

SOUTH AFRICA / JUDGMENT

Goncharko v S (A459/06) [2011] ZAWCHC 443 (5 December 2011)

[2011] ZAWCHC 443

COURT

Western Cape High Court, Cape Town

BEFORE

Van Riet, Zondi

CASE / FILE NUMBER

A459/06

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IN

THE HIGH COURT OF SOUTH AFRICA

CAPE

OF GOOD HOPE PROVINCIAL DIVISION

CASE

NO: A459/06

In

the matter between:

ANDRIY

GONCHARKO

.....Appellant

and

THE

STATE

.....Respondent

JUDGMENT

DELIVERED ON THIS 5th DAY OF DECEMBER 2007

VAN RIET, AJ:

- [1] The appellant stood trial in the Regional Court Cape Town on a charge of the contravention of section 27(1)(a) and (b) of the Copyright Act 98 of 1978 in that, in the period during March and May 2001, the accused sold, by way of trade offered or exposed for sale or hire certain products which were the subject of copyright at the time.

- [2] On 2 November 2005 the accused was found guilty on the above charge and sentenced to a R5 000-00 or 6 (six) months imprisonment. In addition thereto, the appellant was sentenced to a further 6 (six) months imprisonment, conditionally suspended for 3 (three) years.
- [3] On 15 December 2005, the learned Regional Magistrate gave leave to the appellant to appeal to this court on conviction only, hence this appeal against such conviction
- [4] At the commencement of the hearing on appeal the prosecution and the defence agreed that copyright in the Microsoft products reflected on annexure 'A' (only) had been proven by the State, so that this aspect was no longer an issue. They further agreed to provide us with a revised schedule setting out the products in respect of which copyright had indeed so been demonstrated.
- [5] I deal with the three bases upon which it was argued on behalf of the appellant that the learned regional magistrate misdirected himself in convicting the accused.

NO CHAIN OF EVENTS

- [6] It was argued that there is no proper evidential chain linking the products sold by the accused and/or those which were confiscated, and the discs which were ultimately analysed and testified to by the experts.
- [7] For that reason, so it was argued by Mr Bischoff, who appeared on behalf of the appellant, the element of possession which is required for the presumption in terms of s26(10) of the Copy Right Act to arise, had not been proven.
- [8] In response thereto, Mr Tarantal for the State, correctly pointed out that there was no need for the State to rely on this presumption, as it had proved, through direct evidence, the sale of the Microsoft products.
- [9] Mr Bischoff further argued that there was no certainty that the products sold indeed contained Microsoft computer software (as

opposed to, for instance, music) as the purchasers never opened them. During debate, he, however, conceded that, in view of the accused's own evidence (that the discs contained Microsoft computer ware), this was a far fetched and speculative possibility and may be ignored.

ABSENCE OF MENS REA

- [10] The main thrust of Mr Bischoff's argument was that the State had failed to prove beyond reasonable doubt, that the accused had the necessary mens rea in order to commit the offence. Put differently, that the state had not shown that the accused knew that the Microsoft products were protected by copyright.
- [11] As appears from his judgment, the magistrate held that this element of the offence had been proven on the basis of *dolus eventualis* on the accused's part. In *S v Magidson* 1984

- (3) SA 825 TPD Ackermann, J (as he then was), in applying the principles underlying *dolus eventualis* held (at 830C):

"Nor does the accused have to be certain that what he is doing is unlawful. It is sufficient if he realises that what he is doing may possibly be unlawful and reconciles himself with this possibility."

At 831D, with reference to the facts of this case, Ackermann, J held:

It is clear from the foregoing that the accused was pertinently put on his guard, regarding the unlawfulness of his possession of the key rings, ... The conclusion is inescapable in my view that at that stage he must have realised that it was at least possible that such possession was unlawful, ..." (our underlining)

On that basis the accused in that case was held to have had the required *mens rea*, in the form of *dolus eventualis*.

[12] In our view, these principles/observations are, likewise, applicable to the present matter in that:

1. As is quite apparent from the "disclaimer" used by the accused in selling the products, and from concessions made by him in cross-examination, the accused well knew that many products of this kind, including Microsoft products, are protected through copy right. His case was that it was also possible that it might not be protected either because it constituted so-called free ware, or because the rights therein may have been ceded to the webmaster in question. The accused did check on the website that there was no express prohibition against the use of such products, but was also not able to say that it was not so protected. In other words, there was no indication to him as to whether copyright prevailed therein, or not;
2. For that reason, the accused specifically stipulated in the disclaimer that the end user should, were he to ascertain that the product is so protected, either destroy same or purchase another product; 3. It would have been relatively simple for the accused to make inquiries from Microsoft so as to ascertain the true position. He could also have "run" the discs; 4. It appears from his cross-examination that he did not do so, quite simply because; "... I was interested on the easiest way to get my service running, so even if I saw this copyright exists somewhere-let the end user, because he is using the soft ware, let him check and make sure if it is protected by copyright or not" He also conceded: "Ja, I didn't really care (whether copyright existed or not)." 5. It is therefore clear that he foresaw the possibility that copyright might vest in the products at the time of his sale thereof, and reconciled himself with this possibility. [13] In our view, a person in the position of the accused faced with the possibility that the proposed sale might be unlawful is not entitled to pass on the responsibility to check whether this is so to purchasers of the products. It is the sale or trade of such products that is prohibited by the Copyright Act and this applies equally to the seller

and purchaser, who both would be guilty of the offence, provided they had the necessary (criminal) state of mind. [14] We are accordingly of the view that mens rea in the form of dolus eventualis has clearly been demonstrated. NO SALE BUT RATHER A SERVICE BY THE ACCUSED [15] This ground of appeal raised in the Heads of Argument, was not proceeded with during oral argument. In our view, the point was sensibly abandoned. The CD's in question were clearly advertised for sale and sold. At the very least there was a trade in the copyrighted products. [16] In the circumstances I would dismiss the appeal and confirm both the conviction and sentence, save that, by agreement between the appellant and the State, the annexure to the charge sheet is replaced by one reflecting (only) the following computer ware: MS WINDOWS 98 ME WINDOWS NT4 WORKSTATION MS WINDOWS 2000 ADVANCED SERVER MS WINDOWS PRO 2000 WINDOWS XP WHISTLE MS OFFICE 2000 PREMIUM MS OFFICE 97 PROFESSIONAL MS PROJECT 2000 MS VISUAL BASIC 6 ENTERPRISE

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WINDOWS NT4 WORKSTATION

MS WINDOWS 2000 ADVANCED SERVER

MS WINDOWS PRO 2000

WINDOWS XP WHISTLE

MS OFFICE 2000 PREMIUM

MS OFFICE 97 PROFESSIONAL

MS PROJECT 2000

MS VISUAL BASIC 6 ENTERPRISE

VAN RIET, AJ I agree, and it is so ordered. ZONDI, J

VAN RIET, AJ

I agree, and it is so ordered.

ZONDI, J

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