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## SUPREME COURT OF VICTORIA

**SHARP v ANDERS**

Menhennitt J

17 October 1967

**MOTOR TRAFFIC – UNREGISTERED MOTOR VEHICLE TO WIT A TRACTOR – TRACTOR HIRED BY THE DEFENDANT WHO ASKED ANOTHER PERSON TO DRIVE IT WHILST IT WAS UNREGISTERED – DEFENDANT NOT THE OWNER OF THE TRACTOR – WHETHER DEFENDANT PROCURED THE DRIVER TO DRIVE THE TRACTOR – CHARGE DISMISSED BY MAGISTRATE ON THE GROUND THAT THE DEFENDANT WAS NOT THE "OWNER" – WHETHER DEFENDANT PROCURED THE COMMISSION OF THE OFFENCE – WHETHER MAGISTRATE IN ERROR IN DISMISSING THE CHARGE: JUSTICES ACT 1958, s77; MOTOR CAR ACT 1958, ss3(1), 1791(a).**

**HELD: Order nisi absolute. Remitted for further hearing and determination.**

1. It does not follow that because there is an express provision for the owner of the motor car to be liable thereby s77 of the *Justices Act* is excluded. Section 77 is a general provision which to some extent incorporates and may be elaborates the common law in relation to persons who aid or abet. It does use the specific word, in addition, "procures".

2. Section 17(1)(a) of the *Motor Car Act* 1958 imposes liability on the owner by reason of the fact that he is owner, but there is a different concept of responsibility, namely, of one who aids, abets, counsels or procures the commission of an offence. Accordingly, the submission which was accepted by the Magistrate, was not in accordance with the law and that despite the express provision for liability on the part of the owner, any person who aids, abets, counsels, or procures a person to use a motor car on a highway without that vehicle being registered as required by the *Motor Car Act* was liable for the commission of an offence pursuant to the combined operation of s17(1)(a) of the *Motor Car Act* and s77 of the *Justices Act*.

3. Accordingly, the ground upon which the information was dismissed was erroneous.

**MENHENNITT J:** This is the return of an order nisi to review a decision of the Court of Petty Sessions at Koroit constituted by Mr NJ Fitzpatrick, Stipendiary Magistrate and given on Friday, 21 April 1967. There was before the Court of Petty Sessions on that occasion an information in which Senior Constable Sharp was the Informant and Ivan Leonard Anders was the defendant. The charge was that the defendant, on the 4 January 1967, at Woolsthorpe, did procure the commission of an offence punishable on summary conviction in that he did procure another person to wit David Kelly to drive a motor car knowing that such motor car was not registered as required by the *Motor Car Act*.

The evidence established that on the day in question one David Kelly did drive a motor tractor which was not registered as required by the *Motor Car Act*. By s3(1) of the *Motor Car Act* a motor car includes a motor tractor.

The evidence established, as I have said, that it was not registered. The evidence of the informant was that on 4 January 1967 he saw a tractor being driven in Caramut Road, Woolsthorpe by a person who said he was David Joseph Kelly and that on 7 January 1967 he interviewed the defendant at Woolsthorpe who said in answer to questions that he (the defendant) was not the owner of the tractor but that he hires it from D & W Murray; that he told David Kelly to drive it here, that is, presumably to his premises and that his reason for doing so was that he wanted it down here, that is presumably at, his premises. At the conclusion of the case for the informant Mr O'Sullivan, who appeared for the defendant, submitted that under s77 of the *Justices Act* 1958 the penalty was as for the Principal and as Anders was not the owner there was no case to answer.

The Magistrate, having read the section, agreed with Mr O'Sullivan and dismissed the information.

Section 17(1)(a) of the *Motor Car Act* as amended provides that:

"If a motor car or trailer is used on a highway without being registered as required by this Part ... the person driving the motor car, or (as the case requires) the motor car to which the trailer is attached and the owner of the motor car or trailer, shall severally be guilty of an offence against this Act."

There are then certain irrelevant exceptions. Section 77 of the *Justices Act* 1958 as amended provides that "Every person who aids abets counsels or procures the commission of an offence which is now or hereafter punishable on summary conviction shall be liable to be proceeded against and convicted for the same either together with the principal offender or before or after his conviction" and contains certain other provisions as to penalty.

It appears to me that the substance of the submission of Mr O'Sullivan was that, because there was express provision in 17(1)(a) of the *Motor Car Act* for the owner to be liable, that express provision excluded the operation of s77 of the *Justices Act*. "Owner" is defined in s3(1) of the *Motor Car Act* as including any person who is the sole owner joint owner or part owner thereof and any person who has the possession and use thereof under or subject to a hire-purchase agreement or a bill of sale or like instrument. That definition would not it appears to me, include a person who had hired a motor car, including a motor tractor, for a limited period without any right to obtain, in one way or another, the property in the vehicle. And it appears on the evidence that the defendant was probably in that category, namely, that he hired the tractor from time to time without doing so under a hire-purchase agreement or a bill of sale or like instrument.

It appears to me not to follow that because there is an express provision for the owner of the motor car to be liable thereby s77 of the *Justices Act* is excluded. Section 77 is a general provision which to some extent incorporates and may be elaborates the common law in relation to persons who aid or abet. It does use the specific word, in addition, "procures".

It appears to me that it does not follow that, because the owner of a vehicle, which is unregistered, is liable to prosecution, thereby the provisions of s77 of the *Justices Act* have operation. Section 17(1)(a) imposes liability on the owner by reason of the fact that he is owner, but there is a different concept of responsibility, namely, of one who aids, abets, counsels or procures the commission of an offence. Accordingly, it appears to me that the submission made by Mr O'Sullivan, which was accepted by the Magistrate, is not in accordance with the law and that despite the express provision for liability on the part of the owner, any person who aids, abets, counsels, or procures a person to use a motor car on a highway without that vehicle being registered as required by the *Motor Car Act* is liable for the commission of an offence pursuant to the combined operation of s17(1)(a) of the *Motor Car Act* and s77 of the *Justices Act*. Accordingly, it appears to me that the ground upon which the information was dismissed was erroneous.

The evidence also established, I think a *prima facie* case, of procuring the commission of an offence by the defendant. The statements by the defendant that he told David Kelly to drive the tractor here (this is to his premises) and did so because he wanted it down at his premises are, I think, evidence of a *prima facie* case that the defendant procured David Kelly to sue and drive the motor tractor on the highway without being registered as required by the *Motor Car Act*.

As the submission was that there was no case to answer, the course which should be followed is, I think that the case should remitted to the Court of Petty Sessions for further hearing, and determination upon the basis that the evidence did establish a *prima facie* case of the commission of an offence and that there was a case to answer.

The order, accordingly, will be that the order nisi will be made absolute, the dismissal of the information will be set aside, the case will be remitted to the Court of Petty Sessions at Koroit for further hearing and determination upon the basis that the evidence established a case for the defendant to answer. Accordingly, it is ordered that the defendant pay the informant's taxed costs of the order to review not exceeding \$120.

**APPEARANCES:** For the informant Sharp: Mr BC Cooney, counsel. Thomas F Mornane, Crown Solicitor. No appearance of or for the defendant Anders.