

32/69

## SUPREME COURT OF VICTORIA

**MELVILLE v HASTINGS TRANSPORT PTY LTD**

Little J

3 November 1969

**MOTOR TRAFFIC – TRUCK DRIVER FAILED TO HAVE AT LEAST 10 CONSECUTIVE HOURS FOR REST – DRIVER EMPLOYED BY DEFENDANT EMPLOYER – DRIVER ACTED UNDER EMPLOYER'S INSTRUCTIONS – WHETHER EMPLOYER HAD THE RIGHT TO CONTROL THE DRIVER IN THE DRIVING OF THE TRUCK – WHETHER EMPLOYER PERMITTED THE OFFENCE – EMPLOYER CHARGED – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, SS37B(c), 37H(2).**

**HELD: Order nisi discharged.**

1. There was in the material relied upon by the informant ample evidence upon which the magistrate could have been satisfied that the company was aware that on this trip, in common with similar trips, a contravention such as occurred was extremely probable. It was further open to the magistrate to hold that the company's action in sending the driver on this journey without any direction as to rest periods revealed, and indeed was to be attributed to an indifference, a studied indifference, to whether the relevant provisions of the legislation were or were not contravened. It was well recognised by the company that if drivers took the ten hours rest period it would be prejudicial to its financial success. As Hastings said; "If all our drivers took ten hours rest we would not make any money", and "We have to get the trucks back here."

2. Accordingly, the Magistrate was plainly entitled to find that the charge laid against the company was proved.

**LITTLE J:** The defendant company was charged in the Court of Petty Sessions that on the 7 September 1967, contrary to s37H(2) of the *Motor Car Act* 1958, it did cause or permit one Peck to drive a motor vehicle after he had not had at least ten consecutive hours for rest in the period of 24 hours immediately preceding 1.45pm on that date. The defendant was convicted of the offence charged, and it is against that conviction that this appeal by way of order nisi is brought.

The ground of the order nisi is that there was no evidence upon which the magistrate could properly have found that the defendant caused or permitted William John Peck to drive a motor car, registered number SA 556-049, after such person had not had ten consecutive hours for rest in the period of 24 hours immediately preceding 1.45 p.m. on the 7 September 1967.

The material before the Court of Petty Sessions provided ample evidence that Peck had contravened s37B(c) of the Act. Section 37B provides:

"A person shall not drive a motor car at any time if immediately prior to that time—  
(c) he has not had at least ten consecutive hours for rest in the period of 24 hours immediately preceding that time."

The only point at issue in the argument before this court was whether the Stipendiary Magistrate who constituted the Court of Petty Sessions could properly have come to the conclusion that the defendant permitted the offence. In *Chappell v Ross & Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376 the Full Court was concerned to determine what was involved in proof of permission in s37H(2). At pp382-383 of the report the Chief Justice and Smith J said:

"The offence is quite plainly one which involves two persons; the person who permits and the person who is permitted. It requires a permitting – not necessarily communicated – by the first such person of the act or omission by the other constituting the contravention, being conduct which there is a right or capacity in the first person to prevent. We think that in accordance with the natural use of language it involves not only a right or capacity on the part of the permitter to prevent the contravention, but also a state of mind amounting to consent to, or acquiescence in, the contravention. And consent

or acquiescence must include an element of knowledge or foresight. Actual knowledge that the contravention is being or will be committed would be plainly sufficient. Likewise, we think a belief that a contravention is highly likely or probable would suffice."

The material mainly relied on for the purposes of proving permission consisted of the informant's account of a conversation on the 16 February 1968, between him and one Hastings, the managing director of the company, the details of which appear in an affidavit of Mr Skewes sworn in support of the application for the order nisi.

According to the evidence so given, Hastings in that conversation told the informant that on 7 September 1967, a vehicle driven by Peck was the property of the company, and that on that date Peck was employed by it and was acting under his instructions. In answer to the question what instructions he gave Peck concerning his hours of driving and rest, Hastings answered that he did not give Peck any instructions. Further questions received the answer that he did not give any instructions to the company's drivers concerning their hours of driving and rest and their log books, and that he just left it to the drivers. Hastings added, "It is all in the front of the book," meaning the log book. He accepted as correct entries in Peck's log book showing the hours of driving which revealed the contravention of s37B(c). He was asked whether he had any explanation to offer for Peck's failure to have ten consecutive hours for rest in the 24 hours calculated from 8 p.m. on the 6 September, and he answered, "No". To the further question whether he told Peck to have ten hours rest, Hastings replied,

"No. I put it to you this way. From day to day what the trucks are doing it would be impossible to draw up a schedule for our drivers. We are bound by the meatworks. We have to consider our clients. We have stock on hand, and we can be asked late at night to have a load of stock in Melbourne next morning. Drivers could be resting all day for days before they start on the journey. All they have to do is work their trucks. If all our drivers took ten hours rest we would not make any money."

The evidence as to the interview continued in this way: "I said, "Was there any time limit on this journey?: He said, "No, there was no time limit. On occasions a chap might have to leave here one night, and we might require him at Naracoorte the next night. We have to get the trucks back here." I said, "The driver told the inspector he was employed by the company and paid trip money. Would that be so?", He said, "Yes." "And the driver said he had carried 124 sheep from Robe to Melbourne, which would be carried in the course of the company's business as livestock carriers. Would that be so?" Mr Hastings said, "Yes." No evidence was called on behalf of the defendant.

It is plain in this case that the defendant had by virtue of its relationship to Peck the right to control him in the driving of the truck so as to prevent the contravention in question. So much was conceded by Mr Skewes. He contended, however, that there was no evidence that the company knew that the contravention was likely to occur, that it would have been elementary for the driver to know he was required to have a rest period of ten consecutive hours, and there was no practicable way by which the defendant could have prevented the contravention.

As against that contention reliance was placed by Mr Charles on the evidence that the driver was paid by the trip, and the inference to be drawn from the evidence that it was to the financial advantage of both the driver and the company that the truck should do as many trips as possible. In that connection particular emphasis was given to the passages in the evidence which I have read *verbatim*, and to the evidence that no instructions were given to Peck, or the company's drivers generally, as to hours of driving and rest periods. Reference was also made to the complex nature of the legislative requirements as to hours of driving and rest periods, and, adopting the language of the Full Court in *Chappell's case*, it was said there was obviously a high degree of likelihood of breaches thereof by the defendant's drivers if they were not instructed in these complexities and assisted in the planning of trips in such a way as to avoid contraventions.

It is, I think, sufficient for me to say that in my opinion there was in the material relied upon by the informant ample evidence upon which the magistrate could be satisfied that, the company was aware that on this trip, in common with similar trips, a contravention such as occurred was extremely probable. It was further open to the magistrate to hold that the company's action in sending Peck on this journey without any direction as to rest periods revealed, and indeed was to be attributed to an indifference, a studied indifference, to whether the relevant provisions of the

legislation were or were not contravened. It was well recognised by the company that if drivers took the ten hours rest period it would be prejudicial to its financial success. As Hastings said; "If all our drivers took ten hours rest we would not make any money", and "We have to get the trucks back here."

Accordingly in my opinion the Stipendiary Magistrate was plainly entitled to find that the charge laid against the company was proved. In the result the order nisi will be discharged, with costs to be taxed.

---