

07/80

SUPREME COURT OF VICTORIA

MOSS v FUNNELL

Murray J

10th November 1979

CRIMINAL LAW – AVIATION TRAINING SCHOOL – PROPRIETOR CHARGED WITH EXCESSIVE FLYING WITHIN A 30-DAY PERIOD – "FLY" – MEANING OF – WHETHER IT INCLUDES TIME SPENT INSTRUCTING A PUPIL – CHARGE FOUND PROVED – PROPRIETOR CONVICTED AND FINED – WHETHER MAGISTRATE IN ERROR: AIR NAVIGATION ACT 1920 (CTH), S48(1); AIR NAVIGATION REGULATIONS, R71.

F. was a proprietor of an aviation school. The *Air Navigation Regulations* provide that an operator shall not fly in excess of 100 hours in 30 consecutive days. F. was charged in that he flew in excess of 100 hours in 30 consecutive days namely, a total of 141 hours 25 minutes. F. explained that he did so due to pressure of business and that due to the economic situation he had to work when work was available. It was submitted to the Magistrate that time spent by F. instructing a pupil but not actually physically controlling the aircraft was not time in which F. was flying the aircraft. The Magistrate rejected this submission and convicted and fined F. Upon appeal—

HELD: Order nisi discharged.

1. The word "fly" does not import a positive physical control of an aircraft whilst in actual flight or taxiing on the ground.

2. The flight time limitations are plainly directed towards providing for the safety not only of persons flying in aircraft whether as passengers or crew but of the public generally. They are directed towards ensuring that members of crews flying aircraft are not fatigued and can give proper attention to their duties. The requirement that all flight time must be logged no doubt has as one of its objects the policing of flight time restrictions. If this is correct, then such an object would be defeated if time entered in the log as flight time relates to a different thing from the flight time referred to in the restrictions. The pilot supervising, instructing and directing a pupil is exercising a greater and more intimate control over the aircraft than is a pilot flying in an aircraft when the automatic pilot is engaged.

3. Accordingly, the Magistrate was not in error in finding the charge proved.

MURRAY J: This is the return of an order nisi to review the decision of the Stipendiary Magistrate sitting at the Magistrates' Court at Mildura on the 4th December 1978 whereby the Magistrate convicted the applicant of an offence against the *Air Navigation Act 1920* of the Commonwealth. The applicant was in fact convicted on each of two charges but only one application for an order nisi was made and consequently I am concerned with only one of the two convictions.

The applicant is the proprietor of an aviation training school operating at Mildura and Swan Hill airports. He was charged with, between the 12th January 1978 and the 10th February 1978, flying in excess of 100 hours in 30 consecutive days in breach of Air Navigation Order s48.1.15. He was convicted and fined \$25 and ordered to pay \$89.90 costs.

The evidence led before the Magistrate was to the effect that the applicant was interviewed by an officer of the Department of Transport and asked to produce his log book. Upon the production and examination of his log book he agreed that it showed that between the 12th January and the 10th February he had flown 141 hours 25 minutes. He gave as his explanation that he had done so due to pressure of business and the fact that due to the economic situation he had to work when work was available. The log book and Air Navigation Order Part 48 s48.1 were tendered in evidence.

The applicant gave evidence on oath in which he said that he entered the time he spent instructing as flying time in his log and that when he was instructing he did not physically fly the aircraft for much of the time, and that on many occasions the pupil physically operated the aircraft for the whole flight. He said he was unable to say from looking at his log book entries how

much time he spent physically operating the aircraft and how much time he spent merely giving instructions. Cross-examined he agreed that whilst instructing he was designated as the pilot in command for the purposes of the Air Navigation Orders.

Perusal of the relevant entries in the applicant's log book shows that relatively little of the time entered in respect of the relevant period was flown by the applicant when he was the sole occupant of the aircraft. It was submitted both to the Stipendiary Magistrate and to me that time spent by the applicant instructing a pupil but not actually physically controlling the aircraft was not time in which the applicant was "flying" the aircraft and should not be taken into consideration. It was submitted that there was no evidence of how much of the time shown in the applicant's log book as instructing was time during which the applicant was in actual physical control of the aircraft and that therefore the prosecution had not proved that the applicant had flown for more than 100 hours in the time in question. It was submitted in reply that the word "fly" in the Act, Regulations and Air Navigation Order, although not defined, should not be given a restricted meaning and that time spent, as pilot in command and instructing a pupil, was time spent flying for the purposes of the Air Navigation Order.

Before me, Mr Murdoch, who appeared for the applicant submitted that the legislation in question used the word "fly" as a verb and in a positive sense. He submitted that even if whilst instructing an instructor is ready and in a position to take over the control of an aircraft immediately nevertheless whilst he is merely sitting and giving directions to his pupil he is not flying the aircraft. Mr Murdoch sought to use, by way of analogy, the decisions of this Court in relation to the driving of motor cars. See for example *Doyle v Harvey* [1923] VicLawRp 39; (1923) VLR 271; 29 ALR 180; 44 ALT 179; *Rowe v Hughes* [1974] VicRp 7; (1974) VR 60; *Caughey v Spacek* [1968] VicRp 78; (1968) VR 600; *McGrath v Cooper* [1976] VicRp 54; (1976) VR 535 in which in the situations dealt with instructors, persons merely steering cars, and persons preparing to drive cars were held not to be the drivers for the purposes of the penal provisions of the *Motor Car Act*. Mr Murdoch submitted that just as those decisions showed that the driver of a motor car is the person in actual physical control of the movements and propulsion of the vehicle so the word "fly" imports a positive physical control of an aircraft whilst in actual flight or taxiing on the ground.

It appears to me that different consideration may apply to legislation relating to aircraft from that relating to motor cars and that before applying the decisions relating to motor cars to aircraft it is necessary to examine the legislation in question with considerable care. Regulation 71 of the *Air Navigation Regulations* requires each member of the operating crew of an aircraft to keep a personal log book containing certain particulars therein set out. Air Navigation Order 40.1.10 provides that all flight times shall be logged and the Order goes on to deal specifically with various situations and classes of pilots and provides how flying time shall be logged. From this Order it is in my opinion clear that all flight time must be logged irrespective of whether the pilot concerned is in actual physical control of the aircraft or not. The Order provides for the manner in which time in flight may be described in the log. In relation to flight instructors para 10.6 provides: "A rated flight instructor may log as time in command, the total flight time during which he is acting as an instructor, but the log entries shall indicate that the flight time was flown as an instructor."

Air Navigation Order 48, under which the applicant was charged, provides for flight time limitations and deals with various circumstances. Flight time is defined as the total time from the moment when an aircraft first moves under its own power for the purpose of taking off until the moment it comes to rest at the end of the flight. The Order contains various sub-sections dealing with rest periods, reserve times, maximum flying times in respect of periods of 365 consecutive days, 30 consecutive days and 7 consecutive days, in relation to situations when the flight crew include not more than two pilots for other than aerial agricultural operations, not more than two pilots engaged in aerial agricultural operations and when the flight crew consists of three or more pilots. Order 48.2 provides time limitation in respect of flight engineers when the flight crew consists of one flight engineer and when the flight crew includes two or more flight engineers.

The flight time limitations are plainly, in my opinion, directed towards providing for the safety not only of persons flying in aircraft whether as passengers or crew but of the public generally. They are directed towards ensuring that members of crews flying aircraft are not fatigued and can give proper attention to their duties. The requirement that all flight time must be logged no

doubt has as one of its objects the policing of flight time restrictions. If this is correct, then such an object would be defeated if time entered in the log as flight time relates to a different thing from the flight time referred to in the restrictions.

If the submissions on behalf of the applicant are correct then a pilot flying alone in an aircraft fitted with an automatic pilot would not be flying the aircraft when the automatic pilot is engaged. This is difficult to accept. Yet the pilot supervising, instructing and directing a pupil is, in my view, exercising a greater and more intimate control over the aircraft than is a pilot flying in an aircraft when the automatic pilot is engaged.

I notice that Air Navigation Order 48.2 in dealing with flight engineers uses the verb "to fly" in precisely the same way as the verb is used in Order 48.1 in relation to pilots. Order. 48.2.1.15 provides:

"A flight engineer shall not fly and an operator shall not roster him to fly in excess of 100 hours in 30 consecutive days."

In some senses I suppose it could be said that a flight engineer is in physical control of an aircraft but I do not think that the meaning Mr Murdoch submits that I should attach to the word "fly" in s48.1 could possibly attach to the word "fly" in s48.2. I find it difficult to believe that the word has a more restricted meaning in s48.1 than it does in s48.2.

It is obvious that flight time limitations have no application to time spent purely as a passenger and the restrictions must in my view be read as applying to flying as a pilot or flying as an engineer. *Non constat*, however, that a pilot is not flying as a pilot when he is sitting in his seat but his co-pilot is actually controlling the aircraft.

Having carefully considered the arguments advanced on behalf of the applicant I have come to the conclusion that the decision of the Stipendiary Magistrate was correct. Accordingly the order nisi must be discharged. The applicant must pay the respondent's costs not exceeding \$200.
