13/77

SUPREME COURT OF VICTORIA

STONEHAM v SIMKIN

O'Bryan J

3, 7 March 1977 — [1977] VicRp 43; [1977] VR 357; 14 ALR 85

CONSTITUTIONAL LAW – "BORDER-HOPPING" – TEST OF COMMERCIAL PURPOSE, OR TEST OF *BONA FIDES* OF JOURNEY – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *THE CONSTITUTION*, S92.

Casterton Transport Service was engaged to carry beer and dried fruits from Melbourne to Casterton. Goods were loaded by S. and driver to Mount Gambier to a storage depot leased by Border Transport Service. This depot had no telephone and there was one forklift kept there. The truck was not unloaded and was driven to Casterton the next day by another driver. The contractual arrangement was that Casterton Transport since engaged S. (the first driver) and Border Transport Service to carry the goods from Melbourne to Casterton. No evidence was tendered as to the route taken from Melbourne to Mount Gambier or as to whether the driver used the Glenelg Highway through Casterton, or the Henty/Princes Highways via Heywood (the latter being eight miles longer). The defendant (first driver) was paid to take the goods to Mr Gambier only; he was charged under s22 *Commercial Goods Vehicle Act*, and s20 *Motor Car Act*. The sole question was whether the journey was an interstate one and protected by s92, or was it on its time interpretation an intra-state journey only. The charges were dismissed. Upon order nisi to review—

HELD: Order absolute. Magistrate's order set aside and remitted to the Magistrates' Court for the imposition of penalty.

1. There were no facts established before the Magistrate sufficient to discharge the onus of proof cast upon the defendant when he sought to set up a defence based on s92. The Court could only conclude that the journey of motor vehicle No. IS-0244 on 24 July 1975 between Melbourne and Mount Gambier in the State of South Australia was a diversion (into another State) that had no commercial purpose and it appeared merely as a superficial excrescence on the journey [to Casterton] and not as a factor transforming its real character.

Taylor J, in *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR 452, at p472; [1960] ALR 440 at p452); 33 ALJR 353, applied.

2. Accordingly, the defendant should have been convicted of the offences charged in the informations. The orders nisi was made absolute with costs, the order of the Court set aside and the informations remitted to the Magistrates' Court at Footscray to convict the defendant and impose such penalty as in the circumstances should be thought proper.

O'BRYAN J: ... I have to say, quite frankly, that it is a daunting task for a judge to say with any confidence, in a new fact situation, upon which side of an uncertain dividing line facts such as the present case discloses fall for decision. The same may be said for the Magistrate unfortunate enough to have to decide the case at first instance. It is necessary for me to refer to a number of decided cases to do justice to the full and able arguments presented by counsel appearing before me.

The first relevant decision is *Naracoorte Transport Co Pty Ltd v Butler* [1956] HCA 72; (1956) 95 CLR 455; [1956] ALR 1152. In that case the appellant conducted a carrying business in Naracoorte in the State of South Australia. A carrying firm carried wool bales from the Victorian town of Harrow, situated about 90 miles east of Naracoorte, to Naracoorte. The appellant then carried the bales to Geelong, a distance of about 400 miles.

On the face of it, the wool was being carried about 180 miles distance further than was necessary, had the consignor engaged a contractor to travel in the most direct and economical route from Harrow to Geelong. The extra miles made the journey commercially impractical. The Magistrate so decided the case.

In a joint judgment, their Honours the then Chief Justice, (Sir Owen Dixon), McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ, at p459 (CLR) and at p1154 (ALR) said:

> "...the only question which it was material for him to consider, (was) namely whether the operation of the appellant's vehicle in carrying its load of wool in the proved circumstances was an operation in the course and for the purposes of the appellant's inter-State trade".

The Court was of the opinion the transportation of the wool, in the circumstances was within the freedom provided by s92.

A few years later, in *Beach v Wagner* [1959] HCA 24; (1959) 101 CLR 604; [1959] ALR 707; 33 ALJR 353 the High Court gave protection of s92 to a carrier whose journey involved him in carrying goods from one place in the State of Queensland to another place in the same State because, in the ordinary course of his business he took the goods into New South Wales where he had a depot in which he re-loaded the goods. The Court, consisting of the then Chief Justice (Sir Owen Dixon), McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer JJ, decided on the facts the appellant was engaged upon an interstate journey for the perfectly legitimate purpose of his business. Mr Crossley contended, correctly in my opinion, that the rationale of that decision was in the fact that the journey, which was the subject matter of the information, had an interstate element with a real or *bona fide* commercial purpose and it was invested with an interstate nature.

In late 1959 the High Court considered a fact situation that later became known judicially as "border-hopping". The trend of judicial authority hitherto in favour of the road carrier changed direction. In *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR 452; [1960] ALR 440 a carrier engaged to carry goods from a country town in Queensland to Brisbane, a distance of about 170 miles, stipulated to the consignor he would do so via Tweed Heads in the State of New South Wales. This deviation in the route added 120 miles to the journey and was carried out solely to attract the provisions of s92.

The High Court, again consisting of Dixon CJ, and McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer JJ, rejected the argument that s92 afforded a defence and what became known as the "commercial purpose" test was formulated. Fullagar J, said (CLR at p463 and ALR at p445):

> "The deviation or detour was entirely unconnected with the commercial end for which the journey was undertaken. Its physical effect was simply to add about 140 unnecessary miles to the journey." He said: (CLR, at p465 and ALR, at p447) "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 an essential — that is to say, a necessary, or at least natural and appropriate — means of performing a larger operation which possesses the character of inter-State commerce."

Taylor J, said (CLR at p472 and ALR at p452):

> "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."

I do not believe it is necessary for me to consider in depth a number of authorities which were discussed in the course of argument before me. The following High Court cases were referred to: *Egg Marketing Board v Bonnie Doon Trading Co (NSW) Pty Ltd* [1962] HCA 3; (1962) 107 CLR 27; [1962] ALR 561; *Western Interstate Pty Ltd v Madsen* [1961] HCA 63; (1961) 107 CLR 102; [1962] ALR 528; *Barry v Stewart* [1965] HCA 69; (1965) 114 CLR 341; [1966] ALR 697; 39 ALJR 339; *Winton Transport Pty Ltd v Horne* [1966] HCA 51; (1966) 115 CLR 322.

In Victoria, in *McQuinn v Peach* [1964] VicRp 1; [1964] VR 2, Hudson J, distinguished cases such as *Beach v Wagner* and *Naracoorte Transport Co Pty Ltd v Butler*, and came to the conclusion the contract of carriage by the defendant "was essentially an intra-state transaction and no part thereof attracts the protection of s92" (see at p8). That decision was followed by the decision of the Full Court in *Day v Hunter*, already referred to. The reasons expressed by the Court for rejecting the defence based on s92 are found at pp857-9.

On behalf of the informant reliance was placed upon the High Court case of *Jackson v Horne* [1965] HCA 44; (1965) 114 CLR 82; [1966] ALR 368 and, in particular, a passage in the judgment of Windeyer J, (CLR, at p96 and ALR, at p375):

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

In that case the appellant secured a contract to transport a tractor from Brisbane to Aramac in Queensland. He let two contracts, one for its carriage from Brisbane to Tweed Heads in New South Wales, the other from Tweed Heads to Aramac. Whilst the second journey was being undertaken the appellant was intercepted. The tractor had arrived in Tweed Heads at the completion of the first journey and been placed in a depot maintained by another carrying company, which had been engaged to carry the tractor on the second journey. For this journey the tractor had to be loaded onto another vehicle.

In upholding the defence of s92 Windeyer J, said further (CLR at p96 and ALR, at p375):

> "The only question in this case is whether at the relevant time the vehicle was being used in contravention of the Act. It was being driven from Tweed Heads with goods for delivery at Aramac. This movement of the vehicle was thus plainly inter-State commerce, unless it could be said that it was but an integral part of a larger journey in which the crossing and re-crossing of the border at Tweed Heads was an irrelevant detour. When and where inter-State transit begins and ends is to be decided as a matter of practical reality depending on the facts of each particular case..."

I was concerned to ask counsel what were the "commercial realities" which Windeyer J, was referring to. It appeared to me that if that phrase was used in a broad sense the defendant here may find it difficult on the facts to justify as a commercial proposition the additional mileage involved in carrying beer and dried fruit beyond Casterton to Mount Gambier and then back to Casterton. The trailer used was not unloaded in Mount Gambier at the storage depot and the journey was wasteful in terms of time involved, cost and additional risk. However, Mr Crossley did not seek to support his case on a broad "commercial reality" test which I put to him. He preferred to support his argument on the narrower basis of looking at the *bona fides* of the journey. He suggested that the distinction between the journey in the present case and the journeys made in *Beach v Wagner*, *Roadair Pty Ltd v Williams* and *Ward (J and J) Pty Ltd v Williams* (cases to which I shall refer shortly) lay in the fact that in the latter three cases the commercial reality of the situation was that the journeys interstate were made *bona fide* in the conduct of an interstate operation, whereas no bona fide commercial reason, save for an attempt to gain the protection of s92, was proved to exist in the present case.

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.

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:

> "...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."

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."

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. Mr Crossley asked me to find that the contract which led to the journey on 24 July 1975 was essentially one to carry goods from Melbourne to Casterton and nearby areas and intrastate. When a "commercial purpose" test was applied it showed that the depot in Mount Gambier had no purpose to serve, on the facts as found, other than to house temporarily the trailer until it was returned to Casterton. Indeed, it may have been put, the only purpose the depot served was to "shelter" the trailer from the provisions of the law its owner is now seeking to avoid. Mr Crossley argued that on the day in question the journey beyond Casterton to Mount Gambier was "a sham or a pretence" that did not give the driver protection from local Victorian laws by virtue of s92. The consignees had no interest in having their goods carried to Mount Gambier and delayed there for a few hours. As the carrier had his place of business in Casterton and had made the contract of carriage there, the character of the operation disclosed by the evidence was intrastate.

Mr Morrow urged me not to assume that the journey was made from Melbourne through Casterton, along the Glenelg Highway to Mount Gambier, the most direct route possible. He contended it was open to him to argue the journey may have been along the Henty Highway and the Princes Highway through Heywood, a less direct route, involving an extra distance of about eight miles. In my opinion, it matters not what inference is drawn with regard to the route taken by the defendant. I would probably have inferred the defendant took the more direct route, in the absence of any direct evidence to the contrary, but in the circumstances of this case I consider it is not important to decide the matter. The two alternatives suggested only serve to show that unless the defendant can establish some *bona fide* commercial purpose for journeying beyond Casterton with a load of goods all consigned to Casterton he faces the risk that a court will determine the character of the operation was intrastate, not interstate. Mr Morrow contended that the evidence proved on the probabilities that the depot of Border Transport Service Pty Ltd in Mount Gambier was a collection point for goods that originate in South Australia and are carried back to Casterton. In my view that is undoubtedly correct and it may well be that from time to time the defendant or Border Transport Service Pty Ltd carries on a *bona fide* interstate operation between Mount Gambier and Casterton. Indeed, I understood Mr Crossley to concede that if the journey being impugned here before me was the return journey from Mount Gambier to Casterton on 25 July he would not contend that journey was not protected by s92.

It was conceded by Mr Morrow that a vehicle may be used on one occasion in a *bona fide* interstate operation of carrying goods, and on another occasion the same vehicle may be used in an intrastate operation. Consequently, the defendant could find himself protected by s92 on a journey from Melbourne to Casterton via Mount Gambier, carrying goods consigned to Casterton, on some occasions but not on others. It depends entirely "...upon a consideration of all the relevant facts". (See per Walsh J in *Ward (J and J) Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318 at p330; [1969] HCA 65; [1970] ALR 289 at p296; 44 ALJR 19).

I have come to the conclusion that there were no facts established before the learned Stipendiary Magistrate sufficient to discharge the onus of proof cast upon the defendant when he sought to set up a defence based on s92. I believe the Court could only conclude that the journey of motor vehicle No. IS-0244 on 24 July 1975 between Melbourne and Mount Gambier in the State of South Australia was "a diversion" (into another State) that had no commercial purpose and "...it appears merely as a superficial excrescence on the journey [to Casterton] and not as a factor...transforming its real character". (See Taylor J, in *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR 452, at p472; [1960] ALR 440 at p452; 33 ALJR 353.)

For these reasons, I consider the defendant should have been convicted of the offences charged in the informations. The orders nisi will be made absolute with costs, the order of the Court below will be set aside and the informations remitted to the Magistrates' Court at Footscray to convict the defendant and impose such penalty as in the circumstances should be thought proper. Upon application having been made by the respondent, I grant to the respondent to the appeal an indemnity certificate in respect of the appeal under s13(1) of the *Appeal Costs Fund Act*.

Solicitor for informant: John R. Connell. Solicitors for defendant: Hull, Newns and Ballantyne.