02/74

SUPREME COURT OF VICTORIA

FORSHAW v WB HUNTER PTY LTD

Harris J

30 November 1973

MOTOR TRAFFIC – GOODS BEING CARRIED BY TRUCKS – WHETHER VEHICLES WERE OPERATED FOR HIRE OR REWARD IN THE COURSE OF BUSINESS – NO EVIDENCE GIVEN BY DEFENDANT – EFFECT OF – EVIDENCE GIVEN BY PROSECUTION WITNESSES – CONTRADICTIONS BETWEEN ORAL EVIDENCE AND NOTES TAKEN – MAGISTRATE ALLOWED WITNESSES TO REFER TO NOTES – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *COMMERCIAL GOODS VEHICLES ACT* 1958, S22(1).

Information for breach on 4 July 1967 of s22(1) *Commercial Goods Vehicles Act* 1958 in that defendant being owner of a commercial goods vehicle did operate by carrying goods on a public highway not being authorised by licence or permit so to operate. (An earlier Order Nisi on the grounds that the Magistrate should not have admitted a certificate of Incorporation of the defendant in the Australian Capital Territory because s16 *State and Territorial Laws and Records Recognition Act* 1901-64 in so far as it purported to render the certificate admissible in a state Court was *ultra vires* the Commonwealth proved abortive and was expressly disclaimed at this hearing).

Evidence was given by two investigation officers as to their observations of the activities of two semi-trailers FWT-264 and FWH-122 on certain days on the Hume, Midland, and Goulburn Valley highways, and of the vehicles being driven in to a yard at Shepparton where there was a shed bearing the name WB Hunter Pty Ltd. After exhaustion of memory the officers were permitted to refer to a compiled account of notes taken immediately after the observations, the original notes having been destroyed. Certain contradictions between the evidence given without use of the notes at earlier hearings of the information and prior informations, and evidence subsequently given with aid of the notes at later hearings. Both informants gave evidence that the second version was the correct one.
Ground 6 attacked the fact that each of these witnesses contradicted himself and each contradicted the other – hence their evidence was of such a nature that no reasonable Magistrate could have acted upon it as a basis for a conviction. Grounds 1, 2, 3, 5, attacked the fact that the evidence given of the repetitive conduct of the vehicles was not sufficient to prove that the vehicle was being "operated" for hire or reward in the course of business on 4 August 1967 as it did not exclude all reasonable hypotheses as to the use of the vehicle consistent with the innocence of the defendant. The Magistrate found the charge proved. Upon order nisi to review—

HELD: Order nisi discharged.
1. The Magistrate saw the witnesses and it was for him to judge whether or not the contradictions obtained from them did or did not destroy their evidence or make it so unreliable that it should not be acted upon. The cross-examination about the Midland Highway was readily explicable on the ground of confusion.

2. It was not valid to say that once the witnesses had been shown to have contradicted themselves and each other, the evidentiary value of the notes sank and had to be equated with the standard of their confused and contradictory answers. The Magistrate was entitled to take the view that what they originally recorded was accurate and to disregard or discount the contradictions contained in their oral evidence.

3. In relation to the question whether the vehicles were being operated for hire or reward in the course of business, what the Magistrate had to do was to decide whether the evidence as it was left open any reasonable hypothesis which was consistent with the defendant's innocence. If there was any such hypothesis, then the defendant ought not to have been convicted.

4. Apart from the actual evidence given by the witnesses for the prosecution, there was also a negative circumstance that the Magistrate was entitled to take into account when he had to reach a decision at the end of the case. This was the fact that the defendant called no evidence. The Magistrate was entitled to take this into account 'as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear.'
***May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at pp658, 659; [1955] ALR 671, applied.**

5. It was not for the Supreme Court to decide whether such hypotheses were reasonably open. The question was whether it could be said that to disregard the possibility of such hypotheses providing an explanation for the evidence was a course that no reasonable Magistrate could have adopted. The

Court was far from satisfied that any such hypotheses were reasonably open and was not prepared to hold that no reasonable Magistrate could have held that, notwithstanding such possibilities, he was satisfied beyond reasonable doubt that the vehicles were carrying the goods in the course of a trade or business, either of the defendant or of some other person.

HARRIS J: ... For the Magistrate to have been wrong in law in not rejecting the evidence of Swain and Gower by reason of the matters adverted to in Ground 6, it must be established that the evidence which the Magistrate in fact accepted (viz. the two witnesses' accounts of the events of the 4th August 1967 when given with the aid of notes) was a conclusion that no reasonable Magistrate could have come to.

The rule to be applied in this Court in dealing with questions of fact which arise on an appeal to it from the Magistrates' Court by way of order to review is that:-

> " ... it is not for this Court to make up its own mind on the evidence, though giving due weight if necessary to the fact that the tribunal below has seen the witnesses. This Court has merely to see whether there was evidence upon which the Magistrate might, as a reasonable man, come to the conclusion to which he did come."

(*Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at 351 (FC); (1961) 19 LGRA 232.)

The position as to the evidence in this case was that one of the witnesses, Swain, accepted that there was a contradiction between his evidence on the 26th February 1970 and the 3rd October 1969, but said that the contradiction was to be resolved by accepting the evidence he gave on 26th February 1970. The position as to the other witness, Gower, was that he gave his evidence in chief on the 26th March 1970 and contradicted that evidence on 2nd July 1970 by then saying that the evidence he given on 3rd October 1969 was correct. He did not purport to resolve the conflict, for he was never asked to do so, and as I mentioned earlier, appeared to me to be unaware that there was any contradiction.

Not only was there this conflict in the evidence of each of the witnesses, but there was a conflict between what Swain said in this case was the correct account of the events of 4th August 1967 and what Gower said during cross-examination as to the events of that day.

It seems reasonably clear from the transcript that the two witnesses easily became confused when confronted by Mr Francis. They were giving evidence about events which were then well in the past. Furthermore (as the Magistrate observed in giving his ruling) there was not really any great difference between them – the difference was only as to the date on which the vehicle remained overnight in the yard. The Magistrate took what was, in my opinion, a sensible course by going back to the notes. Once he was satisfied that these constituted a genuine contemporary record of these routine observations of long ago, there were strong reasons for holding that what appeared in them was accurate and that what the witnesses had said in cross-examination was due to confusion, or defective memory. The Magistrate saw the witnesses and it was for him to judge whether or not the contradictions obtained from them did or did not destroy their evidence or make it so unreliable that it should not be acted upon. The cross-examination about the Midland Highway is, in my opinion, readily explicable on the ground of confusion.

It is not, in my opinion, valid to say that once the witnesses had been shown to have contradicted themselves and each other, the evidentiary value of the notes sank and had to be equated with the standard of their confused and contradictory answers. The Magistrate was entitled to take the view that what they originally recorded was accurate and to disregard or discount the contradictions contained in their oral evidence.

Thus, I am affirmatively satisfied that it was reasonable for the Magistrate to have accepted, as an accurate account, the evidence of the events of 1st, 2nd, 3rd, 4th and 7th August 1967 as recorded in the notes. This is going even further than is necessary to sustain the course adopted by the Magistrate on this point. The result is that Ground 6 of the order nisi is not made out,

The argument that the defendant ought not to have been convicted did not rest solely upon the contention that the evidence of the two witnesses was too unreliable to afford a basis for conviction. There was also a substantial argument that the evidence of the events of the 1st, 2nd, 3rd, 4th and 7th August, 1967, even if it could be accepted, was such that, on it, no reasonable

tribunal could have come to the conclusion that it proved beyond reasonable doubt that the defendant operated the vehicle No. FWT-364 on 4th August 1967 contrary to Section 22 (1) of the *Commercial Goods Act* 1958. The argument was stated in this way and it comprehended what was contained in Grounds 1, 2, 3 and 5 of the order nisi. (Grounds 1 and 7 were not pursued).

[His Honour then set out s22(1) and the definitions "operate" and "Commercial goods vehicle" in s3 of the Commercial Goods Vehicles Act 1958 and continued] ... It will thus be seen that s22(1) imposes a stringent liability on the drivers and owners of commercial goods vehicles. Many factual situations are covered by it.

So far as is relevant to this case the examination of the provisions of the section may be limited to what follows:—

A semi-trailer (which is a 'motor car' within the *Motor Car Act* 1958) which is used for carrying goods in the course of any trade or business is a 'commercial goods vehicle'. If that semi-trailer carries goods in the course of any trade or business whatsoever on a public highway it is a commercial goods vehicle which 'operates' on a public highway. If that semi-trailer is not authorised by licence or permit so to operate, the owner of that semi-trailer commits an offence, whoever is the driver of the vehicle.

The owner may be able to establish one of the defences open to him under s22(3) but unless he does, the operation of the vehicle in the way described constitutes the commission of an offence by the owner under s22(1). (See and compare *Hudd v Gange* [1941] VicLawRp 46; [1941] VLR 195; [1941] ALR 236).

It follows from what is set out above that it is sufficient in an information for an offence under s22(1) for the informant to establish that the motor vehicle in question is owned by the defendant, that it is a commercial goods vehicle and that it was carrying goods in the course of some person's trade or business, not necessarily that of the defendant. It is also to be observed that *prima facie* proof that goods were carried on the vehicle is *prima facie* proof that the vehicle in question is a commercial goods vehicle (s34(f)).

In the present case, there was evidence that the defendant was the owner of vehicle No. FWT- 264 (by the registration certificates) and that the vehicle was a commercial goods vehicle (by the evidence but it was carrying goods on the 4th August 1967 on the Midland Highway, at Mooroopna). Was there evidence that this commercial goods vehicle was a commercial goods vehicle which 'operated' on that day at that place? Was there evidence that it was then and there being used to carry goods in the course of any trade or business whatsoever?

The prosecution did not lead any evidence directed to establishing that the defendant conducted a business of carrying goods, though one cannot help feeling on reading the evidence that the whole proceedings were conducted as though everyone in the courtroom knew that it did. In any event there was some evidence which would afford a basis for a finding that the premises at Shepparton were used by the defendant as a depot in the course of a carrying business and some evidence that the defendant did conduct such a business.

But it was on the evidence of the observations of the two vehicles on five successive work days that the prosecution really relied. The evidence of the similar acts of the defendant's vehicles on days other than the 4th August 1967 was relied on as circumstantial evidence to establish the main fact i.e. that vehicle No FWT 264 'operated' on the 4th August 1967. What the prosecution contended was that this main fact follows as a rational inference from the subsidiary or connected facts of the other observations. For this intention to have the effect of establishing the guilt of the defendant, the evidentiary circumstances must bear no other reasonable explanation. What I have just done is to take the test of admissibility of this kind of evidence from the judgment of Dixon J (as he then was) in *Martin v Osborne* [1936] HCA 23; (1936) 55 CLR 367 at p375; [1936] ALR 261, and to apply it to this case.

It is clear enough that it was open to the prosecution to lead the evidence of all five observations and it is also clear enough that they afforded some evidence from which a conclusion could be drawn that on the 4th August 1967 the vehicle was being used for the carrying of goods

in the course of a trade of business, whether of the defendant or of some other person. But for the evidence to establish the prosecution's case and warrant a conviction it must have admitted of 'no other reasonable explanation'. Dixon J, in *Martin v Osborne* (*supra*, CLR at p375) explained what he meant by this expression. He said:—

> "This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued."

A little later His Honour said (at p376):—

> "But it is at least true, I think, that the acts of a party are admissible against him whenever they form a component in a combination of circumstances which is unlikely to occur without the fact in issue also occurring. The repetition of acts or occurrences is often the very thing which makes it probable that they are accompanied by some further fact. The frequency with which a set of circumstances recurs or the regularity with which a course of conduct is pursued may exclude as unreasonable any other explanation or hypothesis than the truth of the fact to be proved."

In this case, the five observations showed that two trucks both owned by the defendant, were engaged in similar activities on 1st, 2nd, 3rd, 4th and 7th August 1967. There was a very close degree of identity between the type of goods carried (steel roofing trusses on each occasion) the routes followed (which always were north on the Hume and Goulburn Valley Highways to the defendant's yard at Shepparton and on three occasions from that yard to vacant land at Mooroopna where the trusses were unloaded).

Apart from this actual evidence, there was also a negative circumstance that the Magistrate was entitled to take into account when he had to reach a decision at the end of the case. This was the fact that the defendant called no evidence. The Magistrate was entitled to take this into account 'as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear.' (*May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at pp658, 659; [1955] ALR 671). What the Magistrate had to do was to decide whether the evidence as it was left open any reasonable hypothesis which was consistent with the defendant's innocence. If there was any such hypothesis, then the defendant ought not to have been convicted.

It was argued that one such hypothesis was that the defendant may have been carrying the goods otherwise than in the course of its business, for a friend, or for charity. There was some cross-examination directed to showing that the defendant did charitable work and that this included carrying goods for charities, but it did not get far and such answers as were elicited from the witnesses were of a quite unconvincing character. Thus there was little, if any, evidence to support any such hypothesis, but it was at all events a logical possibility.

Apart from carrying for charity it was said that the defendant might have been carrying the roofing trusses to Mooroopna to enable them to be used in some kind of municipal project and that he was doing this as a voluntary effort. Counsel mentioned an RSL Hall, a hospital, municipal baths, a municipal sporting arena, or a community school or a building for the RSPCA. It was said that this possibility was open in this case, by the very fact that the evidence all related to the same building material.

As stated earlier, it is not for this Court to decide whether such hypotheses were reasonably open. The question is can it be said that to disregard the possibility of such hypotheses providing an explanation for the evidence was a course that no reasonable Magistrate could have adopted. I am far from satisfied that any such hypotheses were reasonably open. To my mind they have an air of fancifulness about them. I am certainly not prepared to hold that no reasonable Magistrate could have held that, notwithstanding such possibilities, he was satisfied beyond reasonable doubt that the vehicles were carrying the goods in the course of a trade or business, either of the defendant or of some other person. Grounds 1, 2, 3 and 5 have therefore not been made out. Consequently, none of the grounds of the Order Nisi have been made out. The Order Nisi will therefore be discharged.