15/69

SUPREME COURT OF VICTORIA

HAINES v FRANK GROGAN & CO PTY LTD

Newton J

22 October 1969

MOTOR TRAFFIC – LOG BOOK REQUIRED TO BE DULY COMPLETED – DRIVER'S EMPLOYEE CHARGED WITH CAUSING OR PERMITTING THE DRIVER TO DRIVE THE VEHICLE WITHOUT A COMPLETED LOG BOOK – WHETHER COMPANY "CAUSED" THE BREACH – DRIVER GIVEN FULL AUTHORITY TO ACT ON COMPANY'S BEHALF IN RELATION TO THE CARRIAGE OF LIVESTOCK – DRIVER TOLD TO ENSURE LOG BOOK DULY COMPLETED – NO EVIDENCE THAT COMPANY KNEW THAT DRIVER WOULD NOT COMPLETE THE LOG BOOK – CHARGE DISMISSED BY COURT – WHETHER COURT IN ERROR: *MOTOR CAR ACT* 1958, S37C(1).

HELD: Order nisi discharged.
1. There was no evidence that the company officer was indifferent to breaches by the driver of s37C(1) of the *Motor Car Act* 1958 ('Act'), and no evidence that he had any knowledge or belief that the driver might commit any such breaches. The company officer stated that the driver was a very capable driver who knew the rules and regulations with regard to driving hours and who had been instructed to fill in his log book correctly at all times. This evidence of what the officer said was admissible at least as showing his own state of mind.

2. There was no evidence that the defendant company had "caused" the driver to drive the vehicle otherwise than in accordance with s37C(1) of the Act.

NEWTON J: In my opinion this Order Nisi should be discharged. It was proved by the informant in the Court of Petty Sessions that the defendant company's employee, one Templeton, drove a motor car (as defined in s37A(1) of the *Motor Car Act* 1958) without having in his possession a duly completed authorised log book, so that Templeton contravened s37C(1).

But in my view there was no evidence upon which the Justices who constituted the Court of Petty Sessions could have been satisfied beyond reasonable doubt that the defendant company itself "caused or permitted" Templeton to drive the vehicle, otherwise than in accordance with s37C (1), and the Justices would have had to be satisfied of this before they could have convicted the defendant company.

There was certainly no evidence that the defendant company had "caused" Templeton to drive the vehicle otherwise than in accordance with s37C (1).

It is established for me by the decision of the Full Court in *Chappell v A Ross & Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376 that the word "permits" in s37H(2) does not mean simply "fails to prevent", nor even "negligently fails to prevent". *Chappells case* establishes, in my view, that in the present case the informant had to satisfy the Justices at the very least that the defendant company, being possessed (as no doubt it was) of the right to control Templeton in relation to his log book entries, had shown a conscious indifference to any breach by Templeton of s37C (1), coupled with a knowledge or belief that Templeton might commit a breach of s37C(1). In my opinion, the evidence before the Justices could not have satisfied them as reasonable men of these matters.

I should perhaps remark at this point that the information in the present case was laid on 4 December 1968, which was only 9 days after the decision in *Chappell's case* had been given and which was several months before that decision was reported. It occurs to me that at the time when it was decided to lay the information, those in charge of the matter may have assumed that the relevant law was in accordance with the views expressed by Herring CJ in *Broadhurst v Larkin* [1954] VicLawRp 75; [1954] VLR 541; [1954] ALR 872, which were disapproved in *Chappell's case*.

Mr Todd, who appeared before me for the interment, the defendant company not being represented, put the case for the informant in two ways in the course of his helpful and fair submissions. In the first place, Mr Todd submitted that the admissions made by the defendant company's director, Frank Grogan, to the witness Renwick showed that Grogan had been away from the management of the affairs of the defendant company at the material time, and had simply left Templeton to do what he liked in relation to his log book.

But assuming for present purposes that Grogan ought to be treated as the responsible officer of the defendant company (cf. *Lamb v Toledo-Berkel Pty Ltd* [1969] VicRp 43; [1969] VR 343; (1968) 14 FLR 181, I do not think that his temporary cesser of direct control over Templeton can be regarded as showing a conscious indifference on his part to any breach by Templeton of s37C (1), coupled with a knowledge or belief that Templeton might commit a breach of s37C(1).

There was, in my view, no evidence that Grogan was indifferent to breaches by Templeton of s37C (1), and no evidence that he had any knowledge or belief that Templeton might commit any such breaches. Indeed Grogan told Renwick, when taxed with the defendant company's own lack of control over Templeton with regard to his log book and hours of driving, that Templeton was a very capable driver who knew the rules and regulations with regard to driving hours and who had been instructed to fill in his log book correctly at all times. This evidence of what Grogan said was in my view admissible at least as showing Grogan's own state of mind: compare *Sharp v Hotel International Ltd* [1969] VicRp 12; [1969] VR 103 at pp109-110; *Higgins v Dorries* [1965] Qd R 389; and *Horne v Tweed River Transport Pty Ltd; ex parte Horne* [1967] 61 Qld. Justice of the Peace Reports 114. And there was no evidence to suggest that it did not accurately show his state of mind.

Mr Todd's alternative submission was that Grogan's statements to Renwick showed that at the time in question Grogan on behalf of the defendant company had delegated to Templeton full authority to act on behalf of the defendant company in all matters relating to Templeton's own driving operations, so that when Templeton committed his breach of s37C (1), Templeton as agent for the defendant company had permitted himself to commit it. But in my view Grogan's statements to Renwick did not show that Grogan had on behalf of the defendant company delegated to Templeton any authority on behalf of the defendant company to permit himself to commit breaches of s37C (1). It would be most extraordinary if Grogan had made any such delegation to Templeton. All that Grogan said to Renwick, so far as presently material was this;

> "During this period I was away for a few days, but I gave this driver full authority to act on behalf of the company on all matters relating to the carriage of livestock, provided of course the livestock was being carted on behalf of the company."

In my opinion, the authority referred to was simply an authority to Templeton to arrange for the carriage of livestock in his vehicle on behalf of the defendant company, not to assume all the functions of the defendant company in relation to the permitting of breaches by himself of s37C (1).

This conclusion is supported by Grogan's later statement to Renwick, to which I have earlier referred, that Templeton had been instructed to fill in his log book correctly at all times.

I should add that the Justices appear to have dismissed the information for reasons very different from those to which I have referred, their reasons being apparently that while Grogan was on holiday he could not have "permitted" Templeton to commit a breach of s37C(1). In my opinion, these reasons of the Justices cannot be supported. The mere fact that Grogan was temporarily on holiday at the time of Templeton's offence, did not mean that Grogan as the responsible officer of the defendant company could not have "permitted" Templeton's offence: for example, if Grogan's past course of conduct had shown a continuing indifference on his part to whether Templeton committed such an offence, coupled with a continuing knowledge or belief on Grogan's part that Templeton might do so, that would, in my opinion, have been enough. But for the reasons which I have given, I consider that the actual decision of the Justices was plainly right, and the Order nisi will be discharged.

At the time of the hearing the affidavit of service sworn by William Canning in June 1969

was missing from the file, although a copy was supplied to me, I shall be grateful if steps could be taken to find the original affidavit and place it on the file; if this proves impracticable I think that a new affidavit of service should be sworn and filed.

APPEARANCES: For the applicant/informant Haines: Mr RK Todd, counsel. Thomas F Mornane, Crown Solicitor. No appearance of or for the respondent/defendant Frank Grogan & Co Pty Ltd

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