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SUPREME COURT OF VICTORIA — APPEAL DIVISION

AMALGAMATED FOOD and POULTRY PTY LTD v ALLEN

Fullagar, Brooking and Gobbo JJ

23, 24 October 1991 — (1991) 74 LGRA 24

ENVIRONMENT PROTECTION – INDUSTRIAL WASTE – TRANSPORTED ON THE HIGHWAY BY INDEPENDENT CONTRACTOR – WASTE PRODUCER UNAWARE THAT TRANSPORT CERTIFICATE NOT COMPLETED – ACT NOT COMPLIED WITH – WHETHER WASTE PRODUCER PERMITTED NON-COMPLIANCE – "WITHOUT COMPLYING WITH THIS SECTION": *ENVIRONMENT PROTECTION ACT* 1970, S53I(3); *ENVIRONMENT PROTECTION (TRANSPORT) REGULATIONS* 1987, R9.

Where a waste producer contracted with another person to transport its waste on the highway, and no transport certificate as required by the *Environment Protection (Transport) Regulations* 1987 was completed, it was open to a magistrate to find that the waste producer permitted the transportation of the waste in contravention of the *Environment Protection Act* 1970.

FULLAGAR J: [1] This is the return in the Full Court of two orders nisi to review the decision or decisions of a Magistrate. I do not think, having heard the whole of the argument in this case, that any adequate reason has really been given to support that part of the order nisi which was applied for *ex parte* to a Master and which directs that the order nisi be returnable in the Full Court rather than before a judge of this Court. It was said that important questions of law are raised by the order nisi, by which was meant, I assume, important questions of construction of the *Environment Protection Act* 1970. Looking at the questions of law which can be said to be properly raised, they are I think no more important than hundred of others that arise from year to year.

The applicant, by its admissions before the Magistrate and by the arguments presented on its behalf before the Magistrate and before this Court, has restricted the contentions open to it into a compass narrower than the scope of the questions which might have been originally opened up by the laying of the information.

Although there have been many alterations to the statutes and rules, I am not presently aware of any jurisdiction in a Master of this Court to insist by an order nisi that the case shall be heard by a Full Court consisting of three judges rather than a Full Court consisting of two judges. The decisions of the Magistrate were made on 7 June 1990, by which the appellant was convicted of a large number of almost identical charges of which the following **[2]** is typical, and I take it from the "information/charge" appearing on page 8 of the Appeal Book:

> "I. At Morwell and Divers Places in the State of Victoria on or about the 13th day of September, 1988, you permitted to be transported on a highway industrial waste, namely grease interceptor trap effluent and residues, without a transport certificate as required by Section 53I(1) of the Act."

Section 53I(3) is in the following terms:

> "Any person who causes or permits the transport on a highway of prescribed industrial waste without complying with this section is guilty of an offence against this Act and liable to a penalty of not more than 100 penalty units."

The matter alleged in the information/charge was said thereon to be contrary to s53I(3). Sub-s.(1) in terms requires that "a transport certificate must be completed and dealt with in accordance with the regulations". The relevant regulations are to be found in Statutory Rules 1987 No. 193.

They provide, *inter alia*, as follows. By Regulation 5, "accredited agent" is defined as a "person authorized in writing by the Authority to complete Part A of the transport certificate on behalf of the waste producer," and by the same regulation, the "transport certificate" is defined

as a certificate which contains certain particulars set out in the definition. By Regulation 8, it is provided that a transport certificate must have 3 Parts, A, B and C, and Regulation 9 provides that:

> "Part A of the transport certificate must be accurately and fully completed by the waste producer except where that waste producer has appointed an accredited agent for that purpose."

Regulation 10 permits a waste producer to appoint accredited agents to complete Part A of the transport certificate on his behalf, and Regulation 11 says:

> **[3]** "Where an accredited agent has been appointed by the waste producer, the accredited agent must accurately and fully complete Part A of the transport certificate."

A regulation which needs to be contrasted, of course, with Regulation 9. I do not think it is necessary to set out the remaining regulations, but I note that later regulations stipulate what is to be done with the three parts, A, B and C, of the transport certificate. I emphasize that an accredited agent must be a person who is authorized by the Environment Protection Authority to complete Part A of the contemplated certificate on behalf of the waste producer, and it is open to the waste producer to appoint such a person, that is to say an accredited person, to fill in Part A on his behalf, whereupon the regulations require the accredited agent to complete Part A of the transport certificate. We were told virtually nothing of relevance relating to the milieu into which these regulations were cast, although one is led to suspect, perhaps wrongly, that the authority habitually accredits various waste transporters as agents whom a waste producer may then appoint to fill in on the waste producer's behalf Part A of the certificates.

The applicant is a waste producer. At the trial, the defendant denied that it had caused or permitted the prohibited transport, but admitted certain facts pursuant to s149A of the *Evidence Act*. It is desirable that I should set out some of the numbered paragraphs by which that was done:

> 3. By an agreement entered into between the Defendant **[4]** and Gee Wee Pty Ltd (formerly Waste Mobile Pty Ltd) on or about the 12 day of September 1988, grease interceptor trap effluent and residues were removed (that is to say from the applicant's premises) for disposal as waste.

I would add to that admission that Mr Garde, who with Miss Warren appeared before us for the applicant, conceded, not surprisingly, that that agreement contemplated that the waste remover would transport that waste to its agreed destination or depot by surface transport across the surface of public highways and by no other means.

> 4. That the waste described in the information was transported by vehicle on a highway and disposed of at licensed waste disposer premises.
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> 5. That the Defendant did not complete a certificate required under the *Environment Protection Transport Regulations* (hereafter called 'regulations') pursuant to the *Environment Protection Act* 1970 in respect of any waste removed from any premises referred to in the earlier paragraphs of the admissions in respect to any date alleged in the information.
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> 6. That the Defendant did not appoint any person to act as an accredited agent for it for the purpose of completing a certificate as required under the regulations.

It was common ground before us that in respect of the waste and journey described in each respective information, the defendant did not fill in Part A of the required certificate, nor did it fill in any parts of any **[5]** certificate. The only grounds of the order nisi, apart from one which was before this court abandoned by the applicant, is in the following terms:

> "The learned Magistrate erred in law in finding that the Applicant permitted prescribed industrial waste to be transported on a highway without a transport certificate in contravention of Section 53I(3) of the *Environment Protection Act* 1970."

It seems to me at least arguable that this is not a ground at all. It seems to me at least arguable to say that it is no more than an allegation that the Magistrate was wrong to convict the applicant. However, the respondent has at no time moved to strike out or set aside the order nisi

and the proper course is to proceed to deal with the matter as if this were a valid ground. It might also perhaps be argued that the orders nisi may be bad because they deal with convictions, each of them, on numerous informations. It was argued on behalf of the respondent that each was valid, and those arguments may well be right, but we are not called upon, in the events which happened, to decide upon them.

Before the Magistrate and before this Court, as I have already indicated, it was common ground that in respect of each load of industrial waste included in the information the applicant did not make out or sign any Part A or any other part of a certificate of any relevant kind. Before the Magistrate and before this Court, the following two reasons were presented as to why the applicant should have been acquitted of the charges:

> (a) At all times whilst the waste was being "transported on the highway", the applicant did not know that the transportation was being effected **[6]** without a transport certificate; and
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> (b) At all such times the applicant did not have any control whatsoever over the independent contractor who was doing the transporting on a highway, and had no power to stop him from doing so.

Mr Garde forcefully contended at length that these two propositions, each of which was conceded by Mr Moshinsky for the respondent to be factually correct, demonstrated conclusively that the applicant could not be said to have "permitted" transportation on the highway or any part of such transportation on a highway. Mr Garde referred the court to numerous authorities which lay down in various circumstances that an applicant must know of certain facts before it can be said to have permitted them, and which lay down in certain circumstances that a person cannot be regarded as permitting something when it is out of his power to prevent it from happening.

In my opinion Mr Garde's propositions do not show, either singly or in combination, that the convictions were wrong in law. There are at least two views open upon the proper construction of Section 53I of the Act in its connection with sub-s.(3). One view is that in sub-s.(3) the expression "without complying with this section" means in substance "without there having been compliance with this section" or "this section not having been fully complied with." **[7]** Upon this view, it was clear that there had not been compliance with the section. It is clear that a transport certificate had not been completed in accordance with the regulations, and it is clear that, at all material times, the transporting vehicle was not carrying a copy of the completed transport certificate.

The alternative view is that the expression, "without complying with this section", means in substance "without having complied with the obligations which this section casts upon that person". Upon this view too, which is the one which appeals to me as at present advised, the requirements of the expression were met, because upon this view sub-section (1) required the applicant to complete the prescribed Part A of a certificate by himself or by an accredited agent of the Authority appointed by the applicant, and it is admitted that the applicant did not do either of these things.

As to the first of Mr Garde's main contentions, it is in a sense of course true that the applicant did not "know" during the period of transportation that there was no completed certificate created and carried in the vehicle. But it is, in my opinion, clear nevertheless that the applicant permitted the transport of waste on the highway by licensing its independent contractor, the waste remover concerned, to collect it and transport it, because the permission given by the licence, that is to say by the contract, was a permission to transport the goods upon such public highways as lay between the **[8]** applicant's place of business and the licensed receiving area. Upon the first view of the construction of the section, the applicant not only permitted, at a time when it knew it had not filled in a Part A, the transportation of the waste on public highways, but also permitted its contractor to transport the waste along highways at times throughout which the applicant knew that it had not filled in a Part A in respect of that waste removalist's journey.

Contention (b) also fails to show the conviction was wrong. The relevant fact is that the applicant did the relevant permitting at the moment when the waste was collected by a land vehicle which, as contemplated by everyone concerned, would get to its stipulated destination only by surface movement along public highways, and at that moment, and for a long time prior to it, the applicant had control over the waste and could have prevented it from embarking on the journey.

The fact is that the applicant, not having any accredited agent, and being assumed to know that it had not, and knowing that the applicant itself had not filled in a Part A, permitted the contractor to transport the waste over highways, and gave the permission at the latest at the time when the contractor picked up the waste; and at that time the applicant had control of the waste and could have prevented the contractor from taking it on to the highway. The offence charged was therefore, in my opinion, complete at the latest when the waste reached the highways, the names of which are laid in the informations.

As to the form of the information, it was not challenged below, and the "ground" of the order nisi, if it should technically be allowed to support any argument **[9]** at all, should not be allowed now to support the argument that the information is either duplex or uncertain, or for some other reason discloses no offence. One possible view is that a properly framed information should have said something like the following - "you permitted the transportation on the highway of prescribed industrial waste, namely grease interceptor trap effluent and residues, without complying with your obligations under s53 of the Act, namely without completing by yourself or an accredited agent appointed by you for the purpose Part A of a transport certificate in respect thereof".

I think, in all the circumstances of this case, it would be wise for this Court to refrain from ultimately deciding this last-mentioned question, and should indeed refrain from deciding any of the following questions:

> (1) whether ground (1) of the order nisi is a valid ground within the meaning of s91 of the *Magistrates' Courts Act* 1971;
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> (2) whether each order nisi is bad because it relates to a large number of convictions and orders;
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> (3) whether the decision of Tadgell J in *Johnson v Collis & Krisohos* [1981] VicRp 37; (1981) VR 349 is correct or incorrect;
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> (4) whether in s53I(3) the words "without complying with this section" means "without there having been compliance" or alternatively mean "without complying with the obligations of that person under this section".

[10] I have already said that as at present advised I incline to the view that the latter is the correct construction, but in all the circumstances I think it unwise for this Court to decide that question when we do not have to decide it in order then to resolve the issues before us.

> (5) the effect, if any, upon liability of a waste producer of his appointing an accredited agent for the purpose of filling in Part A and then reasonably relying upon such agent to fill in Part A of the certificate.

It will be gathered from what I have said about reservation number (4) that I incline to the view that the waste producer would not be liable.

> (6) whether the information can be said to be duplex or uncertain or otherwise defective.

As I have indicated, the "ground" of the order nisi appears to me to concede that the information was properly drawn. It follows from what I have said that I am of the opinion that the Magistrate was entitled on the evidence and the admissions to make the convictions and orders which she made, and I would order that the order nisi be discharged with costs.

BROOKING J: I express no opinion on whether, where more than one conviction results from charges joined in the same information, a single order nisi may be obtained to review those convictions. I also express no opinion on which view should be **[11]** preferred on the effect of the words "without complying with this section" in s53I(3), and no opinion on the possible effect of the appointment of an accredited agent. Subject to these matters, I concur in the judgment which has just been delivered.

GOBBO J: I agree with the reasons for judgment and the view expressed by the learned presiding judge, and agree the appeal should be dismissed, and that the order nisi should be discharged.

FULLAGAR J: The order of the court will be order nisi discharged with costs, including reserved costs.

APPEARANCES: For the appellant Amalgamated Food & Poultry: Mr G Garde QC with Ms M Warren, counsel. Freehill Hollingdale & Page, solicitors. For the respondent Allen: Mr N Moshinsky QC with Mr N Robinson, counsel. Victorian Government Solicitor.
