CASE NO: 259/91
NvH

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SELECTA SEA PRODUCTS (PTY) LTD	1st Appellant
M I STANLEY	2nd Appellant
RL PENNY	3rd Appellant
PAT CHAMBERS	4th Appellant

and

THE STATE	Respondent

CORAM: SMALBERGER, VIVIER, et HARMS, JJA

HEARD: 23 August 1994

DELIVERED: 1 September 1994

JUDGMENT

SMALBERGER, JA:

The first appellant ("Selecta") is a registered company which carries on the business of processing and selling fish, including the

exporting of fish and fish products. At all relevant times the second appellant ("Stanley") was Selecta's managing director; the third appellant ("Penny")'its sales manager; and the fourth appellant ("Chambers") its factory production manager. The four appellants were originally charged in the regional court, Cape Town, with 168 counts including fraud and contraventions of various provisions of the Sea Fisheries Act 58 of 1973, the Fishing Industry Development Act 86 of 1978 ("the Act") and the Exchange Control Regulations. At the close of the State case they were discharged on a large number of counts. They were ultimately convicted on four counts of contravening sec 23(l)(a) of the Act read with the relevant regulation (exporting perlemoen without a permit - counts 124, 125, 126 and 127) and one count of attempting to do so (count 130). Fines were imposed on the appellants on all counts as well as, in the case of Stanley and Penny, periods of imprisonment which were conditionally suspended. Their subsequent appeals to the

Cape Provincial Division against their convictions and sentences failed (save for a technical alteration to the conditions of suspension). They were granted leave by the court a quo to appeal further to this court.

With the exception of count 130, the State case against the appellants was based solely on circumstantial evidence. In a careful and comprehensive judgment the trial magistrate dealt at length with the evidence adduced at the trial (which included a mass of documentary evidence). No useful purpose would be served by repeating or reviewing such evidence. It is common cause that Selecta made use of the facilities of Paarden Eiland Cold Storage ("PECS") for the storage and dispatch of fish and related products for sale (whether on the local market or overseas). When goods were delivered by or on behalf of Selecta a "receiving voucher" was made out by PECS corresponding to the delivery note which accompanied the goods. The information reflected in the receiving

voucher was entered weekly onto "stock sheets". Every Monday Selecta was furnished, either by telefax or telex, with details of stocks held on its behalf by PECS. Whenever Selecta wanted goods dispatched on its behalf an instruction to this effect would be given to PECS by either telephone, telefax or telex. When a container was loaded by PECS pursuant to such instructions details of what was loaded would be recorded on a "loading sheet". The information recorded on the loading sheet would then be transposed onto an "issue voucher" a copy of which would be sent to Selecta to inform it of what had in fact been loaded. Selecta's stock sheets would in due course be adjusted accordingly.

It was incumbent upon the State to prove that the appellants knowingly exported perlemoen, or attempted to do so. It is common cause that Selecta did not have a permit entitling it to export perlemoen. The magistrate's meticulous analysis of the relevant documentation and other evidence shows convincingly that

PECS received into storage on behalf of Selecta quantities of perlemoen from various distributors (or from Selecta itself) which were later consigned to Hong Kong, on the instructions of Selecta and on the occasions to which counts 124, 125, 126, 127 en 130 relate, under the names "super kingklip" or "kingklip fillets". To take count 127 as an example. The documentary evidence shows that on 18 November 1987 Blue Continent Products (Pry) Ltd sold and delivered 449 boxes of abalone (another name for perlemoen) to Selecta. The abalone was reboxed on Selecta's premises. On the same day 449 boxes of what was described in Selecta's delivery note as abalone was delivered to PECS. The quantity concerned was in due course entered on the Selecta perlemoen stock sheet. On Selecta's instructions the same 449 boxes were withdrawn from stock on 23 November 1987 and packed in a container which was shipped for export to Hong Kong. Having regard to dates and quantity it is beyond the bounds of coincidence for these 449 boxes

to have been other than the ones delivered as abalone. On the loading sheet the product was referred to as "kingklip super", but the issue voucher reflects it as being abalone. The perlemoen stock sheet was debited accordingly. There is no suggestion that Selecta ever raised any query in regard to these entries on the issue voucher or the stock sheet. What was therefore delivered to Selecta as abalone and, according to the internal documentation, received by PECS, dealt with, packed and accounted for to Selecta as such, was exported under the name "super kingklip". The position is essentially the same in regard to counts 124, 125 and 126.

The crux of the appellants' defence on these counts was that the products delivered by or on behalf of Selecta to PECS as abalone or perlemoen for export as super kingklip was neither of these, but in fact kingklip bladders, a product much sought after in the Far East for its alleged medicinal properties. This scheme to disguise the true nature of the product was allegedly designed to

mislead competitors and to prevent or limit competition in a lucrative market. Evidence in this regard was given by Stanley and Penny (Chambers did not testify). Their evidence was rejected by the magistrate. He found that Stanley was an evasive and unimpressive witness (a finding confirmed by a reading of Stanley's evidence). He gave comprehensive and convincing reasons for concluding that their evidence could not reasonably possibly be true. He has not in my view been shown to have erred in any material respect in his assessment of the evidence and the probabilities, and no sufficient ground exists for interfering with his findings.

In this regard it would be appropriate to highlight some of the relevant considerations which the magistrate took into account. Foremost amongst these is the support to be found in the evidence relating to count 130. On that count it is common cause that the container packed by PECS on Selecta's behalf for export to Hong Kong was intercepted before it was loaded at the Cape Town

harbour. An examination of its contents revealed that what had been consigned as 2000 kgs kingklip super was in fact perlemoen.

The appellants contended that the perlemoen (which was in unmarked boxes) had been consigned for export by mistake, the suggestion being that PECS employees had mistakenly loaded perlemoen intended for up-country delivery instead of super kingklip intended for export. The magistrate, once again for cogent and unassailable reasons, found that no such mistake had been made. Significantly, the alleged up-country consignees of the perlemoen appear never to have complained about not receiving their orders, or having received kingklip instead! The findings in relation to this count go a long way to negating the appellants' defence on the other counts and establishing that perlemoen was shipped as super kingklip. Further important considerations relate to the inherent improbabilities and absurdities relating to the alleged method of disguising kingklip bladders for export purposes as

something else (first as perlemoen, for which no export permit existed, and then as super kingklip) with all the attendant confusion it was likely to cause; the fact that, contrary to the alleged scheme and the need for secrecy, kingklip bladders are frequently referred to in the documentation in undisguised form; and inferences arising from documents (relating to count 125) emanating from an overseas consignee which refers to "super kingklip (abalone)" and describe a product indicative of perlemoen, as well as from a letter sent by Selects to an such consignee referring to the source of the product which strongly suggests it could only have been perlemoen.

In the result I agree with the conclusion reached by the magistrate that the only reasonable inference to be drawn in respect of counts 124, 125, 126 and 127 from the relevant facts and circumstances was that Selecta, to the knowledge of Stanley, Penny and Chambers, exported perlemoen without a permit on the occasions to which those counts relate, and in the quantities found

by him, and that in respect of count 130 it attempted to do so. It is apparent from their evidence and the documentation that Stanley and Penny throughout had knowledge of what was being exported. Once it was established that perlemoen was in fact exported, and their evidence of fish bladders being exported in disguise rejected, the only reasonable inference is that they knew that what was exported was perlemoen. Chambers, the person primarily responsible for the dispatching of products for export failed to give evidence, thus rendering a prima facie case of knowledge on his part conclusive. All three therefore took part in the commission of the offences. At the very least it was never established by them that they did not so participate or that they could have prevented their commission (see sec 332(5) of Act 51 of 1977). The appellants were accordingly correctly convicted on the counts in question.

I come now to the question of sentence. The total sentences

imposed in respect of the 6ve counts were as follows: (1) Selecta, a fine of R22 000-00; (2) Stanley, a fine of R13 500-00 or 9 years imprisonment plus a further 9 years imprisonment conditionally suspended; (3) Penny, a fine of R9 000-00 or 6 years and 9 months imprisonment plus a further 8 years and 9 months imprisonment conditionally suspended; and (4) Stanley, a fine of R6 750-00 or 2 years and 3 months imprisonment. In addition the magistrate ordered the 2 000 kg of perlemoen in respect of count 130 (which had been impounded) to be forfeited to the State.

No basis exists for interfering with any of the fines imposed, or with the order of forfeiture. The magistrate has not been shown to have misdirected himself in any material respect, nor can the extent of the fines, in the light of the penalty provisions in the Act and the relevant factors mentioned by the magistrate in his judgment on sentence, be considered excessive or inappropriate.

At the hearing of the appeal the question was raised with

counsel whether the alternative periods of imprisonment (in the case of Stanley, Penny and Chambers) and the suspended periods of imprisonment (in respect of Stanley and Penny) were not disproportionately high having regard to the fines imposed and the seriousness of the offences. Counsel agreed that they were. It is necessary to maintain an equitable balance between the fines imposed (having regard to the amounts involved and their real value) and the alternatives of imprisonment, both in relation to each other and as between the various appellants. Furthermore, should Stanley breach the conditions of suspension he runs the risk (at least notionally) of having a total sentence of 9 years imprisonment put into operation; in the case of Penny the period would be 8 years and 9 months . This constitutes on unduly high risk in the circumstances. The lack of balance between the fines and the alternative imprisonment, and the excessively high suspended periods of imprisonment require and justify correction.

Since the appellants were convicted and sentenced the Act has been repealed and replaced by the Sea Fishery Act 12 of 1988 which contains a provision (see 37(l)(a)) similar to sec 23(l)(a) of the Act. This notwithstanding the conditions of suspension should still refer to the Act, being the operative enactment in force at the

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time the sentences were originally imposed.

The following order is made:

1) The appellants' appeals against their convictions are dismissed;

2) The appeal by the first appellant against its sentence is dismissed;

3) The appeals of the second, third and fourth appellants against their sentences succeed to the extent that they are altered to read:

(a) Second appellant:

Counts 124. 125. 127 and 130: On each count, a fine of R3 000-00 or 8 months imprisonment plus a further 8 months imprisonment suspended for 5 years on condition that he is not convicted of a contravention of

sec 23(l)(a) of Act 86 of 1978, or any enactment in substitution thereof, committed during the period of suspension.

Count 126: A fine of Rl 500-00 or 4 months imprisonment plus a further 4 months imprisonment suspended for 5 years on the same conditions as in

respect of counts 124, 125, 127 and 130.

(b) Third appellant:

Counts 124. 125, 127 and 130: On each count, a fine of R2 000-00 or 6 months imprisonment plus a further 6 months imprisonment suspended for 5 years on condition that he is not convicted of a contravention of sec 23(l)(a) of Act 86 of 1978, or any enactment in substitution thereof, committed during the period of suspension.

Count 126: A fine of Rl 000-00 or 3 months imprisonment plus a further 3 months imprisonment suspended for 5 years on the same conditions as in respect of counts 124, 125, 127 and 130.

(c) Fourth appellant:

Counts 124. 125. 127 and 130: On each count, a fine of Rl 500-00 or 4 months imprisonment.

Count 126: A fine of R750-00 or 2 months imprisonment.

4) The appeal against the order of forfeiture is dismissed.

J W SMALBERGER
JUDGE OF APPEAL

VIVIER, JA)
HARMS, JA) Concur