**04/03; [2003] VSC 161**

**SUPREME COURT OF VICTORIA**

# *ARACHCHI v ORLOWSKI*

**Nettle J**

**22 May, 2 June 2003**

**TRANSPORT – STATUTORY OFFENCE – FAILING TO PRODUCE A VALID TICKET UPON REQUEST BY AUTHORIZED PERSON – REQUEST MADE WHEN JOURNEY COMPLETED – CHARGE DISMISSED BY MAGISTRATE ON GROUND THAT PERSON HAD NO POWER TO MAKE REQUEST ONCE THE JOURNEY HAD BEEN COMPLETED – STATUTORY INTERPRETATION – MEANING OF RELEVANT SECTION – WHETHER MAGISTRATE IN ERROR: *TRANSPORT ACT* 1983, S221(4).**

Section 221(4) of the *Transport Act* 1983 (Act) provides:

"A person who makes a journey in a carriage, or is on land or premises for entry to which a tIcket is required, and, not being entitled to make that journey or entry without a ticket, fails, upon request being made by ... an authorized person, to produce a ticket that is valid for that journey or entry is guilty of an offence."

**HELD:**
**1. The words "makes a journey" in s221(4) of the Act are to be read as meaning "is making a journey". This is the natural and ordinary meaning having regard to the context of the words as well as the purpose which the enactment seeks to achieve.**

**2. Accordingly, a magistrate was not in error in holding that the powers of an authorized officer to require production of a ticket ceased on the completion of a journey by a commuter.**

**NETTLE J:**
1. This is an appeal from a final order of the Magistrates' Court made at Melbourne on 21 January 2003, whereby the Respondent was acquitted of a charge of failing to produce a ticket on request in contravention of s221(4) of the *Transport Act* 1983.

2. There is no dispute about the facts. On 10 May 2002 the Respondent travelled by tram from the city to a tram stop in Swanston Street, Carlton adjacent to the University. Having come to the stop he alighted to the pavement and took the one or two steps necessary to reach the safety zone. At that point he was requested by an "authorised person"[1] to produce a ticket that was valid for the journey he had just completed. He had a valid ticket and he could have produced it. But he chose not to do so because he considered that s221(4) did not require him to do so.

3. In the court below the Magistrate defined the sole issue as:

> "whether or not in all of the circumstances the (Respondent) having completed his journey was required to comply with the requirements of the authorised person under the *Transport Act*".

His Worship determined the issue in favour of the Respondent by holding that an authorised person does not have power to request production of a ticket under s221(4 ) once the journey has been completed.

4. In this Court the question of law directed to be heard on the appeal is:

> "whether the learned Magistrate erred at law by misapplying section 221(4) of the *Transport Act* 1983 in holding that the powers of authorised officers to require production of tickets set out in that provision ceased on the completion by a commuter of a journey".

In my opinion the Magistrate did not err. The question is to be answered: no.

**Section 221(4)**

5. Section 221(4) provides:

> "(4) A person who makes a journey in a carriage, or is on land or premises for entry to which a ticket is required, and, not being entitled to make that journey or entry without a ticket, fails, upon request being made by a member of the police force or an authorized person, to produce a ticket that is valid for that journey or entry is guilty of an offence."

6. The Magistrate considered that the words "makes a journey" are to be read as meaning "is making a journey". So do I. In my opinion that is their "natural and ordinary meaning having regard to (their) context... as well as the purpose which the enactment seeks to achieve"[2].

7. Mr Holdenson QC who appeared with Mr Burns for the Appellant advanced a number of arguments to the contrary. It is appropriate that I mention each of those arguments and set out what I think to be the answers to them.

***(i) Mounsey v Lafayette***

8. The first argument was based upon something which I said in *Mounsey v Lafayette*[3]. In that case the question was whether it was necessary to show compliance with s221(2)(c) of the Act in order to make out a defence to a contravention of s221(4) constituted of travelling in a tram without a ticket. I held that it was.

9. Section 221(2) provides that:

> "(2) A person may make a journey in a carriage, or be on land or premises for entry to which a ticket is required, without a ticket if - (a) prior to commencing the journey or entering that land or those premises he takes all reasonable steps to purchase a ticket; and (b) while making the journey or being on that land or those premises he has no reasonable opportunity to purchase a ticket; and (c) on completion of the journey or on leaving that land or those premises he takes all reasonable steps to purchase a ticket."

10. I reasoned that:

> "... it was possible... and preferable, to read s221(2) as infusing ss221 (3) and (4) with the meaning that a person commits an offence under those sections only if they do the things provided for in those sections and there is not established by way of defence all the things provided for in s221(2) (a), (b), and (c)."

11. Mr Holdenson seized on that idea of s221(2) *infusing* s221(4) with meaning and submitted that because one of the limbs of s221(2) (scil s221(2)(c)) is referable to events which can only occur after the end of a journey, it should follow as a matter of logic and intended meaning that the requirement to comply with a request for the production of a ticket under s221(4) continues for a time after the end of the journey.

12. The answer to that submission was given by Mr Priest QC, who appeared with Mr Croucher for the Respondent: the logic of the submission is flawed. It assumes that because the defence is not acquired until after the end of the journey, the contravention of the Act which constitutes the offence is not committed until after the end of the journey. That is not so. The fact that a defence to the contravention of the Act may be acquired by things done after the end of the journey does not logically dictate that the contravention does not occur until after the end of the journey. To the contrary, the contravention occurs during the journey, by travelling without a ticket during the journey, and the only significance of the subsequent conduct is that it provides an *ex post facto* excuse for the contravention.

13. I do not think that there is anything in *Mounsey* that implies that the requirement to produce a ticket to an authorised person applies after the journey is over.

***(ii) Textual analysis***

14. Mr Holdenson's second argument was one of textual analysis. He contended that if one looks to s221(2)(b) it is plain that the legislature conceives of the expression "makes a journey" as something different to "making a journey", and hence it is to be supposed that "makes a journey" is capable of extending to some period of time following completion of the journey. He submitted

that if the power to request the production of a ticket under s221(4) were intended to be confined in the way held by the Magistrate, s221(4) would have read:

> "A person *while making a journey*... who fails upon request to produce a ticket..."

15. I do not consider that to be correct. In my opinion the fact that the opening words of sub-s(2) are "a person may make a journey if..." and the expression which is used in par(2)(b) is "while making the journey" demonstrate that the two expressions are directed to precisely the same thing: making a journey. Therefore, as it seems to me, s221(2) is a strong textual indicator that the expression "who makes a journey" in s221(4) means "who is making a journey".

16. A further consideration is that because of context the expression "is on land" which appears throughout s221 almost certainly means "is presently on land". If so, the power to request that a person who "is on land" produce a ticket under s221(4) may only be exercised while the person "is presently on the land". And if the power to request production of a ticket by a person who is on land is confined to the period that they are on the land, the logical implication is that the power to request production of a ticket by a person who makes a journey was intended to be exercisable only during the journey.

17. Importantly, there is also a matter to which the Magistrate referred. His Worship identified the provisions of s53 of the *Road Safety Act* 1986 which allow a police officer to demand that a driver provide a breath sample up to three hours after driving, and his Worship reasoned that if Parliament had intended the power of an authorised person under s221(4) to be exercisable after the end of a journey it is likely that the section would have so provided in terms similar to the terms of s53. With respect, I agree.

18. That does not mean of course that Parliament cannot use one set of words to achieve a result in one statute and a different set of words to achieve a similar result in another statute. It can and sometimes it does. Nor is it to say that s221(4) of the *Transport Act* and s53 of the *Road Safety Act* should necessarily be regarded as *in pari materia* or even that the *in pari materia* principle of statutory construction applies to differences as between statutes in the way that it has been held to apply to similarities[4]. It is to say, however, that where Parliament has in one piece of legislation provided for a power in terms which are perspicuous, it may be doubted that it would choose to provide for an analogous power in another piece of legislation by means of oblique implication.

***(iii) Policy considerations***

19. Mr Holdenson's third argument was that unless the power to request production of a ticket is read as extending for a period of time after completion of the journey, the evident policy of the section – which he submitted was to prevent fare evasion – would be frustrated or at least severely inhibited in its operation.

20. There are a number of answers to that argument. The first is that it is not permissible to substitute a broad notion of the policy of a provision for the plain meaning of the words of the provision. To the extent that policy is a relevant consideration in statutory construction it is the policy revealed by the words of the statute itself[5]. Hence, if when judged against other provisions of the statute it emerges that the ordinary and natural meaning of the provision could not rationally have been intended as the meaning, it is sometimes permissible to give to the provision the meaning which appears would rationally have been intended[6]. But one may not substitute a different meaning for the plain meaning of a provision unless it is compelled by the other provisions of the statute or, in the case of ambiguity, by relevant extrinsic materials.

21. Here, in my opinion, the plain and ordinary meaning of the words is that which the Magistrate gave to them, and that meaning is not irrational when considered in the context of the remainder of the Act.

22. A second answer was given by the Magistrate. In his Worship's opinion the power to require production of a ticket could not have been intended to extend until after the completion of the journey; for otherwise who would say for how long it went on?

23. Mr Holdenson endeavoured to answer that rhetorical question with the submission that the power should be thought to go on for a reasonable time, and he referred in support of that submission to observations of Ormiston J in *Director of Public Prosecutions v Webb*[7]. They were to the effect that where a penal provision requires an act to be done either without a time being stipulated, or even where the act must be done forthwith, a reasonable time is implied sufficient to enable performance to be effected.

24. If I may say so, however, it seems to me that his Honour's observations do not assist the submission. The question to which his Honour was directing attention (in the section of the judgment to which Mr Holdenson referred) was whether a driver required to supply a preliminary breath sample had a reasonable time in which to provide it. The point under consideration had nothing to do with extending by reference to a reasonable period of time a power which in its terms is limited to an earlier period of time. Indeed, at the level of principle it points in the opposite direction.

25. A third answer to the argument, which was supplied by Mr Priest and Mr Croucher, is that even if it were permissible to have regard to some broad purpose or policy of arresting fare evasion, the meaning given to s221(4) by the Magistrate would not frustrate or inhibit that purpose or policy in its operation. As they point out, there is adequate power under sub-ss218B(2) and 219(2) to deal with a person after he or she has completed a journey (if he or she is suspected on reasonable grounds of having committed an offence against the Act). And the fact that those powers exist is itself a significant indication that the power to request production of a ticket under s214(2) is not intended to extend beyond the journey itself.

26. The final answer, which was also supplied by Mr Priest and Mr Croucher, is the principle of statutory construction which requires that great care be exercised in the construction of any statute which affects the liberty of the subject. The statute must not be extended beyond the area of operation for which Parliament has clearly provided[8]. Therefore, a construction of a statute which interferes with the legal rights of the subject to a lesser extent and produces the less hardship is to be preferred to another[9].

27. Mr Priest and Mr Croucher referred to a number of authorities[10] in support of that principle. Reference might also be made to the observations of Mason CJ and Brennan and Gaudron JJ in *Coco v R*[11] and the observations of McHugh J in *Puntoriero v Water Corporation*[12]. The principle is of course so well entrenched that the recitation of authority is hardly necessary. But it is worth recalling the reason for its existence. As French J reminded us in *Commissioner of Taxation v Citibank Ltd*[13]:

> "Australia is a liberal democracy with a broad tradition of at least nominal resistance to encroachment upon established rights and freedoms.... The nature of this society and its tradition of respect for individual freedoms, will support an approach to construction which requires close scrutiny and a strict reading of statutes which could otherwise remove or encroach upon those freedoms."

28. So construed, s221(4) must be given the meaning determined by the Magistrate.

**Conclusion**

29. For the reasons given, the appeal will be dismissed. Subject to the submissions of counsel, I consider it is appropriate that the Appellant should pay the costs.

---

[1] *Transport Act* 1973, s221(1)(c).
[2] *Malika Holdings v Stretton* [2001] HCA 14; (2001) 204 CLR 290 at p299; (2001) 178 ALR 218; (2001) 75 ALJR 626; (2001) 22 Leg Rep 26, per McHugh J.
[3] [2002] VSC 342; (2002) 37 MVR 256.
[4] Pearce & Geddes, *Statutory Interpretation in Australia* 5th Ed at [3.33]; *Federal Commissioner of Taxation v ICI Australia Ltd* [1972] HCA 75; (1972) 127 CLR 529 at pp578 -9; [1972-73] ALR 715; (1972) 3 ATR 321; 46 ALJR 35 per Gibbs J.
[5] *Masters v McCubbery* [1995] VICSC 209; [1996] VicRp 47; [1996] 1 VR 635 at p646; 9 VAR 164; *Inline Courier Systems Pty Ltd v Walker* [1998] VSCA 131; [1999] 1 VR 405 at p414.
[6] *Public Transport Commission of NSW v Murray Moore (NSW) Pty Ltd* [1975] HCA 28; (1975) 132 CLR 336 at p350 per Gibbs ; (1975) 6 ALR 271; 49 ALJR 302
[7] [1993] VicRp 82; [1993] 2 VR 403 at p415; (1992) 16 MVR 367.
[8] Pearce & Geddes, *op cit* at [9.12].
[9] *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* [1979] HCA 67; (1977)

143 CLR 499 at pp508-9 per Stephen J; 52 ALJR 73.
[10] *Sargood v The Commonwealth* [1910] HCA 45; (1910) 11 CLR 258 at p279; 16 ALR 483; *Melbourne Corporation v Barry* [1922] HCA 56; (1922) 31 CLR 174 at p207; *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; (1983) 12 CLR 328 at p341; 45 ALR 609; (1983) 57 ALJR 236; [1983] ATPR 40-341; 5 TPR 75.
[11] [1994] HCA 15; (1994) 179 CLR 427 at p437; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270.
[12] [1999] HCA 45; (2000) 199 CLR 575 at p588; (1999) 165 ALR 337; (1999) 73 ALJR 1359; [1999] Aust Torts Reports 81-520; (1999) 104 LGERA 419.
[13] (1988) 20 FCR 403 at p433; (1989) 85 ALR 588; (1989) 20 ATR 292.

**APPEARANCES:** For the appellant Arachchi: Mr OP Holdenson QC with Mr AG Burns, counsel. Geraldine Sharman, Department of Infrastructure, solicitor. For the respondent Orlowski: Mr PG Priest QC with Mr M Croucher, counsel. Hale & Wakeling, solicitors.

---