14/75

SUPREME COURT OF VICTORIA

LOLAS v NEW MANNINGHAM MOTORS PTY LTD

Gillard J

17 May 1975

PROCEDURE – ADMISSIONS BY COMPANIES – WITNESS REFRESHING MEMORY – ADMISSIBILITY OF STATEMENTS IN DOCUMENTS IN CRIMINAL PROCEEDINGS: *EVIDENCE ACT* 1958, S55(2)).

The defendant company was convicted under Section 31 of the *Consumer Protection Act* 1972 i.e. "did sell goods, to wit a Ford Motor Car, to which a false trade description was applied". It was alleged that mileage recorded on the "speedometer" was 32,567 miles whereas in fact the mileage travelled by the car was 62,553 miles.

The only two grounds of review on which argument was advanced were:-
(c) There was no sufficient evidence before the Magistrate on which he could properly have held that
(i) there was an odometer in the motor car registered number KPY350 which indicated a mileage; or

(ii) if there was an odometer in the said motor car which indicated a mileage the trade description deemed to be applied to the said motor car pursuant to s36(2)(b) of the *Consumer Protection Act* whatever the description might be was false; and

(d) There was no sufficient evidence upon which the Magistrate could have properly held that Mrs S Dunlop was authorised or entitled to make any admissions on behalf of the applicant.

HELD: Order absolute. Conviction set aside. Matter referred to the Magistrates' Court for hearing and determination by another Magistrate.
1. If a witness is unable to give evidence after exhausting his memory, then he can only refresh his recollection by leave of the court from some source which appears to be reasonably authenticated.

2. The witness in the present case stated he was unable to remember the data, the mileage shown on the vehicle or in fact any particular in relation to the transaction without reference to the book. He said he had not made the entries the book and as far as he could remember he had written particulars including mileage on a scrap of paper and handed the paper to his secretary and his secretary had entered the particulars in the book. He further stated he presumed his secretary had transferred the writing on the scrap paper accurately but he had not checked the book after it was completed. He stated that his Secretary would not have had any personal knowledge of the matter she was writing in the book nor would she have checked the mileage on the vehicle itself.

3. On the basis of that evidence, if it stood alone, it would appear that according to the decision of the Full Court of *Burman v Woolf* [1939] VicLawRp 57; (1939 VLR 402 at p409, the witness was not entitled to refresh his memory from such a source.

4. Nowhere in the evidence did it appear that the book was a record or formed part of a record relating to any business and was admissible in evidence under the provisions of Section 55(2) of the *Evidence Act* 1958. Accordingly, the foundation for the Magistrate's finding to justify acting on Mr Jongejan's evidence failed. If Mr Jongejan's evidence were rejected or alternatively, it could not be acted upon, then clearly there was no foundation for the Magistrate finding as he did.

GILLARD J: ... To say the least the proceedings before the Magistrate were somewhat confusing, and at times, the Magistrate did not get the assistance from the legal practitioners which should have been afforded to him. There is a good deal to be said in criticism of both prosecuting and defending counsel, but in the end, I believe that the learned Magistrate did face up to the problems arising from the evidence as it was advanced ...

Throughout the narrative of evidence given by the prosecution, there was a reference to a mileage showing on 'the Speedometer' and it is so referred to in the agreement between the company and Ellis Motors. It is clear that a speedometer as such merely measures speed. Equally, it is notorious that on the speedometer, usually on its face, there is a meter which sets out the

mileage that the vehicle has travelled. Technically that is an odometer. No objection was taken in the proceedings before the Magistrate that the description of the mileage on the speedometer was not a relevant fact. If attention had been drawn to the matter there could be little doubt that the technical men who were called as witnesses would have corrected their evidence to refer to the mileage on the speedometer as meaning a reading on an odometer.

It would be quite unrealistic of this court to say that merely because a witness described the mileage on "the speedometer" therefore there was not sufficient evidence to show there was an odometer on the motor car. In my view this ground cannot be sustained.

In the alternative, however, Mr Uren urged to the court that if there was an odometer on the motor car, then whatever its description might be as to the mileage, it was false. This immediately raises the question of how the prosecution intended to prove its case against the company. In the first place, it relied upon an interview between the informant, the Inspector of the Consumer Protection Bureau, and a Mrs Dunlop who apparently at all times material was a director and later secretary of the company.

In the course of interviews with the lady she made certain admissions which clearly established a sale by the defendant of the motor car to Ellis Motors. It also by inference might have been deduced that she, if she had the requisite authority for the company, was admitting that somebody had altered the mileage figure on the speedometer before it was sold by the company and after it was purchased by the company. Little attention seemed to have been paid by counsel for the defendant as to the course of this evidence in that he did not object to that evidence being led. Nevertheless, I believe the Magistrate took the correct course in not relying on it and I refer to the cases of *Fraser Henleins Pty Ltd v Cody* [1945] HCA 49; (1945) 70 CLR 100; [1945] ALR 186, S*cott v Fernhill Stud Poultry Farm Pty Ltd* [1963] VicRp 2; [1963] VR 12, and *Chappell v A Ross & Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376 at p385.

The Magistrate in coming to the conclusion that the company had committed an offence relied upon evidence given by a Mr Jongejan that some time in August 1973, he had checked the vehicle being sold by the company to Ellis Motors to carry out a roadworthiness test so that a roadworthiness certificate could be issued. Not unnaturally, the witness was unable himself to recollect precisely the details of the transaction. He therefore referred to a book which he held in his hand to remember the exact date when he received the vehicle into his premises. He then swore that it was on the 27th August 1973. This evidence was given without objection and the legal representative of the prosecution had not sought leave for him to refresh his memory. Having obtained the evidence that the vehicle was received into his premises for checking on that precise date, the witness was then asked to state the mileage shown on the speedometer of the vehicle at the time he received it. He apparently commenced to refer to the book again then counsel for the defendant requested permission to cross-examine the witness in relation to the nature of the book he was refreshing his memory from. Here the second error crept into the proceedings. Instead of the Magistrate then directing that the witness was not entitled to refresh his memory until he had exhausted it, counsel for the defendant was permitted to cross-examine the witness. I say this was the second error that happened in this part of the proceedings.

Under cross-examination by defendant's counsel the witness stated he was unable to remember the data, the mileage shown on the vehicle or in fact any particular in relation to the transaction without reference to the book. He said he had not made the entries the book and as far as he could remember he had written particulars including mileage, on a scrap of paper and handed the paper to his secretary and his secretary had entered the particulars in the book. He further stated he presumed his secretary had transferred the writing on the scrap paper accurately but he had not checked the book after it was completed. He stated that his Secretary would not have had any personal knowledge of the matter she was writing in the book nor would she have checked the mileage on the vehicle itself.

On the basis of that evidence, if it stood alone, it would appear that according to the decision of the Full Court of *Burman v Woolf* [1939] VicLawRp 57; (1939 VLR 402 at p409, the witness was not entitled to refresh his memory from such a source. It perhaps is convenient to consider whether the view that the Full Court expressed on that occasion does not narrow unnecessarily the rule in regard to reviving one's recollection (See *Wigmore on Evidence* 3rd Edition, Vol, iii

paragraph 758 *et seq.*) In the end, it is the testimony given by the witness that is the important factor. On the other hand, it is recognised that a fabricated story can be invented unless some control is kept over the sources from which the witness may obtain his recollection. Hence several rules have been worked out. First, counsel who is objecting to a witness refreshing his memory is entitled to look to the source that the witness desires to use and may cross-examine the witness on the source. He may, by the way he cross-examines allow the source to be admitted as part of the evidence. On the other hand if no objection is taken then it is assumed, first, that the Bench is giving permission to refresh the witness's memory and secondly, that no objection is being taken to that course. This frequently happens in jury actions in running down cases where medical witnesses are called to give expert testimony. They look at their report and freely give their evidence based upon refreshing their memory from the report. But in strictness the rule is as I stated it. If a witness is unable to give evidence after exhausting his memory, then he can only refresh his recollection by leave of the court from some source which appears reasonably authenticated. In my own case I always make it the practice to ask the witness who desires to refresh his memory whether it is from some contemporaneous document that he himself has prepared or which has been prepared by somebody else and he immediately adopted its accuracy.

In this case however, the proof fell far short of any such authentication, The Magistrate realised this when he came to give his reasons for judgment because he said that the basis of his finding that the witness could refresh his memory was that by virtue of probably s55 sub-s2 *Evidence Act* 1958 as amended, the book itself would have been admissible in evidence and accordingly the witness was entitled to refresh his memory from it. The difficulty about that view of the evidence is that the book was never put in evidence and it was never submitted or tendered in evidence, This court does not know what was the nature of the book. It may be that it was handed to the Magistrate but that does not appear in the affidavits. It is true there was a submission by counsel for the prosecution which would have supported the opinion that it was a book being used in the course of the witness's business. But nowhere does it appear in the evidence that there was a book of the relevant character. Unless there was intrinsic evidence in the book itself which in fact was shown to the Magistrate then the Magistrate was not entitled to find that it was admissible in evidence under the provisions of Section 55(2).

I repeat, so far as this court is concerned, it does not know whether the book was admissible in evidence, or not. There is insufficient in the record so to hold. This then relieves this court of determining whether a witness is entitled to refresh his memory from book which is otherwise admissible in evidence under s55(2).

Mr Uren has urged me there can be a distinction between the two types of documents, the one from which one can refresh one's memory, and secondly, a document that is admissible under s55(2). I am inclined to agree with the distinction he makes but I do not think this is a case where one is called upon to give a concluded opinion on a matter and it is a matter that should be reserved, if and when in the future, the occasion should arise to apply the distinction. It is sufficient for the purpose of this case to say that on the evidence in the affidavit on which the Order Nisi was granted nowhere did it appear that the book was a record or formed part of a record relating to any business and was admissible in evidence. Accordingly, the foundation for the Magistrate's finding to justify acting on Mr Jongejan's evidence fails. If Mr Jongejan's evidence were rejected or alternatively, it could not be acted upon, then clearly there was no foundation for the Magistrate finding as he did. On the ground C(ii) and on this very narrow ground, I am prepared to make this Order Nisi absolute. But there are two other matters to which I should refer before deciding what should be done with the proceedings in the future.

Turning to ground (d) of the Order Nisi, I am inclined to agree there was no sufficient evidence upon which the Magistrate could have properly held that Mrs Dunlop was authorised or capable to make any admissions on behalf of the company. Again, however, I am not going to decide that completely or conclusively. There seems to be great gaps of proof in the record and from some of the statements made it would appear to me that probably the Magistrate on the basis of objection on behalf of the defendant was in error in relation to rejecting certain evidence which might have established the relevant authority. I refer in particular to his rejection of the stock card. In view of the course that I am going to adopt I make no finding on the matter on ground (d).