

22/69

SUPREME COURT OF VICTORIA

PAICE v HASTINGS TRANSPORT PTY LTD

Nelson J

22 April 1969

MOTOR TRAFFIC – DRIVER NOT IN POSSESSION OF AUTHORISED LOG BOOK DULY COMPLETED – DRIVER'S EMPLOYER CHARGED WITH CAUSING OR PERMITTING THE DRIVER TO BREACH THE ACT – WHETHER DEFENDANT WAS IN CONTROL OF THE DRIVER – LEASING AGREEMENT IN EXISTENCE – FINDING BY MAGISTRATE THAT THE LEASING AGREEMENT WOULD DETERMINE THE QUESTION AS TO CONTROL – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S37(C).

HELD: Order nisi absolute. Remitted to the Court for re-hearing.

1. There was evidence before the Court that the driver was employed by the defendant company; that Mr Hastings had in an interview stated to the interviewing officer that the driver was acting under his instructions as a driver on that day; that he had himself instructed the driver to drive from Naracoorte to Melbourne, and other evidence from which it was clearly open to the magistrate to have found that the driver at the time and commission of the offence was subject to and under the control and direction of the defendant company.

2. In determining the question of whether the defendant had any control over the driver the Magistrate said this was to be determined whether the driver's possession of the truck was pursuant to the terms of the hiring agreement which had been put in evidence, and it was clear that if he was satisfied of that fact that would itself have concluded the question as to whether the defendant was in control of the driver.

3. In so directing himself the Magistrate was in error. The question of whether the defendant caused or permitted the commission of the offence was one to be determined in the light of all the relevant evidence which included all the evidence as to the capacity which the defendant had to control the actions of the driver.

NELSON J: This is an order nisi to review a decision of a Court of Petty Sessions consisting of a Stipendiary Magistrate sitting at Melton on 2 September 1968 whereby an information which had been laid against the defendant that it caused or permitted one Arthur John Parker to drive a motor car without such person having in the motor car in his possession an authorised log book issued to him and duly completed in accordance with the requirements of s37(C) of the *Motor Car Act* was dismissed.

A number of grounds are taken in the order nisi to review, many of which appear to me to be directed to the argument that the magistrate was on the evidence bound to hold or bound to find certain facts, and insofar as any of the grounds do rely upon that basis I am not prepared to find they are established. It would be a very strong case indeed in which a Court would hold that a magistrate was bound to be satisfied beyond reasonable doubt of a certain issue on the evidence before him, and I am not prepared to say in this case that the evidence was of such a nature that he would have been bound to come to any such conclusions upon it.

The substantial matter, however, which Mr Charles has argued is that it is clear from the decision of the magistrate that he had been misled in applying the wrong test as to whether the defendant had been guilty of the offence alleged or not.

The defendant's manager had given evidence and in the course of the proceedings had stated that the driver on the day in question was driving the truck pursuant to a leasing or hiring agreement on the vehicle. The agreement itself was not produced, Mr Hastings stating that at that stage it could not be found, but secondary evidence as to its contents were placed before the Court. The contents of the agreement that were placed before the Court indicated nothing more

than that the defendant had hired the truck to the driver, the driver to pay to the defendant two-thirds of what was apparently earned by the truck during the period of the hiring.

There was evidence before the Court that the driver was employed by the defendant company; that Mr Hastings had in an interview stated to the interviewing officer that the driver was acting under his instructions as a driver on that day; that he had himself instructed the driver to drive from Naracoorte to Melbourne, and other evidence from which it was clearly open to the magistrate to have found that the driver at the time and commission of the offence was subject to and under the control and direction of the defendant company. That, of course, does not mean that the Stipendiary Magistrate was bound to find that fact.

At the conclusion of the evidence Mr Skewes submitted that while the question was that of whether the defendant was in control of the actions of the driver at the time that he was intercepted, the provisions of the leasing agreement in effect removed him from control, that under the agreement he had, to quote from the words as set out in the affidavit in support of this application, "a right to leave Naracoorte and when he had his load to take the load to Melbourne; that he could stop on the road when he liked and he was his own boss."

I have found some difficulty in interpreting precisely what the magistrate meant in a number of the statements which it is alleged that he made in giving his reasons. He does advert to the question as to whether a man in the position of the driver could not be employed by the company in one capacity and still have time to act as an independent Contractor.

But I think on a fair reading of what he said and particularly from the last sentence set out in the affidavit that it is clear that to his mind the question of whether the defendant had any control over the driver was to be determined by the question as to whether the driver's possession of the truck was pursuant to the terms of the hiring agreement which had been put in evidence, and I think that it is clear that he does assume that if he was satisfied of that fact that would itself conclude the question as to whether the defendant was in control of the driver.

In so directing himself I am quite satisfied that he was in error. The question of whether the defendant caused or permitted the commission of the offence is one to be determined in the light of all the relevant evidence which includes all the evidence as to the capacity which the defendant had to control the actions of the driver.

The leasing agreement, whether it was a genuine agreement between the parties or not, was only one factor among all the other factors which the Court had to consider in determining whether on the whole of the evidence it was satisfied that the defendant had permitted the commission of this offence, and I think it is quite clear that the Stipendiary Magistrate did not consider the whole of the relevant evidence in arriving at this conclusion. What conclusion he would have arrived at if he had so considered it I do not know. It was a matter for him to determine in the light of all the relevant evidence.

But in my view since it is clear that he did not concern himself with evidence which was relevant to this issue, the order nisi must be made absolute. The order of the Court below to be set aside. The matter will be remitted to the Court of Petty Sessions at Melton for re-hearing. The informant's costs of this application fixed at \$120, are to abide the result of the hearing in the Court below, and if the informant is successful to be paid by the defendant. Certificate for indemnity under the *Appeal Costs Fund Act* granted to the respondent ... in relation to the informant's application for the grant of a certificate I do not propose to grant it.

APPEARANCES: For the informant Paice: Mr S Charles, counsel. Thomas F Mornane, Crown Solicitor. For the defendant Hastings Transport Pty Ltd: Mr EF Skewes, counsel. Eggleston, Clifton Jones & Co, solicitors.
