32/77

SUPREME COURT OF VICTORIA

STONEHAM v KLOSE

O'Bryan J

25 March 1977

INTERSTATE TRADE – OWNER OF MOTOR VEHICLE LICENSED TO OPERATE A PASSENGER VEHICLE TO CARRY SPECIFIC PERSONS IN VICTORIA – LICENCE NOT GRANTED IN RESPECT OF INTERSTATE TRADE – JOURNEY TAKEN TO TRANSPORT OTHERS INTERSTATE – BELIEF THAT SUCH JOURNEY WAS WITHIN TERMS OF LICENCE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR – APPLICATION OF *PROUDMAN v DAYMAN* [1941] HCA 28; (1943) 67 CLR 536 TO SUCH JOURNEY: *THE CONSTITUTION*, S92.

K. owned a commercial passenger vehicle licensed to operate to carry school children and teachers only on specific routes within Victoria. He was charged with operating outside the terms of his licence by collecting a football team and supporters in Wodonga and driving to Albury travelling a distance of .9 of a kilometre in NSW. He then returned to Wangaratta. Argued that his journey was protected by s92 of the Commonwealth *Constitution* being an interstate journey, and if it was not, then the defendant had an honest and reasonable belief that his journey was so protected. The Magistrate dismissed the information relying on *Roadair Ltd v Williams* [1968] HCA 18; (1968) 118 CLR 644; 42 ALJR 7. Upon Order Nisi to review—

HELD: Order absolute.

1. There was no *bone fide* commercial purpose in the mind of the defendant when he drove the vehicle into NSW. He drove the vehicle .9 of a kilometre into the State of NSW for the sole reason that he believed that by so doing the whole journey gained the protection of s92. The character of the operation was always intrastate, because it was in reality a journey between Wodonga and Wangaratta, and the defendant's stratagem did not gain for him the protection of s92 of the *Constitution*. Had the defendant's *bona fide* journey been between Wodonga and Albury it would have been protected by s92.

2. Accordingly, the Magistrate was wrong in holding that s92 afforded the defendant a defence to the information on the facts.

3. The statement of law in *Proudman v Dayman* [1941] HCA 28; (1943) 67 CLR 536 does not mean that a person who has a genuine but mistaken view of the law can escape conviction in a case where intent is not an ingredient of the charge. Ignorance of the law or a mistaken view of the law does not afford an excuse to a wrongdoer.

4. Had the defendant persuaded the Magistrate he honestly believed a licence he held authorised him to make the journey in question, the position may have been otherwise. An honest but mistaken belief by the defendant that the short journey he made into New South Wales afforded him the protection of s92 is no answer to that charge. Such a belief may, however, operate to mitigate the penalty, but it is not exculpatory.

O'BRYAN J: ... I have recently had to consider the transport cases in relation to s92 and the problems raised by cases such as *Roadair Ltd v Williams*, *Beach v Wagnar* [1968] HCA 18; (1968) 118 CLR 644; 42 ALJR 7, *Jackson v Horne* [1965] HCA 44; (1965) 114 CLR 82; [1966] ALR 368 and *JJ Ward Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318; [1970] ALR 289; 44 ALJR 19. In a judgment, (delivered on the 7 March 1977), *Stoneham v Simkin*, [1977] VicRp 43; [1977] VR 357 at p10; (1977) 14 ALR 85 it cited passages from the judgments of Fullagar J and Taylor J in *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR 452; [1960] ALR 440; 33 ALJR 353. Fullagar J said at page 465:-

> 'When the carriage of goods by road between two points in the state is protected by s92 it can only be because that carriage is undertaken as essential – that is to say, a necessary, or at least natural and appropriate – means of performing a larger operation which possesses the character of interstate commerce.'

Taylor J said at p472:-

> 'It would be quite unreal to treat this diversionary incident, artificial in the extreme as it was, as capable of giving a colour to the whole journey. To me it appears merely as a superficial excrescence on the journey and not as a factor capable of transforming its real character.'

In *Jackson v Horne* [1965] HCA 44; (1965) 114 CLR 82; [1966] ALR 368, Windeyer J at p96 said:-

> 'This court has said more than once that the question whether or not a particular activity occurs in the course of interstate commerce depends upon commercial realities. Colourable transactions that lack commercial reality such as mere "border-hopping" get no protection from s92.'

I shall now cite a passage from my judgment in *Stoneham v Simkin* at pages 12 to 13:-

> "In *Roadair Pty Ltd v Williams* [1968] HCA 18; (1968) 118 CLR 644; 42 ALJR 7 a carrier proved he had a collection and distribution depot at Albury in the State of New South Wales. He carried a quantity of goods from Melbourne to Albury, part of the load having been consigned to Wodonga in Victoria. The trailer was stacked by placing the heavier Wodonga-bound goods at the bottom of the load. The lighter goods were unloaded in Albury and the truck returned to Wodonga. It was not surprising to find the High Court allowing an appeal against conviction on those facts.
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> The Chief Justice (Sir Garfield Barwick) and Kitto, Menzies and Owen JJ, expressed the view at p647 it was not a "border-hopping" case because "in the ordinary course of its business the appellant had established its depot at Albury for the purposes we have already mentioned..." They said at p648:
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> > "... the carriage of them across the border to Albury and back across the border to Wodonga gave the whole of their carriage, in the circumstances of this case, the character of the carriage of goods inter-State."
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> Subsequently, in *Ward (J and J) Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318; [1970] ALR 289; 44 ALJR 19 the High Court arrived at a similar conclusion in a case where the appellant had established a collection and distribution depot at Mount Gambier in South Australia to which he carried goods consigned from Geelong to Hamilton. Some of the load was removed at Mount Gambier and the truck then loaded with additional goods, which were then carried to Hamilton. Walsh J, in a judgment agreed with by Barwick CJ, Kitto, Menzies, Windeyer and Owen JJ said (CLR at p330 and ALR, at p296): "In every case of this type a decision as to the character of the operation must depend upon a consideration of all the relevant facts."
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> It appears clear to me a court is enjoined by judicial authority to have regard to all the relevant facts and to determine from such facts whether the commercial reality of the situation requires a finding that the journey in question was being made *bona fide* as part of an interstate journey."

How can it be said that the defendant, on the facts before the Magistrate in this case, made a *bona fide* journey interstate? The journey was between Wodonga and Wangaratta, carrying passengers to a football match. The diversion into NSW was what Taylor J referred to 'as a superficial excrescence on the journey and not as a factor capable of transforming its real character.' (103 CLR 452 at 472)

There was no *bone fide* commercial purpose in the mind of the defendant when he drove the vehicle into NSW. He drove the vehicle .9 of a kilometre into the State of NSW for the sole reason that he believed that by so doing the whole journey gained the protection of s92. The character of the operation was, in my opinion always intrastate, because it was in reality a journey between Wodonga and Wangaratta, and the defendant's stratagem did not gain for him the protection of s92 of the *Constitution*. Had the defendant's *bona fide* journey been between Wodonga and Albury it would have been protected by s92. In my opinion, the Magistrate was wrong in holding that s92 afforded the defendant a defence to the information on the facts before him.

In the course of giving his reasons for dismissing the information, the Magistrate added that even if he had not dismissed the information on that ground he would have dismissed it on the authority of *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 (paragraph 11 of the affidavit of John Raymond Connell sworn on the 29th day of October 1976).

Lest the Magistrate should take this course when the matter is before him again, it is desirable that I refer to *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536. In that case Dixon J (as he then was) said: '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 for doing what would otherwise be an offence'. I have never understood that statement of law to mean that a person who has a genuine but mistaken view of the law can escape conviction in a case where intent is not an ingredient of the charge. Ignorance of the law or a mistaken view of the law does not afford an excuse to a wrongdoer.

Had the defendant persuaded the Magistrate he honestly believed a licence he held authorised him to make the journey in question, the position may have been otherwise, but I do not have to decide that point as it did not arise. An honest but mistaken belief by the defendant that the short journey he made into New South Wales afforded him the protection of s92 is no answer to that charge. Such a belief may, however, operate to mitigate the penalty, but it is not exculpatory, in my opinion.

In my opinion, for the reasons given, the two grounds of the order nisi have been sustained. On the evidence before the Magistrate the defendant ought to have been convicted.
