20/83

SUPREME COURT OF VICTORIA

VICTORIAN RAILWAYS BOARD v SNOWBALL

Marks J

30 June 1982 — [1983] VicRp 64; [1983] 1 VR 689

CRIMINAL LAW – CRUELTY TO ANIMALS – WHETHER VICTORIAN RAILWAYS BOARD IMMUNE FROM PROSECUTION – WHETHER CRUELTY OFFENCES ABSOLUTE: *PROTECTION OF ANIMALS ACT* 1966, S4.

S. who is an officer of the RSPCA attended the railway yards of the Victorian Railways Board, and saw 3 cattle wagons loaded with horses. In one wagon, there were 12 horses one of which was cast. S. tried unsuccessfully to get the horse on its feet, but it was not fit and there was insufficient room. S. asked the yard foreman to unload the wagon, but this request was not complied with. When S. returned 10 hours later, the wagon was still loaded and the same horse still down unable to get up. When the horses were unloaded 2 hours later, the horse which had been down at the bottom of the wagon was examined by a veterinary surgeon and found to be distressed and suffering severe pain. It was then destroyed. An information was laid subsequently alleging that the Board committed an act of cruelty on an animal. It was submitted on behalf of the Board that it was an instrumentality of the Crown and immune from prosecution. Alternatively, if it was not immune, it was submitted that the Board could not be convicted of a criminal offence there being no proof of the necessary mental element in any relevant employee or agent. The magistrate rejected these submissions and convicted and fined the Board $250. On order nisi to review—

HELD: Order nisi discharged.
(1) Upon an interpretation of the *Railways Act*, the Board carries out functions pursuant to a discretion of its own, so that its relevant conduct was not that of or on behalf of the Government so as to attract immunity.

(2) Some acts of cruelty (such as conveying animal causing unnecessary pain or suffering) require mere proof of facts without proof of knowledge or other state of mind.

MARKS J: *[After setting out the facts, the grounds of the order nisi, and the submissions of counsel, His Honour referred to* Sweeney's case *and* Herbert's case*, and said]: ...* The task therefore is essentially to interpret the *Railways Act* for the purpose of deciding whether the function or functions the Board was discharging at the relevant time were protected by the doctrine of Crown immunity from the operation of the *Protection of Animals Act* 1966. If this understanding of my task is correct, it involves the proper characterisation of the function or functions being performed and whether in effect they were being so performed as agents of the Crown; whether, therefore, the functions "were governmental in character" as Latham CJ identified the test in *Grain Elevators Board (Vic) v The Shire of Dunmunkle* [1946] HCA 13; (1946) 73 CLR 70 at p75; [1946] ALR 273.

It is clear enough that there may be more than one description or characterisation of the functions being exercised by the Board at the relevant time. Mr Chernov submitted that the Board was merely "running the railways" which was a governmental function. But I consider that a far too general and colloquial designation. In a general way, the Board was performing its functions of a common carrier and specifically was performing obligations under a contract of carriage of livestock. At the some time, it owned and controlled the wagon, locomotive, if any, to which it may have been attached, and the railroad itself. This wherewithal was under the management and control of the board through its employees as also was other rail traffic which might have affected the mobility of the subject wagon. In performing all these functions the Board was acting pursuant to powers conferred on it under various provisions of the *Railways Act*. By s4 the Board is deemed a common carrier "subject to the obligations and entitled to the privileges of such as carriers".

[His Honour then referred to ss71, 72, 75, 79, 83(1), 83(3), 101, 147 and 179 and said]: ... In respect of all these matters it appears that the Board is empowered to exercise a discretion of its own. Pursuant to those powers the Board was bailee of the subject animal, with power and control over its destiny. The discretions to which I have referred are not expressed to be fettered or subject to

Ministerial control or supervision and the *Railways Act* does not contain any provision like that which persuaded the Full Court of New South Wales in the *Electricity Commission of New South Wales v Australian United Press* (1955) 55 SR NSW 118; 72 WN (NSW) 65 that immunity was conferred on the Electricity Commission of New South Wales.

In *Grain Elevators Board v Shire of Dunmunkle* [1946] HCA 13; (1946) 73 CLR 70; [1946] ALR 273, Latham CJ at p76 said:

> "Where persons or an incorporated authority are subject to direct Ministerial control so that they act under the direction of a Minister, such persons or authorities act on behalf of the Crown and any provision, whether express or implied, for Crown exemption is applicable to them: *Marks v Forests Commission* [1936] VicLawRp 58; [1936] VLR 344; [1936] ALR 476*; Repatriation Commission v Kirkland* [1923] HCA 18; (1923) 32 CLR 1; 29 ALR 297. But if a Board is a body independent of the Government with discretionary powers of its own so that it is not a mere agent of the Government, then such a body does not represent the Crown."

In the present case, there is no foundation for saying that in carrying out the subject contract of carriage, or in conveying, packing or carrying the horse referred to in the information, or in managing or controlling the wagon in which it got down, the Board was subject to Ministerial control so as to be either actually or notionally acting under it. The functions the Board were carrying out were essentially among those reposed in it for exercise pursuant to a discretion of its own. It follows, that in my view the relevant conduct of the Board was not that of the Government or on behalf of the Government so as to attract immunity. This view, as I have indicated, depends on interpretation of the *Railways Act*. There is, I think, further support for that interpretation.

Firstly, the *Railways Act* could well have expressly provided for Crown immunity but does not. The State railways system has been the subject of legislation since 1960 when its conduct was first entrusted to an independent body corporate analogous to the Board. But there never has been any statutory provision conferring on any such body the rights and privileges of the Crown. Section 77 of the *Railways Act* provides that the Board is not liable to pay rates and taxes as owners of the property vested in it under the Act. This provision would not be necessary if the legislature intended the Board to be a mere agent of the Crown. (See *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* [1979] HCA 34; (1979) 145 CLR 330; (1979) 53 ALJR 614, 618-9; (1979) 10 ATR 97; (1979) 53 ALJR 614; [1979] AEGR 71.)

It is beyond dispute that the Board in some respects is given discretionary powers of its own and a high degree of independence. Section 100 for example confers on the Board power to occupy control manage and conduct the Chalet at Mt Buffalo and to provide tourist and holiday accommodation and any amenities in respect thereof and "to do or provide any matter or thing whatever incidental expedient or usual in that behalf". There is also, of course, *Herbert's case* which is binding authority to the effect that the Board in exercising its functions as a landlord is not under the shield of the Crown. Further by s5 the Board is empowered to pay damages by way of compensation for fire damage caused by the passage of trains and by s119, s199 and s200 extensive provision is made in respect of actions against the Board in tort and contract and the fund out of which it is to meet any liability to pay damages. These provisions in some measure assume and underscore a wide ambit of functions independently exercised by the Board.

Finally, there is an early authority of this court which is strongly in point. *Sweeney v Board of Land and Works* Vol IV [1878] VicLawRp 175; (1878) 4 VLR (L) 440 was followed by the Full Court in *Herbert's case*. *Sweeney's case* was a decision of this court sitting *in banc* to the effect that the Board of Land and Works (a predecessor of the Board) when carrying on the business of the railways in 1878 was not entitled to the immunity of the Crown, when sued in an action of tort for injuries to a friend accompanying a passenger upon a railway station, such injuries being occasioned by the neglect to light sufficiently the station at night.

[His Honour then referred to a passage at p 445 by Stawell CJ and said]: ... Although the *Railways Act* in its present form has been much amended since 1878 many provisions remain unchanged and the observations of Stawell CJ have not been rendered inapposite. *[His Honour then referred to the submission regarding proof of* mens rea *and/or any relevant 'knowledge' or state of mind, and continued]:* ... It is clear enough from *Christie v Bruce* [1962] VicRp 91; (1962) VR 654 that some acts of cruelty, constituted now as then under the prevailing legislation, require mere proof of facts without proof of

knowledge or other state of mind of the defendant. The fact that the defendant is a body corporate cannot provide an escape route should the offence charged be regarded as absolute, that is, not dependent on proof of knowledge or guilty intent. The law in this regard was succinctly stated by Viscount Reading CJ in *Mousell Bros Ltd v London & North Western Railway Company* (1917) 2 KB 836 at p844:

> "*Prima facie*, then, a master is not to be made criminally responsible for the act of his servant to which the master is not a party. But it may be the intention of the legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not a party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the *Food and Drugs Act* there are again instances well responsible, even though he knows nothing of the act done by his servant, and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the legislature absolutely forbids the act and makes the principal liable without a *mens rea*."

This statement of Viscount Reading was quoted with approval by Lord Norris speaking in the House of Lords in *Tesco Ltd v Nattrass* [1971] UKHL 1; [1972] AC 153 at p176; [1971] 2 All ER 127; [1971] 2 WLR 1166. The evidence before the learned Stipendiary Magistrate was uncontradicted. It was capable of satisfying him, in my view, that acts of cruelty had been made out in so far as the same related to negligent commission or omission of the act alleged. There was evidence in particular, that the horse was conveyed or carried on a wagon over a period of some ten hours whilst cast down and unable on account of injury and insufficient room to get up or be got up with assistance. There was further evidence that whilst in this position and in those circumstances it had pain or suffering which was unnecessary because if the truck had been unloaded on the night of 10th September its plight could have been relieved. It is unnecessary therefore to discuss the more difficult question relating to proof where required of relevant knowledge in the Board. The order nisi shall be discharged with costs.
