63/87

SUPREME COURT OF VICTORIA

FOLEY v MOLONEY

Murphy J

11 November 1987 — (1987) 6 MVR 22

MOTOR TRAFFIC – LOAD TO BE SECURED "IN SUCH A MANNER AS PREVENTS ITS FALLING – OFFENCE IF LOAD FALLS: *MOTOR CAR Regulations* 1984, R711.

Regulation 711 of the *Motor Car Regulations* 1984 provides (in so far as relevant) that

"Any load carried on ... any motor car ... shall be secured in such a manner as prevents ... such load ... falling."

Whilst M. was driving his truck with a load of bricks, a brick fell from the truck. M. was subsequently charged with a breach of R 711. On the hearing, the magistrate found that the bricks had been caged and secured on pallets with straps, ropes and chains and dismissed the charge on the basis that when the load was first placed and secured on the vehicle it was done in a manner which was likely to prevent the load from falling. Upon order nisi to review—

HELD: Order absolute. Dismissal set aside. Defendant convicted.
(1) Regulation 711 of the *Motor Car Regulations* 1984 imposes a positive continuing duty upon a person carrying a load on a motor vehicle to secure it by particular means according to its nature. This duty attaches at all times during the carriage of the load on the motor vehicle.

(2) Where part of a load being carried fell from a motor vehicle, it followed (by that very fact) that it had not been secured in such a manner as did prevent its falling and accordingly, a breach of R 711 occurred.

MURPHY J: [1] Return of an order nisi to review a decision of a Magistrates' Court at Morwell on 6 February 1986, whereby an information dated 26 November 1985 charging the respondent, **[2]** John William Moloney with an offence against the *Motor Car Regulations* 1984, was dismissed. Mr Loewenstein of counsel appeared to move the order absolute, and Mr Hurley of counsel to show cause. The information charged that the defendant Moloney "on 27 September 1985 at Princes Highway Morwell did drive on a highway a motor car with the load carried on such motor car not being secured in such a manner as to prevent such load or equipment or any part thereof becoming dislodged or falling from such motor car. MCR 1984 Reg. 711(b)(ii)".

Regulation 711(b)(ii) of the *Motor Car Regulations* 1984 is headed "Loading" and insofar as relevant reads:-

> "711 Any load carried on ... any motor car ... shall be secured—
> (a) by means of ... steel wire, rope, ... wire cages ... or a combination thereof, whichever is appropriate to the nature of the load ..., and
>
> (b) in such a manner as prevents or is likely to prevent such load ... or any part thereof—
> (i) hanging or projecting from such rotor car ... in a manner likely to cause injury or damage to any person or property or likely to cause a hazard to other road users;
>
> (ii) becoming dislodged or falling from such motor car...".

It will be seen immediately that the information does not charge the defendant in the terms of the Regulation. Whereas the Regulation states "in such a manner as prevents or is likely to prevent" the information charges "in such a manner as to prevent".

I agree with Mr Hurley that Regulation 711 does **[3]** not itself create an offence – but states a duty, the breach of which is made an offence by Regulation 1107(b). What then is the duty laid down by Regulation 711(b)(ii)? For, it is common ground that whilst the defendant was driving his truck and rounding a bend, a brick became dislodged or fell from his truck.

The evidence as to the securing of the load of bricks being carried on the truck was such as to leave it open to the Magistrate to find that when the load was first secured to the truck with ropes, steel wire and wire cages, it was secured in such a manner as was likely to prevent the load or any part thereof becoming dislodged or falling from it. That is to say, not only was it open to the Magistrate to find that he was not satisfied that it was not so secured – but it was open to him to find that it was so secured. But did this entitle the Magistrate to dismiss the information, in the face of the fact that a brick, a part of the load, had fallen from the truck?

Counsel for the defendant submitted to the Magistrate that as the evidence showed that the load had been secured in a manner which was likely to prevent the load from becoming dislodged or falling he had complied with Regulation 711. The duty in the Regulation he submitted was stated as an alternative. The Prosecutor submitted that "paragraph (b)" (of Regulation 711) should be taken as reading that the load shall be secured in such a manner as to prevent the load **[4]** from becoming dislodged or falling and that the words "is likely to prevent" should be disregarded.

The Magistrate found that a brick fell from the defendant's truck whilst he was driving it on the highway. He also found that the bricks were caged and secured on pallets, with straps ropes and chains, and continued -

> "Mr Moloney loaded the vehicle so as to prevent or likely to prevent (sic) the load or part thereof becoming dislodged... Mr Wood makes the submission that paragraph (b) gives the defendant an out if the load is secured in such a manner as prevents or is likely to prevent such load or equipment or any part thereof becoming dislodged or falling from such motor car. Mr Foley in his submission suggests that the entire paragraph (b) should not be taken into consideration and that it should be read 'shall be secured in such a manner as to prevent the load becoming dislodged or falling'. There is no comma or 'and' in subsection (b), therefore he must take the Regulation as read and I feel that the evidence suggest that the defendant loaded it in a manner which was likely to prevent the load from becoming dislodged or falling and because of this, the case is dismissed."

The Regulation is framed so as to impose a positive duty upon a person carrying a load on a motor vehicle, to secure it by particular means, according to its nature and in a particular manner. It appears to me that the problem which presented itself to the Magistrate on construing the Regulation may have stemmed from the fact that everyone involved in the case appears to have considered that the duty imposed by the Regulation was one which applied at the time when the load was first placed and secured on the vehicle. Approaching the matter this way, if the load was then so secured as to be likely to prevent any part of the load falling from **[5]** the motor vehicle, the duty imposed by Regulation 711, was seen to be complied with and once satisfied, there was no breach within the meaning of Regulation 1107(b), so as to create an offence. If, however the Regulation is seen to give rise to a continuing duty, attaching at all times during the carriage of a load on a motor vehicle, the use of the words in paragraph (b) namely – "in such a manner as prevents or is likely to prevent such load – or any part thereof (ii) becoming dislodged or falling from such motor ... vehicle" tend to take on a more readily understandable meaning.

For then the Regulation can be seen as being intended to apply to circumstances where part of a load has in fact fallen or become dislodged, as well also as to circumstances where no such event has yet occurred, but the load is being carried and is not secured in a manner which is likely to prevent it or part of it from becoming dislodged or falling from the motor vehicle. On this construction, if a load or part of a load being carried does become dislodged or falls from the vehicle, then, *ipso facto*, it has not been secured in "such a manner as prevents" it from falling and a breach of the duty is demonstrated.

But if a vehicle is stopped when carrying a load, which is found not to be so secured as likely to prevent the load or part of it from becoming dislodged or falling from it, then again, a breach again is demonstrated. Adoption of this view as to the purpose of the Regulation would I think involve reading "or" in paragraph **[6]** (b) as if it read "and", and not disjunctively. In construing wills, this may be often seen to be the effect of applying rules of construction (*Jarman* [8th Ed.] Vol. 1 pp608 *et seq.*). I believe that this is the appropriate construction here.

In a Regulation such as we are here considering, it would seem to me an absurdity to read the words in paragraph (b) of Regulation 711, as meaning that the duty to secure the load "in such a manner as prevents ... such load from falling" is fulfilled by securing it "in such a manner ...

as is likely to prevent such load" from falling. I have no doubt that this was not intended by the legislature, and that it was intended that the duty as imposed by the Regulation was intended to have regard to two situations, the one, where the load has in fact fallen the other, where it has not fallen but it is likely to do so.

Reference to the history of the Regulation would seem to lend support to this view as to the intention of the draftsman, and the purpose of the Regulation. The Regulation in its original form was to be found in Regulation 149 of the *Motor Car Regulations* 1966. It then read -

> "Any load carried on any motor car or on any trailer or other vehicle attached to a motor car shall be secured in such a manner as to prevent such load or any part thereof becoming dislodged or hanging or projecting from such motor car trailer or other vehicle (as the case may be) in a manner likely to cause danger or unreasonable annoyance to any person and as to prevent such load or any part thereof falling from such motor car or trailer or other vehicle (as the case may be)".

(my underlining)

The words "as prevents or is likely to prevent" did not appear in that Regulation. But it did contain the **[7]** words "secured in such a manner as to prevent" which also appear in the present information. This Regulation was considered by Fullagar J in *Stillman v Falla* [1977] VicRp 25; (1977) VR 212. In that case a prosecution for a breach of the Regulation had been dismissed by the Justices of the Peace sitting at Footscray, in circumstances where the defendant had been apprehended driving a vehicle loaded with bags of powdered milk, which it was alleged were not secured in such a manner as to prevent such load from becoming dislodged etc. Fullagar J construed the original Regulation 149 saying (at p216) -

> "In my opinion the Victorian R. 149 intended to put a strict liability upon those who drive or use or cause to be used a loaded vehicle upon a highway, if and only if the load or part thereof actually suffers one or more of the fates or mishaps set out in the Regulation; that is to say, only if the load or part thereof becomes dislodged in a manner likely to cause damage ... If none of the stipulated mishaps can be shown to have actually occurred, no offence can be shown to have been committed, whether the load was in fact 'secured' in some positive way or simply allowed to rest with the force of gravity holding it in place (which, in my opinion, still constitutes 'securing', if the point matters). On the other hand, if any of the stipulated mishaps can be shown to have actually occurred, then *res ipsa loquitur* ... He is liable whether the load is or is not secured by so many chains and ropes that the mishap which occurred was rendered extremely unlikely ... He is liable if the load is so secured that there is no explanation available as to why the mishap occurred. If the mishap occurs he is liable, because it follows that the load was not so secured as to prevent it from occurring." (1977) VR at pp216-7.

Fullagar J went on in his judgment to draw attention, in passing, to the contrast between the wording **[8]** of Regulation 149 and other Regulations eg. 146(2) which used the words "as to prevent or be likely to prevent", stating that the draftsman could have used such wording in Regulation 149. He said -

> "The Regulation could have provided that no load shall be so stowed or loaded or secured as to be likely to cause any of the stipulated mishaps or as to leave likely the occurrence of any of the stipulated mishaps, but none of these alternatives was adopted." (1977) VR at p217.

I feel confident in inferring that the draftsman of the present Regulation 711(b)(ii) has attempted to seize upon one of the alternatives posited by Fullagar J in order to render liable to an offence of breaching the new Regulation anyone driving a vehicle with a load not secured in such a manner as to be likely to prevent it from any of the "mishaps" (as Fullagar J aptly terms them) stipulated in the Regulation.

This construction of the Regulation would mean that the duty imposed by Regulation 711 is breached –

(1) if a load does become subject to any one of the stipulated mishaps; or

(2) if a load is so secured as to be likely to become subject to any one of the stipulated mishaps.

I have no doubt this was intended by the draftsman. But the information in the present case, as I have said, framed to allege that the load carried was not secured "in such a manner as

to prevent" a particular type or types or mishaps – namely "becoming dislodged or falling from such motor car". **[9]** The information may have been duplex, but no objection on this count was taken, and if it had been, the evidence being as it was, the alternative of "falling from" would have been chosen. The use of the words "as to prevent", when the words "as did prevent" would have been more appropriate, do not in my opinion render the information defective. Any such defect was capable of amendment.

In my opinion the dismissal of the information was wrong. The only finding open on the evidence was that the information was proven. It is in my opinion unnecessary to refer the matter back to the Magistrate. The finding that the information should be dismissed should be set aside. The defendant should be convicted. The matter should be remitted to the Magistrates' Court for a penalty to be imposed according to law. Accordingly the order nisi is made absolute with costs. The order below is set aside. In its place, the defendant should be convicted, and the matter remitted to the Magistrates' Court for an appropriate penalty to be imposed according to law.
