23/69

SUPREME COURT OF VICTORIA

HASTINGS TRANSPORT PTY LTD v MACLENNAN & PAICE

Nelson J

21 April 1969

MOTOR TRAFFIC – LOG BOOK NOT DULY COMPLETED BY DRIVER – DRIVER SUBJECT TO A LEASING AGREEMENT WITH DEFENDANT – DEFENDANT CHARGED WITH CAUSING OR PERMITTING THE DRIVER TO DRIVE WITHOUT A DULY COMPLETED LOG BOOK – MEANING OF THE WORD "PERMIT" – WHETHER THE LEASING AGREEMENT WAS A SUFFICIENT MEASURE OF CONTROL OVER THE DRIVER – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S37C.

HELD: Order nisi absolute. Conviction and order quashed.
1. For a person to be convicted of permitting commission of an offence there must be proved both an actual or an imputed knowledge on the part of the alleged offender, that an offence will or is likely to occur, and secondly, that that person must have the power or capacity to prevent the commission of the offence. That does not mean to say that he must have the physical power to prevent the offence occurring, but that he has in fact a power which, if exercised, will probably prevent the offence from occurring.

2. The leasing agreement could not be regarded as a sufficient measure of control of the defendant, so far as the commission of this particular offence was concerned. The offence committed by the driver was that of failing to complete a log book, and on the commission of that offence the degree of control which must have rested in anybody in a position of authority to prevent that being done must have been a very substantial degree of control indeed. If it could be established that the driver, as an employee, was in fact acting under the instructions of an employer, even although the truck had been leased to him, then it would have been open to the Stipendiary Magistrate to make a finding that the offence had been committed by the employer.

3. However, in this case the evidence fell short of the evidence which would warrant such a conclusion being drawn by a Magistrate beyond reasonable doubt.

NELSON J: This is an order to review the decision of a Stipendiary Magistrate at the Court of Petty Sessions at Ararat on 3 June 1968 whereby the defendant was convicted of causing or permitting one Barry Joseph Brace to drive a motor car without having in his possession an authorised log book which had been issued to him and duly completed in accordance with the requirements of s37(C) of the *Motor Car Act*.

The first ground of the order to review is based on the same material which is set out more specifically in the second ground of the order to review, and substantially what it comes to is that there was no evidence upon which the Magistrate could find that the said Barry Joseph Brace had not complied with the provisions of s37(C) in completing the authorised log book which he admittedly carried. I do not think I need to say anything further than what I have said in the course of argument in this matter. It seems to me that there is clear evidence on which the Magistrate could come to the conclusion that an offence had been committed by Barry Joseph Brace under s37(C), and the grounds taken in para. 1 and 2 of the order nisi consequently fail.

The third ground of the order nisi is that the learned Magistrate was wrong in holding that the defendant on 31 January 1968 caused or permitted the said Barry Joseph Brace to commit the offence alleged, notwithstanding that he was driving the defendant's truck as a hirer thereof, pursuant to the agreement produced in Court. That ground also I think can be taken in conjunction with the fourth ground, that there was no evidence upon which the learned Magistrate could properly have found that the defendant caused or permitted the breach of the Act which had been committed by Barry Joseph Brace. It appeared in evidence, and the Magistrate, according to his reasons, accepted the fact that Brace at the time of the offence was working under the terms of an agreement dated 23 October 1967, which provided for the hiring by Brace of a truck from

the defendant. This conviction was recorded before the decision of the Full Court in the orders to review of *MacLennan v Hastings Transport Pty Ltd* and *Chappell v A Ross & Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376, a decision which was delivered on 25 November 1968, and it is clear that the decision of the Full Court in those cases gave a different interpretation to the word "permit" in sections of this type from that which had previously obtained under earlier decisions of single judges in this State. As at the time of the conviction and according to the law as it then would appear to the Stipendiary Magistrate, there was ample evidence to warrant the conclusion that the defendant did permit the commission of this offence.

But the law on that matter has now been made clear, so far as I am concerned, by the decision of the Full Court, and that decision makes it clear that for a person to be convicted of permitting commission of an offence there must be proved both an actual or an imputed knowledge on the part of the alleged offender, that an offence will or is likely to occur, and secondly, that that person must have the power or capacity to prevent the commission of the offence. That does not mean to say that he must have the physical power to prevent the offence occurring, but that he has in fact a power which, if exercised, will probably prevent the offence from occurring.

Now the evidence as to "permitting" in this case, on the basis that the Magistrate accepted as a fact that the driver was working under the terms of the hiring agreement, and consequently that the truck had been hired to him by the defendant, was that the defendant had not given the driver any instructions as to the hours of work or the driving of such a vehicle under the law of Victoria; that the driver himself in evidence and the managing director of the defendant in admission to the informant had said that the driver was an employee of the defendant at the time of the offence, and, of course, the terms of the agreement itself.

I think that it would have been open to the Magistrate in this case to be satisfied on the evidence that the defendant recognised that offences of this type might be committed by the driver of the truck involved, and I think it was also open to the Magistrate to be satisfied that the defendant used the agreement as a means of endeavouring to ensure its own immunity from any offences which should take place, and that it would be open to the Magistrate to have formed the view in those circumstances that the defendant, knowing of the possibility of the commission of offences, was showing its indifference to whether the offence was committed by the device which it had entered into in relation to its drivers.

But that is not the whole of the case which the informant was bound to make before a conviction could be recorded. The informant also had to prove that with that knowledge the defendant had the power to prevent the commission of the offence. On that question I think that the matter is very much more difficult.

There was evidence that the driver was an employee of the defendant at the time that the offence was committed. But the mere fact that a man is stated to be an employee at the time the offence was committed does not necessarily involve any control by his employer over him, excepting in relation to the work which he is carrying out as part of the work involved in the course of his employment. And the fact that the Magistrate has found that he was at that time working under the terms of this agreement, while not inconsistent with his still being under the control of the defendant as an employee, does leave the position open to the view that so far as the work he was doing at that time was concerned he was working not as an employee, but as a lessee under the lease.

If there had been some evidence which indicated that the work that he was doing at that time was work which was part of the business of the defendant, then I think it would have been clearly open to the Magistrate to have come to the conclusion that the defendant did have a sufficient power of control over the driver at that time, which when taken in conjunction with the knowledge to be imputed to him from the mere fact of his having got his employee to enter into this agreement, would have been sufficient to have justified this conviction.

But in the absence of any such evidence, in my opinion the mere fact that there was evidence that the driver was an employee at the relevant time, was not sufficient for the Magistrate to find the second necessary leg upon which the question of permission depends. It was put to me by Mr Charles, in his very complete argument in this matter, that the leasing agreement itself gave

to the defendant the necessary degree of control which would involve the power to prevent the commission of the offence, because it was open to an owner of a truck not to enter into the lease, and consequently not to place into the hands of the defendant the instrument without which the offence could not be committed.

But I do not think that can be regarded as a sufficient measure of control of the defendant, so far as the commission of this particular offence is concerned. I think it is important to have regard to the offence which the driver is alleged to have committed. The offence is that of failing to complete a log book, and on the commission of that offence the degree of control which must rest in anybody in a position of authority to prevent that being done must be a very substantial degree of control indeed. If, as I say, it could be established that the driver, as an employee, was in fact acting under the instructions of an employer, even although the truck had been leased to him, then it would obviously be clearly open to the Stipendiary Magistrate to make a finding that the offence had been committed by the employer.

But in this case the evidence, in my opinion, fell short of the evidence which would warrant such a conclusion being drawn by a Magistrate beyond reasonable doubt; and the order nisi must, in my opinion, be made absolute. The order nisi will be made absolute and the conviction and order of the Court of Petty Sessions at Ararat will be quashed, the informant to pay the defendants' costs of the proceedings in the Court below which I fix at $30, and costs of these proceedings which are fixed at $120.

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