548-3

IN THE COURT OF APPEAL OF MANITOBA

Coram: Monnin, C.J.M., Twaddle and Lyon, JJ.A.

B E T W E E N:

HER MAJESTY THE QUEEN	)	
	)	D. G. Frayer, Q.C.
Respondent	)	for the Attorney-General
	)	of Canada
- and -	)	
	)	H. L. Morphy, Q.C.
SHELL CANADA PRODUCTS LIMITED	)	and K. Thomson
	)	for Shell Canada
(Accused) Appellant	)	

A N D B E T W E E N:

HER MAJESTY THE QUEEN	)	
	)	
Appellant	)	Appeals heard:
	)	October 12 and 13, 1989
- and -	)	
	)	Judgment delivered:
SHELL CANADA PRODUCTS LIMITED	)	February 8, 1990
	)	
(Accused) Respondent	)	

MONNIN, C.J.M.

I have read the reasons for judgment of Twaddle, J.A. I concur in his refusal to grant leave to appeal the conviction. Shell Canada was properly convicted.

I would not increase the fine from $100,000 to $200,000. A fine of $100,000 is substantial, even for Shell. I would dismiss Shell's appeal with respect to sentence as well as the Crown's cross-appeal on the matter.

C.J.M.

Suit Nos. 145/89 and 146/89

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Coram:
Monnin, C.J.M., Twaddle and Lyon, JJ.A.

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent,

- and -

SHELL CANADA PRODUCTS LIMITED

(Accused) Appellant.

A N D B E T W E E N:

HER MAJESTY THE QUEEN

Appellant,

- and -

SHELL CANADA PRODUCTS LIMITED

(Accused) Respondent.

D. G. Prayer, Q.C.
for the Attorney-General of Canada

H. L. Morphy, Q.C. and K. Thomson
for the Accused

Appeals heard:
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TWADDLE, J.A.

The accused corporation ("Shell") was convicted of retail price maintenance, contrary to s. 61(1)(a) of the Competition Act, R.S.C. 1985, c. C-34, and fined $100,000.00 by Kennedy, J. Shell appeals from the conviction and seeks leave

to appeal against the sentence. The Attorney-General of Canada seeks leave to cross-appeal against the sentence.

Section 675(1)(a) of the Criminal Code confers on a convicted person a right of appeal against conviction on any ground that involves a question of law alone. To appeal on any other ground, including one of mixed fact and law, the convicted person requires the leave of this Court or the certificate of the trial judge that the case is a proper one for appeal.

No ground of appeal in the case at bar involves a question of law alone. At best, the grounds of appeal involve questions of mixed fact and law. Notwithstanding the need for leave, Shell did not seek it.

I do not raise the issue of leave to embarrass counsel who failed to ask for it, but because this is a case in which, if it had been asked for, I would have refused it. Although interesting points of law were raised, they could only arise on the basis of facts different from those which the learned trial judge must have found in order to convict Shell.

It is argued skilfully that the judge may not have found the facts to be those which, on a proper view of the law, were a necessary prerequisite to a conviction. But that

submission necessarily involves a question of mixed fact and law, a question which can be considered by this Court only if leave to appeal is first given.

The law applicable to this case cannot be stated as rigid principles. The issues were whether a threat was made and, if so, whether it was made in circumstances that make the corporation responsible. Those issues are essentially ones of fact and, in the absence of some clear misdirection, the findings made on them should not be reviewed on appeal.

Nowhere in the judge's reasons is there an indication that he misdirected himself as to the proper law. It is not suggested that he did. His fault, if any, lay in his failure to state explicitly the legal principles which he applied in reaching his verdict. Such a failure is not of itself a legal error. To succeed on the appeal, the appellant would need to show that, on the basis of the proper law, the verdict was either unsupported by the evidence or was unreasonable.

In my view, the verdict is both supported by the evidence and reasonable. That is a conclusion which I reached readily, so readily that I do not think it a proper case in which to grant leave to appeal. Nonetheless, following the

usual practice of this Court, adopted as a matter of convenience, the appeal was heard together with the application for leave. The need for leave was not raised and in consequence the appeal proceeded as though leave had been granted. In those circumstances, I think it right that I should give my reasons for disposing of the case as I propose we do.

Shell is a producer and marketer of gasoline, having approximately 55 retail locations in Winnipeg through which its gasoline is sold. One of those locations in 1986 was that owned and occupied by a business carried on under the name of "Jet". Without going into precise details, Jet owned the land from which gasoline was sold, but had leased it to Shell which, in turn, had leased it back to Jet. Shell paid Jet $3,000.00 per month more in rent than it received. Jet's obligation was to buy from Shell for resale a minimum quantity of 3,410,000 litres of gasoline per year. The lease arrangement was subject to cancellation by Shell upon 30 days' notice.

Shell's operation in Winnipeg is managed on a hierarchal system. One Ronald Benson was in charge of gasoline sales in Manitoba and Saskatchewan. In the next tier of command was a supervisor of the marketing representatives. He supervised those who had direct contact with the retail outlets, some owned and operated by Shell and some owned and operated

independently. One Bruce Lettner was the marketing representative who dealt with Jet.

Ronald Benson testified that the marketing representatives, such as Lettner, were responsible for ensuring that dealers, such as Jet, complied with Shell's policies, procedures and guidelines and for implementing "various marketing facets of our business to ensure that we are achieving our marketing objectives."

Prior to April, 1986, Shell sold gasoline, throughout Canada, on a consignment basis. On this basis, the gasoline was owned by Shell until its sale to the ultimate consumer. Shell was thus able, without contravening the Competition Act, to dictate the price at which the ultimate sale was made.

Commencing in April, 1986, Shell sold gasoline to retailers for resale instead of delivering it on consignment. The evidence of Shell employees was that Shell made great efforts to explain to retailers that they were now masters of the price at which gasoline was sold to ultimate consumers. In particular, a meeting was held at which Jet employees were present. Efforts were made at this meeting to explain the new pricing system. Shell employees explained, to their counterparts at Jet, Jet's freedom to set its own retail prices,

a freedom which was known by Jet's management.

There is remarkable similarity between the prices charged for gasoline by different retailers. So remarkable is that similarity that those in the industry, such as Ronald Benson, notice a minor variation from what might be regarded as the standard price, the only variation not noticed with concern being the variance between the self-service and the full-service prices.

Mr. Benson also testified about the consequences of a "price war" in Winnipeg. From the evidence, I understand a "price war" to be the situation which occurs when several retailers successively reduce the price of gasoline. One retailer, hoping to increase his market share, reduces his price. Another retailer, with hopes of doing the same, follows. Then another. And another. One of the retailers then elects to drop his price even further. The others do likewise. And thus, on the price war goes.

At first, it is the retailers collectively who suffer. The wholesale price to them is fixed, but not indefinitely. The gasoline producer can reduce the wholesale price to keep its retailers competitive. Thus, a producer is not immune from loss of profit in the price war. It may be forced to reduce its

wholesale price to keep its product competitive and to maintain its market share.

But that is not the only effect on Shell of a price war. Shell not only produces gasoline and sells it at a wholesale level: it owns many of the retail outlets. With respect to those outlets, Shell can legitimately dictate the price at which gasoline is sold. It is thus directly affected by a war of prices.

It is against the foregoing background that the events giving rise to Shell's conviction must be looked at.

One morning towards the middle of July, 1986, it was raining in Winnipeg. This meant that Jet's primary business, providing automatic car-wash services, would be slack. In accordance with a pre-arranged policy, the employee who was in charge at the time reduced the advertised price of gasoline by 2.4 cents per litre to 43.4 cents.

It just so happened that Mr. Benson, who was not at work that morning, was in the vicinity. He saw the sign advertising gasoline for sale at the reduced price. He promptly placed a telephone call to his office. He asked an employee to check as to whether there wwas any activity in the retail price at which gas was being sold in the city.

Approximately one hour later, the Jet employee received a telephone call from a Shell employee. The Jet employee was asked the price at which Jet was selling gasoline. The Jet employee told the Shell employee what Jet's price was and asked if something was wrong. The Jet employee testified that in response the Shell employee "hesitated and he sort of said, like, well, I don't really know, to that effect, because, you know, like he said that he was replacing Bruce Lettner because he was on holidays."

Although the Jet employee contacted management, no alteration was made to the price at which Jet was selling gasoline. But at approximately 2:30 p.m. Bruce Lettner called. We know from his evidence that he was on holiday at the time, but had been contacted by his office. The Jet employee testified that Lettner was "very abrupt and he used short words." Lettner asked whether Jet's price was 43.4 cents per litre. According to the Jet employee, her confirmation that that was Jet's price was responded to by Lettner who told her that this price could cause a price war and that "it was detrimental to the price of gas." She said that Lettner told her "to put the price of gas up by 5:00 p.m."

The Jet employee testified that, as a result of that telephone conversation, she increased gas prices at Jet by two

cents per litre. Asked why she did so, she replied that she was kind of intimidated "with the way he talked to me."

The price of gasoline sold by Jet remained at 45.4 cents per litre until the following Monday morning, when the price was increased by a further .4 cents per litre, returning the price to that at which it had been prior to the previous week's reduction. This further price increase followed an improvement in the weather and was consistent with the policy of Jet to decrease prices only during rainy weather.

About 20 minutes after the price increase had been implemented, it then being 8:04 a.m., Lettner telephoned the Jet station. He spoke to the employee he had spoken to the previous week. She asked him what was wrong with Jet using a self-service price (which was .4 cents per litre below the full-service price). Although unbeknownst to him the price had already been put back to the full-service level, Lettner told her the price should go back up to that level. According to the Jet employee, Lettner told her that the price should go back up "or else Shell will be ticked off."

At 11:48 a.m. on the Monday morning, Letter called by telephone again. He asked if Jet's price was back up.

There was a discrepancy between the evidence of the Jet employee and that of Jet's owner. The employee's evidence was that the price towards the end of the previous week had been increased by her on her own initiative. The owner's evidence was that he had instructed her to increase the price of 2 cents a litre after she had reported her conversation with Lettner to him. The owner said that he made that decision because he was "afraid of offending Shell and losing [his] lease"; that the lease was critical to the financial well-being of Jet and was "basically the only leverage they had over [him]."

Jet's owner testified that on Tuesday, July 15, 1986 he received a telephone call from Lettner, during which Lettner told him that Benson had called him (Lettner) while on holiday "to get the price of gas back up." The owner also testified of Lettner saying that Jet was "acting irresponsible (sic) to the Shell independents."

Although there was some disagreement as to details, Lettner agreed that he had made the telephone calls alleged and that in substance he had been counselling Jet to restore its price to that being charged by other retailers. He denied that he had threatened Jet or intended to do so. Specifically, he said that he did not indicate to Jet that it would suffer some harm if it did not increase its prices. To have done so, he

said, would have been "contrary to everything that Shell and the people in the field like myself, the marketing reps, would stand for."

It is convenient at this point to remind ourselves that the offence with which Shell was charged was not one requiring success in its endeavours to influence upwards the price at which Jet sold gasoline. The offence lay in Shell's attempt to do so. Section 61(1)(a) of the Competition Act provides:

> "61(1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trademark, copyright or registered industrial design shall, directly or indirectly,
>
> (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada;"

The learned trial judge generally accepted the evidence of the Jet employee and Jet's owner as to the conversations each had had with Lettner. Based on that evidence, he accepted that Lettner had attempted to influence

upward the price at which Jet was selling its gasoline. He found on the evidence that, in the legal sense, the attempt was accompanied by a threat, a finding which I understand to mean that implicit in the conversations, as a result of the words used and the tone of each, was a warning of a consequence which would follow if the counsel given by Lettner to Jet was not heeded.

It is argued that the learned trial judge must have applied an incorrect test, reference being made to his statement as to the logicality of the conclusion that the Jet employee might fear alienating Shell if she had done something wrong. I do not regard that reference as being an application of a subjective test. In my view, the learned trial judge was applying an objective test as to the reaction a reasonable man would have to the conversations between Lettner and the Jet employee, given that the reasonable man had knowledge of the relationship between Shell and Jet. That, in my view, is the correct test. His finding that there was a threat is then a finding of fact.

The major attack on the conviction was launched on the ground that Lettner was too low in the hierarchy to be the directing mind of Shell. That submission might have had merit in other circumstances, but in the circumstances of this case

the conviction does not rest on Lettner's conduct alone. It was open to the trial judge to find, as I think he did, that Lettner's conduct followed direction from above. There was no direct evidence of that, it is true, but it is to me a compelling inference from the fact that the telephone calls to Jet came quickly after Benson called his office and from the fact that Lettner himself was called back from holiday to deal with the situation.

In Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662, at p. 681, Estey, J. referred to the transition from virtual corporate immunity for criminal liability to virtual equality with humans in like circumstances. He went on to quote with approval the statement of the governing principles made by Schroeder, J.A. in R. v. St. Lawrence Corp., [1969] 2 O.R. 305. Schroeder, J.A. said (at p. 320):

> "While in cases other than criminal libel, criminal contempt of Court, public nuisance and statutory offences of strict liability criminal liability is not attached to a corporation for the criminal acts of its servants or agents upon the doctrine of **respondeat superior**, nevertheless, if the agent falls within a category which entitles the Court to hold that he is a vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself, then his conduct is sufficient to render the company indictable by reason thereof. It

> should be added that both on principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied.

In Canadian Dredge & Dock Co., supra, Estey, J. noted (at p. 719) that the outer limit of the identification theory had not been reached. It may be that to identify Lettner as a directing mind of Shell would be to push beyond the outer limit of the theory, but to identify Benson as such is well within it. He was clearly the directing mind of Shell with regard to gasoline prices in Manitoba. It was open to the learned trial judge to find that Shell, through the instrumentality of Lettner and Benson combined, was guilty of the offence with which it was charged.

Although the learned trial judge did not state the test which he applied, there is no reason to believe he applied the wrong one. The issue before him was essentially one of fact. The conclusion which he reached was entirely reasonable and supported by the evidence.

In what is in effect its application for leave to appeal, Shell is attempting to raise a legal issue which does not arise on the facts as found by the learned trial judge. It

is not a case which, in my opinion, merits the intervention of this Court even to the extent of granting leave.

On the applications for leave to appeal against the sentence, I am of a different view. Each application raises an important point of principle. The points are these:

(1) Is it a mitigating feature that Shell had no corporate policy of resale price maintenance?

(2) Should the earnings of a corporation be taken into account in assessing the fine to be imposed?

On these points, I would grant leave to Shell and the Attorney-General respectively to appeal against the sentence.

The learned trial judge found that Shell had no corporate policy of resale price maintenance. He consequently declined to impose a prohibition order pursuant to s. 34 of the Competition Act, it being his view that such an order is only necessary where the corporation is likely to repeat the offence in the absence of such an order. Shell now seeks to use the judge's finding as a shield against a substantial fine.

I do not disagree with the learned trial judge with respect to the non-imposition of a prohibition order. Indeed, the Crown abandoned its proposed appeal from that part of the disposition. But the absence of an illegal corporate policy, officially approved, is not, in my view, a mitigating circumstance in this case. In discussing the effect of an official policy not to engage in illegal activity, Estey, J. had this to say, in Canadian Dredge & Dock Co. v. The Queen, supra, at p. 699:

> "If the law recognized such a defence, a corporation might absolve itself from a criminal consequence by the simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law."

That statement is equally apt, in my view, when considering the absence of an illegal policy as a potentially mitigating circumstance in a case in which the corporation, not the employee, has been found guilty of the crime.

There is no doubt that, officially, Shell obeyed the law. Despite its official policy, however, it committed the crime of which it has been convicted. To say that the absence of a policy of resale price maintenance is a mitigating

circumstance is like saying that the absence of a previous declaration by a burglar that he will break and enter homes at night is a mitigating circumstance when he does so.

As a result, I am of the view that the absence of corporate policy to maintain the resale price of gasoline does not aid Shell in its appeal against the fine of $100,000.00.

The Attorney-General of Canada submits that the learned trial judge, in assessing the appropriate fine, should have applied a formula whereby the fine would be a percentage of Shell's earnings. Although there is ample support in the case law for the proposition that the wealth of a corporation should be taken into account, there is no support for the concept of a formula. Nor was I persuaded that there is sufficient merit in the concept to warrant its adoption.

Nonetheless, when assessing a fine, regard must be had to the earnings of the company. The point was dealt with by Brooke, J.A. in R. v. Browning Arms Co. of Canada Ltd. (1974), 18 C.C.C. (2d) 298. He said (at p. 299):

> "When considering the appropriate fine one must carefully characterize who it is who has committed the offence and the significance of a penalty to that person or corporation."

Those words were spoken in dissent, but it is clear from the majority judgment, delivered by Arnup, J.A., that the corporate earnings were important in the assessment of the fine. Arnup, J.A. considered the amount of the fine with specific reference to the profits.

The total fine in Browning Arms Co. represented 7% of the anticipated profits from the company's Canadian operation for the year in which the offence was committed and well in excess of 10% of the profit in each of the three previous years. I do not refer to these percentages to suggest that they should be similar in this case. The cases are quite different. I refer to the percentages only to indicate the relationship of the fine to profits in that case. It should not be as high in this case, but should it be as low as 0.1% of earnings?

It is an admitted fact that in each of the years 1986, 1987 and 1988 Shell earned in excess of $100,000,000.00 from its business as an oil producer. In the context of those earnings, a fine of $100,000.00 is but a slap on the wrist: it is inordinately low. Having regard to the circumstances of the offence and the significance of the penalty to the offender, I would increase the fine to one of $200,000.00.

In the result, I would dismiss Shell's appeal against sentence, but allow that of the Attorney-General to the extent of increasing the fine as indicated.

J.A.

I AGREE:

J.A.