11/83

SUPREME COURT OF VICTORIA — FULL COURT

WELSH v DONNELLY

Young CJ, McInerney and Southwell JJ

13 December 1982 — [1983] VicRp 79; [1983] 2 VR 173

MOTOR TRAFFIC – SPECIAL PERMIT – PROVISIONS OF PERMIT EXCEEDED – OVERLOADING - WHETHER HONEST AND REASONABLE BELIEF IS A DEFENCE: *MOTOR CAR ACT* 1958, S35.

D. was driving a 6-axle articulated vehicle carrying a 40-feet shipping container, when he was requested by W. to proceed to a weighbridge to have the vehicle weighed. W. gave evidence that the gross weight permitted by D's permit was exceeded by 2.43 tonnes. D. gave evidence to the effect that although he had not weighed his vehicle after it was loaded, he had no reason to doubt the gross weight shown in the paper work (i.e. manifest), and that he had been carrying numerous containers for the same consignors and that in his experience all weights shown by those consignors were gross weights. The court held that D. had an honest and reasonable belief that his vehicle was not overloaded and dismissed the charge. On order nisi to review—

HELD: Order nisi absolute.
Failure to comply with s35(5) of the *Motor Car Act* 1958 imposes a strict liability upon a driver. The defence of honest and reasonable mistake is not open.
***Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536, discussed.**

YOUNG CJ: The question presented for decision by this order to review is whether the provisions of the *Motor Car Act* restricting the weight which may be carried in a motor vehicle impose a strict liability for an infringement or whether "an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence" (see per Dixon J in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at p540).

[After setting out the facts and the provisions of s35(1) of the Motor Car Act *1958, His Honour continued]:* It was common ground that a special permit was required and that the permit granted under s35 of the Act allowed the total weight of the defendant's vehicle and load to be 27.5 tonnes. It is useful to begin by quoting the paragraphs following immediately the quotation from Dixon J's judgment in *Proudman v Dayman* which I have set out above for they show clearly the criteria upon the basis of which the case must be decided. Having said that as a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse, His Honour went on: *[His Honour then quoted from Dixon J's judgment, referred to some of the provisions of Div 2 of Part IV of the* Motor Car Act *1958, and said]:* It is thus apparent that the purpose of Division 2 is in part public safety and in part protection of the use of the roads. It was not contended before us that the offence was one in which it was incumbent upon the informant to prove that the defendant knew that the gross weight of the vehicle exceeded the weight allowed by the permit. I think this view of the sub-section is clearly right. There is probably now no presumption that *mens rea* is a necessary ingredient in modern statutory offences.

However, as Dixon J pointed out in *Proudman v Dayman* in a paragraph just before those I have quoted, it is one thing to deny that a necessary ingredient of the offence is positive knowledge on the part of the defendant that the gross weight of the vehicle exceeded that allowed by the permit, but quite another to say that an honest belief on reasonable grounds that it was not being exceeded cannot exculpate the defendant. It seems to me that these two considerations are not always kept entirely separate in some of the authorities where the discussion includes the question whether *mens rea* is a necessary ingredient of the offence. The necessity on the part of the informant to prove that the defendant had knowledge of the facts may properly be described as a necessity to prove *mens rea*. Where a defence of honest and reasonable mistake is relied upon, however, I think it is preferable not to speak of *mens rea*. The burden of establishing honest and reasonable mistake is in the first place on the defendant.

How then is it to be decided whether the defence of honest and reasonable mistake is to be available in a case such as the present? The answer is to be found in the terms of the statute: see the discussion by Wills J in *R v Tolson* [1886-90] All ER 26; 9 WR 709; (1889) 23 QBD 168 at pp172-176. The nature of the matters with which the *Motor Car Act* is concerned is peculiarly public safety. The notorious dangers of travel on modern highways and the necessity for strict control of the handling of motor vehicles on those highways suggest that if ever the intention to be imputed to Parliament is to impose strict responsibility, it is likely to be in statutes dealing with the control and handling of motor vehicles.

I have endeavoured to show that the purposes of the part of the *Motor Car Act* in which s35(5) is found are public safety and protection of the use of the roads. In matters of public safety it is not difficult to impute an intention to the legislature to impose strict responsibility: *Provincial Motor Cab Co Ltd v Dunning* (1909) 2 KB 599; *Green v Burnett; James & Son Ltd v Smee* [1955] 1 KB 78; [1955] 1 QB 78 at pp93-4; [1954] 3 All ER 273; (1954) 3 WLR 631. And I think that in view of the notorious problems faced by authorities concerned today with the maintenance of highways used by heavy transport it is also not difficult to impute an intention to the legislature to impose strict responsibility for adherence to limitations of the weight to be carried. Some of those problems can be discerned from a study of the transport cases in the High Court culminating in *Armstrong v Victoria (No.2)* [1957] HCA 55; (1957) 99 CLR 28. I also think that the history of the legislation which has been set out by McInerney J in his reasons which I have had the advantage of reading supports the conclusion that the legislature intended to impose strict responsibility.

The conclusion that I would reach from a consideration of the general provisions of the statute is reinforced by a consideration of the language of s35(5) although of course it stops short of expressly negativing the defence of mistake. The fact that the maximum penalty is not particularly heavy also assists in this conclusion. The provision for the additional penalty and the proviso expressly conferring upon the Court a discretion not to impose the additional penalty in certain circumstances strongly suggests that the legislature intended to exclude the defence of honest and reasonable mistake as a ground of exculpation from the offence.

Notwithstanding these conclusions I have been troubled by the fact that the defendant's vehicle was carrying a container and that it might be thought that there was little that the defendant could have done to bring himself within the law. Is this a case of the kind referred to by the Privy Council in *Lim Chin Aik v R* (1963) AC 160 at p174; [1963] 1 All ER 223; (1963) 2 WLR 42 where Lord Evershed for the Board said that it was not enough merely to show that the statute was one dealing with a grave social evil? Is it a case where it would be absurd to suppose that the legislature intended to expose an innocent carrier who could not be aware of the true facts to a penalty: see *Maher v Musson* [1934] HCA 64; (1934) 52 CLR 100; [1935] ALR 80; 89 P 7 per Evatt and McTiernan JJ at CLR p109?

I have ultimately come to the conclusion that the putting of the defendant under strict liability is necessary for the enforcement of the statute. In such a case the exclusion of the defence of honest and reasonable mistake inevitably means that individuals are called upon so to conduct their affairs that the general welfare is not prejudiced and to that extent the rights of the individual are subjected to the common good. I think that the class of person included in s35(5) shows that the legislature regards the legislation as being of that character and therefore intends that the defence of honest and reasonable mistake should be excluded. It may be that the owner, for instance, will have to improve his business methods or take some other action to ensure that the provisions of a permit are obeyed, but I see no reason why this should not be done. It may be more difficult for the driver. But it is not a case like *Maher v Musson* where the breach arose from antecedent breaches of the law generally by other persons: see 52 CLR at p106 per Dixon J.

We were pressed with some decisions of the Full Court of South Australia. These have been examined in the reasons prepared by Southwell J which I have had the advantage of reading. I wish only to refer to the judgment of Bray CJ in *Kain and Shelton Pty Ltd v McDonald* (1971) 1 SASR 39 and to the passage quoted by McInerney J in his reasons. The passage has considerable force but, if I may say so with respect, a statute must be construed against the whole background of the law which includes the principles by which the question whether the presumption that honest and reasonable mistake provides a defence has been excluded is to be determined. For very many

years now the Courts have had to grapple with this problem but I detect no ready assumption that Parliament intends to exclude the defence. It is only after prolonged consideration that I have reached the conclusion that it is to be excluded in the present case.

It follows that the order nisi should be made absolute. Having regard to the fact that the Magistrate was of the opinion that the defendant believed on reasonable grounds that the vehicle and load were not overweight, I agree in the suggestion made by McInerney J that instead of sending the information back to the Magistrate we should ourselves convict the respondent and impose a nominal penalty.

McINERNEY J: *[After setting out the terms of the order nisi and the facts of the case, His Honour continued]:* Before us Mr Uren (for the informant) argued that this was not a *Proudman v Dayman* case but a case where the statutory provisions in question imposed strict liability upon the defendant and that honest and reasonable mistake as to the weight carried afforded no defence to the defendant respondent.

In *Maher v Musson* [1934] HCA 64; 52 CLR 100 at p105; [1935] ALR 80 at 81; 89 P 7, Dixon J said:

> "In the case alike of an offence at cannon law and, unless expressly or impliedly excluded by the enactment, of a statutory offence, it is a good defence that the accused held an honest and reasonable belief, in the existence of circumstances which, if true, would make innocent the act for which he is charged. "

There has been debate as to whether the proposition so formulated is to be regarded merely as a proposition that the accused did not have the necessary *mens rea* (in which case the ultimate onus of proof would be on the prosecution) or whether it is to be regarded as a separate defence to be established by the accused. On this matter opinion has been divided both among judges and academic writers. In *Handmer v Taylor* [1971] VicRp 37; (1971) VR 308 at p311, in which I cited various authorities on this point, I was content to proceed on the view, which appeared to be that of Sir Owen Dixon, (but which is rejected by Professors Smith and Hogan in the 4th Edition, published in 1978, of their book on *Criminal Law*) that the defence of mistake was something distinct from a denial that *mens rea* had been proved.

It has now to be said that since the decision of the House of Lords in *DPP v Morgan* [1975] UKHL 3; [1976] AC 182; [1975] 2 All ER 347; (1975) 61 Cr App R 136 (in this respect following earlier Victorian decisions – e.g. *R v Flannery & Prendergast* [1969] VicRp 5; (1969) VR 31) a mistaken belief on the part of a man accused of rape that the prosecutrix was consenting to his having sexual intercourse with her is to be treated as negativing *mens rea* and that the question whether there were grounds for that belief goes only to the question whether the jury should be satisfied beyond reasonable doubt that such belief did not exist. I venture to think, however, that the present case may be an instance where the defence of mistake may be distinct from the question whether the prosecution has established the necessary *mens rea*, and certainly this has been the view taken by Bray CJ, in a series of cases in South Australia. It becomes necessary to determine whether the prosecution must prove that the defendant is liable irrespective of his state of mind or his belief that he was not carrying excess weight. Is it a case where he can defeat the charge by proving that he believed on reasonable grounds that he was not carrying excess weight?

[His Honour then referred to a passage from Smith and Hogan on Criminal Law *(4th Edn. 1978) at p182, and continued]:* Mr Uren submitted that in the first instance the matter was one of interpretation of the statute. In developing this submission Mr Uren contended that the courts have looked first, at the category of the offence itself and secondly at other circumstances which the courts have considered to be such as to support the conclusion that the offence was one of strict liability. Basically, the cases in which this construction has been adopted have been (Mr Uren submitted) cases of "regulatory offence" to adopt the term used by Professor Howard in his book *Strict Liability* (1963) at p1. Professor Howard adopts this term because, as he submits, the type of offence referred to is usually part of a legislative scheme for the administration or regulation of society. Sayre, in a celebrated article entitled *Public Welfare Offences*, (1933) 33 Columbia Law Review 51 at p73 classified regulatory offences into the following categories:

(1) illegal sales of intoxicating liquor;
(2) sales of impure or adulterated food or drugs;
(3) sales of misbranded articles;
(4) violations of anti-narcotic acts;
(5) criminal nuisances:
    (a) annoyances or injuries to the public health, safety, repose or comfort;
    (b) obstructions of highways;
(6) violations of traffic regulations;
(7) violations of motor vehicle laws;
(8) violations of general police regulations passed for the safety, health or well-being of the community.

[His Honour then referred to decisions of English and Australian courts propounding the doctrine that save in exceptional cases, statutory offences require proof of guilty mind or mens rea*. He also referred to cases in which, although* mens rea *is not an ingredient of the offence, courts have recognised that it is a defence that the accused held an honest and reasonable belief in the existence of circumstances which if true, would make innocent the act for which he is charged. He continued]:* In my opinion the true rule governing this matter is that stated by O'Bryan J in *McCrae v Downey* [1947] VicLawRp 25; (1947) VLR 194 at pp202-3; [1947] ALR 157, as follows:

> From these authorities I take the rule to be that honest and reasonable belief in a state of facts which, if true, would take the defendant outside the defence charged, is a good answer to a statutory offence, unless the language used clearly excludes that defence, or unless, although the language leaves the matter in doubt, the object and scope of the enactment, the nature of the duty imposed, or other considerations arising from the subject matter of the legislation, make it probable that the legislative authority intended to impose a duty of absolute responsibility..."

It may be added that in *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132 at p158; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470 Lord Pearce (at AC p158) described this doctrine as "a satisfactory concept". The doctrine was likewise accepted as satisfactory by Lord Diplock in the same case (see at pp163-4) where he expressly considered and found no difficulty in the application to that doctrine of the decision in *Woolmington v DPP* [1935] UKHL 1; [1935] AC 462; [1935] All ER 1; 25 Cr App R 72; 153 LT 232 which had occasioned some difficulty to Lord Pearce.

[His Honour then examined the terms and context of the section under which the information was laid and the legislative history of that section, and continued]: I do not think this legislative history throws any significant light on the problem we are now considering, but it is not inconsistent with the view that the offence created by s35(5) of the *Motor Car Act* is one with respect to which it is not incumbent on the prosecution to prove that the defendant knew that the motor car used on the highway was being used in circumstances which constituted a contravention of some condition of the permit granted under s35(1) and (2) of the Act. It is sufficient for the prosecution to prove that the motor vehicle was being used on the highway in contravention of some provision of the special permit, so that in the circumstances of the present case it was sufficient for the prosecution to prove that the weight being carried exceeded the weight permitted under the special permit governing the use of that vehicle. It was no part of the prosecution's task to prove that the defendant knew that he was carrying excess weight.

The question still remains, however, whether the accused is entitled to be acquitted if he satisfies the Court that he believed, on reasonable grounds, that the weight being carried did not exceed that permitted by the special permit. In *Maher v Musson* (*supra*), Dixon J (CLR at p105 ALR p81 column 1) and Evatt and McTiernan JJ, (CLR at p107 and at p119, ALR p82 column 2 and p83 column 1) all appeared to attach considerable weight to the circumstance that the illicit character of the spirits might have arisen by reason of some antecedent transaction of which the defendant was unaware. All three judges refused to credit the legislature with the intention that a person should be convicted of an offence if the illicit character of the spirits arose from matters of which the accused was entirely ignorant and where he neither believed nor had reason to believe that the spirits in respect of which he was charged were illicit. This aspect of the present case has caused me considerable concern. The section now under consideration is a section which may have to be applied in circumstances which include the taking of delivery on trucks of goods discharged from a ship at its berth alongside a wharf, upon which weighbridges are not commonly found, and where speedy turn-around of goods and the vehicles into which they are discharged is commonly regarded as extremely desirable. In nearly all such cases the carrier collecting on behalf of the consignee or indeed on behalf of the consignor's agent will be collecting on the faith of shipping documents goods whose weight will have been declared on those documents and which

it is so far as I am aware neither customary nor practicable to weigh before receiving them on to the vehicle.

In *Lim Aik's Case* (1963) AC 160 at p174; [1963] 1 All ER 223; (1963) 2 WLR 42 Lord Evershed, delivering the judgment of the Board of the Privy Council said:

> "But it is not enough in their Lordships' opinion merely to label a statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means there must be something he can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exalting those whom he may be expected to influence or control, which will promote the observations of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

For reasons which I have already discussed I find some difficulty in seeing what it is that the defendant could do by inspection, improvement of his business methods or exaltation to prevent a mistake of this character arising given the circumstances which I understood to prevail in the taking of delivery of goods at the wharf. *[After referring to a line of South Australian authorities, His Honour said]:* I think, however, the general scheme of Part IV of the *Motor Car Act*, taken in conjunction with its legislative history, particularly the amendments as to additional penalty introduced in sub-s (5) of s35 of Act 6628, is too intractable to permit of the conclusion that the defence of honest and reasonable mistake is open. I am accordingly impelled to conclude that the Magistrate erred in law in dismissing this information, and that the order nisi should be made absolute and the dismissal of the information set aside.

SOUTHWELL J: *[After setting out the facts of the case and the grounds of the order nisi, His Honour then referred to several authorities and said]:* In the present case, it is reasonable to infer that the defendant could have exhorted the shippers, or those in charge of truck loading operation, to see that no more than the permissible weight was carried; the evidence showed that the defendant did not weigh or cause to be weighed the truck himself, and although there was no evidence as to the whereabouts of the nearest weigh-bridge, the existence of "portable weighing devices" is acknowledged by the provisions of the Act, and they should enable a truck operator to see that the gross weight does not exceed permissible limits. One circumstance which would militate against a finding of strict liability is the impossibility of the actor having knowledge of his transgression. The defendant cannot here avail himself of that.

[His Honour then referred to other authorities and the provisions of Part IV of the Act. In relation to the proviso to s35(5), His Honour continued]: The presence in the section of that proviso lends strength to the submission of Mr Uren that strict liability here exists. Where the legislature casts upon a defendant the onus of establishing difficulty or impossibility of avoiding the carriage of excess weight, not as a defence to the charge, but merely as a mitigating factor relevant to the imposition of an additional penalty, I find difficulty in accepting that the legislature intended that proof of a belief that the vehicle was not of excess weight could constitute a complete defence.

Section 36 confers powers on certain inspectors and members of the Police Force to weigh vehicles with "portable mechanical devices", and provides a penalty of not more than $360, or imprisonment for a term of not more than 7 days, for failure to comply with lawful requests relating to the weighing of vehicles. Division 3 relates to the imposition of limits upon periods of driving of motor trucks, the keeping of log books in respect thereto, and there are penal provisions for non-compliance. Part V of the Act deals with third party insurance. Part VI relates to offences and legal proceedings.

It will thus be seen that Part IV relates principally to matters of safety, but also, and more specifically, (for example, s32(1)) to matters of road wear. The power in the Board to grant such a special permit as is here relevant is to be exercised "having regard to the nature of the construction and to the condition of any state highway..." All of the matters referred to deal with physical items which may be seen, measured or checked by the owner or driver of a vehicle. This factor, in my opinion, renders the case very different indeed from cases such as *Sherras v DeRutzen* and *Lim Chin Aik v R* where, as I have earlier stated, the alleged offender had no knowledge of or means of acquiring knowledge of the facts giving rise to the alleged offence. The provisions in Part IV creating offences do not use the word "knowingly" or "wilfully" (contrast, for example, s28(9), a

factor, which, although by no means conclusive, is not to be regarded as irrelevant. (See *Maher v Musson* (*supra*) per Evatt and McTiernan JJ, at p108; *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136; [1952] ALR 1001, per Williams and Taylor JJ at CLR p150: *Hawthorn v Bartholomew* [1954] VicLawRp 4; (1954) VLR 28 at p30; [1954] ALR 144.)

The "context of the subject matter", the "general nature of the enactment" (*Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 per Dixon J at CLR p540) and the consideration (referred to above) of the proviso to s35(5) of the Act lead me to the conclusion that a failure to comply with s35(5) of the Act imposes strict liability upon the driver.

APPEARANCES: Mr G Uren, counsel for Appellant. D Yeaman, Crown Solicitor. Mr A Radford, counsel for Respondent. Solicitors for the respondent: J Donald and Co.
