product that contained tobacco. The evidence of the two expert witnesses for the prosecution was, Mr Singh submitted, equivocal.

c) There was no evidence that Gutkha was a chewing tobacco.

d) Section 29(2) in referring to labelling only applied to labelling in English.

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[1] *Herewini v Ministry of Transport* [1992] 3 NZLR 482 at 489
[2] *R v Ramage* [1985] 1 NZLR 392 CA
[3] *R v Hart* [1986] 2 NZLR 408
[4] *Te Tau v MacPherson* [1956] NZLR 34
[5] *Rae v International Insurance Brokers (Nelson-Marlborough) Limited* [1998] 3 NZLR 190 CA

[8] On behalf of the Crown Mr Thomas first asked that it be recorded that the appellant had failed to file submissions in advance as he was required to do. Nonetheless Mr Thomas was content for the hearing to proceed.

[9] Mr Thomas submitted that on each of the matters raised by Mr Singh the District Court Judge had before him evidence on which he could reasonably make the findings set out in his judgment.

Discussion

[10] With respect to the first issue which was whether Exhibit 1 produced by the prosecution was the actual product sold by the appellant and purchased by the Ministry's employee, it is noted that the District Court Judge at [9] of his judgment rejected the defence submission that it was Exhibit A, not Exhibit 1, that was sold. I note that the Judge said:

> In this regard the defence attempted to raise the suggestion that it was not Exhibit 1 which was sold to the employee of the Ministry of Health, but a product similar to Exhibit A. The evidence pertaining to Exhibit 1 was not effectively challenged.

[11] In the following paragraphs the District Court Judge refers to the evidence in relation to Exhibit 1. I can find no support in the following paragraphs for the appellant's submission that the District Court Judge was not satisfied that it was Exhibit 1 that had been sold by the appellant.

[12] The second argument put forward for the appellant was that the product Gutkha was not a tobacco product. On this point the District Court Judge had before him evidence from two expert witnesses. The first was the evidence of Ms Sibley as to her analysis of the product. She gave evidence that the product contained nicotine.

[13] Secondly, there was evidence from Dr Braggins, who is a Botanist. He gave evidence as to reviewing the list of ingredients for the products and said that from those ingredients the only one which could contain nicotine was the ingredient listed

as tobacco. His conclusion was that the product contained tobacco, although accepting that it was in a very small quantity.

[14] The third point raised by the appellant was as to whether there was sufficient evidence that the product was a chewing tobacco. In this respect the District Court Judge had before him evidence of Ms Manjett Singh, an interpreter, and from Mr Sunder Lokhande. Both gave evidence to the effect that Gutkha is known in India as a tobacco suitable for chewing.

[15] Finally, with respect to whether the product was labelled or otherwise described as chewing tobacco and as to whether s 29(2) applied only to labelling in English, I note that this particular argument was not raised in the District Court. However, there are several factors which, in my view, entitled the District Court Judge to find that the product was "otherwise described as" chewing tobacco. Accordingly, it is not necessary to consider Mr Singh's argument that s 29(2) only applied to labelling in English. Those factors are:

a) The product was labelled Gutkha.

b) The inclusion of tobacco in the list of ingredients;

c) The evidence of Ms Singh and Mr Lokhande that Gutkha is known to be chewing tobacco; and

d) The statutory warning in English printed on the packet to the effect that "Chewing of tobacco and supari is injurious to health.".

[16] In my view, those were sufficient for the Judge to find that the product Gutkha was a tobacco product that was "otherwise described as" suitable for chewing.

[17] In summary I am satisfied that the District Court Judge had before him evidence upon which he could properly convict the appellant on a charge under s 29(2) of the Smoke-Free Environments Act 1990.

[18] Accordingly, the appeal is dismissed.

[19] I make no order as to costs.

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Andrews J