29/77

SUPREME COURT OF VICTORIA

STILLMAN v FALLA

Fullagar J

14, 16 February 1977 — [1977] VicRp 25; [1977] VR 212

MOTOR TRAFFIC – DRIVING MOTOR CAR WITHOUT LOAD BEING SECURED – PALLETS SITTING ON LIP OF TRAY NOT SECURED WITH ROPES OR CHAINS – STRICT LIABILITY ONLY IF LOAD SUFFERS A MISHAP AS SET OUT IN REGULATIONS – COPY OF REGULATIONS NOT TENDERED IN EVIDENCE – WHETHER FATAL TO PROSECUTION – FINDING BY JUSTICES THAT THERE WAS NO EVIDENCE THAT LOAD HAD MOVED FROM ITS ORIGINAL POSITION – CHARGE DISMISSED – WHETHER JUSTICES IN ERROR: *MOTOR CAR REGULATIONS* 1966, R149.

Clause 149 of the *Motor Car Regulations* 1966 is in the following terms:

> "149. Any load carried on any motor car or on any trailer or other vehicle attached to a motor car shall be secured in such a manner as to prevent such load or any part thereof becoming dislodged or hanging or projecting from such motor car trailer or other vehicle (as the case may be) in a manner likely to cause danger or unreasonable annoyance to any person and as to prevent such load or any part thereof falling from such motor car or trailer or other vehicle (as the case may be)."

A charge of driving a motor car without the load being secured under clauses 140 and 149 of the *Motor Car Regulations* 1966 was dismissed. The load carried was bagged powdered milk secured to pallets by their own weight and plastic sheeting, ("shrunk bags") without the use of ropes or chains. The informant, an inspector of the Transport Regulation Board in his affidavit in the Supreme Court stated the evidence given in the Magistrates' Court which may be summarized as:-
(1) that he has had six years experience as an inspector and he considered the load on this vehicle was insecure;

(2) that it was his contention that the pallets which were sitting on the lip of the tray could slide off the vehicle;

(3) that he was unable to say whether he tendered a copy of the *Motor Car Regulations* 1966 although it was his usual practice to do so.

(4) that the Bench at the close of the prosecution conferred and announced that the case would be dismissed as "There was no evidence that the load had moved from its original position". Charge dismissed as there was no evidence that load had shifted from its original position. Upon Order Nisi to review—

HELD: Order nisi discharged.
1. Regulation 149 is intended to put a strict liability upon those who drive or use or cause to be used a loaded vehicle upon a highway, if and only if the load or part thereof actually suffers one or more of the fates or mishaps set out in the regulation; that is to say, only if the load or part thereof becomes dislodged in a manner likely to cause danger or unreasonable annoyance to any person, or if the load hangs or projects from the vehicle in a manner likely to cause danger or unreasonable annoyance to any person, and so on. If none of the stipulated mishaps can be shown to have actually occurred, no offence can be shown to have been committed, whether the load was in fact "secured" in some positive way or simply allowed to rest with the force of gravity holding it in place (which still constitutes "securing", if the point matters).

2. In the present case, there was no evidence that the load or any part thereof had become dislodged in a manner likely to cause danger or unreasonable annoyance to any person; and no evidence that the load or any part thereof was hanging or projecting from the vehicle in a manner likely to cause danger or unreasonable annoyance to any person; and no evidence that the load or any part thereof had fallen from the vehicle.

3. In the circumstances the justices were bound to dismiss the information and that they correctly did so for the right reasons. All grounds of the order nisi must fail.

FULLAGAR J: This is the return of an order nisi to review made by Master Brett on 22 June 1976 to review the decision of two justices of the peace sitting as a Magistrates' Court at Footscray on 10 May 1976, whereby they dismissed an information by Mr Stillman against the defendant, Mr Falla.

The information alleged a breach of CL149 of the *Motor Car Regulations* 1966 and alleged against the defendant that on 7 August 1975 at Cowper Street, West Melbourne, he "...did drive a motor car on a highway without the load on such motor car being secured in such a manner as to prevent such load or any part thereof becoming dislodged or hanging or projecting from such motor car in a manner likely to cause danger or unreasonable annoyance to any person and as to prevent such load or any part thereof falling from such motor car contrary to Cl149 of the *Motor Car Regulations* 1966."

Clause 149 of the Regulations is in the following terms:

> "149. Any load carried on any motor car or on any trailer or other vehicle attached to a motor car shall be secured in such a manner as to prevent such load or any part thereof becoming dislodged or hanging or projecting from such motor car trailer or other vehicle (as the case may be) in a manner likely to cause danger or unreasonable annoyance to any person and as to prevent such load or any part thereof falling from such motor car or trailer or other vehicle (as the case may be)."

Before me there was no appearance for the defendant although he was on two occasions during the day called. I am satisfied that he was properly served with the appropriate documents and I was informed by Mr McCabe of counsel for the informant that the defendant was notified by letter of the date for which this matter was listed in the printed list.

During argument I referred to the view that the information suffered from duplicity, but Mr McCabe satisfied me that the new statutes made this no longer a fatal objection to the information.

As I pointed out to counsel, a regulation in the form of reg 149 cannot itself create any offence; one cannot prosecute the load or the motor vehicle and there would appear little reason to select the driver as the obligor in preference to the loader or owner of the vehicle or perhaps, in some special cases, the owner of the load. However, reg 140 creates an offence in any person who drives or uses or causes to be driven a vehicle which does not comply with the requirements of the Regulations. It might be said that, in the case of a non-compliance with reg 149, it is the load and not the vehicle which fails to comply but, in my opinion, the "securing" of the load required by the Regulations is the making of the load "secure" in relation to the vehicle, though not necessarily by any fastening or positive attachment. In my opinion, the requirement is that the load shall be in such a position or condition in relation to the vehicle that the events next referred to in the regulation (which I shall call "stipulated mishaps") are, in fact, prevented from occurring. The first point to be made at this stage, however, is that for the load to be in a particular position or condition in relation to the vehicle necessarily requires the vehicle to be in a particular position or condition in relation to the load so that the vehicle, just as much as the load, can and must "comply with" reg 149. Reg 140 therefore makes it an offence to drive a vehicle the load on which does not comply with reg 149.

To return to the facts of the case, the informant's affidavit in the Supreme Court sets out the following course of the hearing before the Magistrates' Court so far as material. These paragraphs are as follows:—

> (5). That I then gave evidence the substance of which is as follows: 'At approximately 11.30 a.m. on the 7th August, 1975 I intercepted a vehicle in Cowper Street, West Melbourne. The Registration number of the vehicle was KSR-849. The vehicle was driven by a person who gave his name as Roy Charles Falla of Flat 4, 21 Wingate Avenue, Ascot Vale. I observed this vehicle was loaded with pallets of bagged powdered milk which was secured to pallets with plastic sheeting.' I then tendered a photograph of the vehicle and load. Now produced and shown to me at the time of swearing this my affidavit and marked with the letter 'B' is that photograph. I said to the Defendant 'Do you agree that the load on this vehicle is insecure?' He replied, "I've only come a short distance, I don't think they would come off.' The vehicle was travelling from Port Melbourne to West Melbourne and the driver didn't have ropes and chains in the vehicle. I have been an Inspector of the Transport Regulation Board for approximately six years during which time I have seen many loads fall off vehicles. I consider that the load on this vehicle was insecure. I am unable to say as to whether I then tendered a copy of the Motor Car Reg 1966. It is in my usual practice to do so and if I did not do so in this case it was due to an oversight.
>
> (6). That Mr Dana then cross-examined me and during cross-examination I gave evidence the substance of which is as follows: 'I know that shrink bags are a means of securing loads onto pallets.

I don't doubt that shrink bags are sufficient to keep bags onto the pallets. I know very little about them. The pallets themselves were able to slide. I have loaded vehicles. I don't know the weight the shrink bag contained. The weight of each pallet would have been about 3/4 of a ton. It is my contention that the pallets could slide off the vehicle. The pallets were sitting on the lip of the tray.' I am unable to recall any other matters which were raised in cross-examination.

(7). That I then closed the case for the prosecution.

(8). That the Bench then conferred and announced that the case would be dismissed as 'There was no evidence that the load had moved from its original position.'"

In my opinion, it is quite clear that the failure to tender a copy of the *Motor Car Regulations* in the Court below is not fatal and I gave leave to Mr McCabe to tender them before me and he did so.

The photograph which was put in evidence shows a long trailer, probably drawn by a prime mover, but the whole may be all one vehicle. The trailer has a flat tray surrounded by a vertical side or lip about three inches high. On top of this tray are placed flat pallets probably of wood but possibly of metal, being perhaps six inches high and having a roughly equal length and breadth which is half or slightly more than half the width of the trailer. Each pallet is placed so that its outer side (that is to say, the side facing the side of as distinct from the ends of the trailer) is projecting a few inches over the raised lip. Thus each pallet slopes down and inwards from the side of the trailer towards its centre, so that the loads on top of the pallets would tend to press inwards upon one another at the centre of the trailer. Each pallet has on top of it about 10 layers of bags lying flat on their sides, each doubtless filled with powdered milk. It appears that over the top of each "pallet-load" is placed a large plastic bag, in the form of a sheet which is square in section, closed at the top of the pallet-load and open at the bottom; these are doubtless the "shrink bags" of which the oral evidence speaks. There is, apparently, nothing more than gravity to hold the bags of powdered milk on to the pallets or the pallets on to their partial contact with the floor and lip of the tray, although of course their "security" is doubtless increased by the presence of the shrink bags.

As par.8 of the informant's affidavit discloses, the two justices of the peace comprising the Magistrates' Court conferred together at the close of the case for the prosecution and then dismissed the information upon the ground that "There was no evidence that the load had moved from its original position."

The order nisi granted to the informant by Master Brett contains three grounds as follows:—

"1. That the magistrates were not justified in dismissing the information;

"2. That the justices misdirected themselves in finding that there was no evidence that the load had moved from its original position;

"3. That on the evidence the justices should have convicted the defendant."

I should say at the outset that I am clearly of opinion that the justices were right in finding that there was no evidence that the load had moved from its original position. Mr McCabe for the informant gave an affirmative answer to my question whether the substantial contention of the informant is that the conclusion of law by the justices, that there was no evidence that the load had moved from its original position, albeit correct, is irrelevant and did not require the justices to dismiss the information. In other words, the principal contention is that their second conclusion of law, stemming doubtless from their unspoken construction of reg 149, was wrong.

This case is far from easy, but I have concluded that the justices were correct and that the order nisi must be discharged. The case must turn on what I regard as the difficult questions of construction raised by reg 149, questions of construction which, counsel informed me, have apparently not been the subject of judicial consideration, except so far as may be gleaned from three decisions (two scantily reported in England and one Victorian unreported decision) which are mentioned below.

I return then to the construction of reg 149. It is doubtless possible to construe the

regulation as requiring, by the word "secured", that there must be some positive attachment between the load and the vehicle, for example, by bolting to the vehicle or by straps or chains attached to each side of the tray and passed over the top of the load and drawn and fastened tightly, so that the strap or chains cause the load to press down upon the tray with a positive force greater than that merely of gravity. Upon this construction, the informant might well be successful in these proceedings. Upon this construction and upon others which were mentioned to me in argument, the regulation requires at least some material things to be done by the driver; first, that his load must be "secured" to his vehicle and secondly, that the securing must be such as to prevent the occurrence of the facts or mishaps which are set out later in the Regulations. Upon this construction the driver in the present case might have been convicted, because the load was not "secured" to the vehicle at all; and *a fortiori* was not secured in the required manner. However, counsel for the informant expressly rejected this construction when I put it to him during argument and, in my opinion, he was correct in rejecting it. If it were to be accepted it would have the result that nearly every driver of a high-walled truck carrying a load of garden soil would be committing an offence, irrespective of the likelihood of any of the said mishaps occurring. I do not think the regulation evinces such an intention.

As I understood Mr McCabe, he contended that reg 149 on its proper construction required that the load should be in such a firm and safe (or secure) position in relation to the vehicle as to leave not possible or not likely the future happening of one or more of the stipulated mishaps. I am not sure that he differentiated very clearly between "possible" and "likely" but, as I understood him, he in the end chose "not possible". In my opinion this construction of the regulation should not be upheld, whether on the basis of "not possible" or on the basis of "not likely". As I say, I am told by counsel that there are no decisions on the construction of the regulation other than three decisions to which I have referred and to which I will refer below. It is to be observed that in every one of them a "stipulated mishap" had actually occurred. The first two decisions are each of an English Divisional Court of three judges of the Queen's Bench Division, apparently reported only in [1975] Crim LR. They are, in chronological order, *Cornish v Ferry Masters Ltd* [1975] Crim LR 241; and *Friend v Western British Road Services Ltd*, *ibid* 521. I was told that the English *Motor Vehicles (Construction and Use) Regulations* 1973 are not available in the Supreme Court Library; I therefore cannot ascertain whether the English regulation reproduces the Victorian reg 149, or what the precise form of the English regulation is. One can divine from the scanty reports of these two cases that reg 90(2) of the English Regulations requires that a load carried on a motor vehicle shall, perhaps as one of a number of alternatives as to stowage, be so secured that danger is not likely to be caused to any person by reason of the load or any part thereof falling from the vehicle. It may be that it requires negatively that it be not so secured that danger is likely to be caused.

In *Cornish's Case, supra*, the acquittal by the magistrate was held to be wrong. It was held that "the general principle of the offence of using, being one of absolute liability, had to be applied". A defective pallet, whose defects could not have been discovered on any reasonable inspection until a split second before it collapsed on the lorry under load in the course of a journey, broke and therefore a drum fell on to a highway. The owner of the lorry was held guilty on appeal — "when the defective pallet was doing its work and also when it broke down, there were circumstances from which it was proper to assume that danger was likely to be caused, the defendants ... lack of knowledge being irrelevant, the condition of the load was such that the Justices had no alternative but to find the case proved". (Compare the "luckless victim" considerations referred to by the Privy Council in *R v Lim Chin Aik* [1963] AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42; and distinguished by Herring CJ in this Court in *Hancock v Cooley* [1964] VicRp 81; [1964] VR 639; (1964) 11 LGRA 7.)

In *Friend's Case* [1975] Crim LR 521, decided six months after *Cornish's Case*, again an actual falling from the vehicle had occurred, but by a rare though known phenomenon of "slow roll-over" not fully understood; it being clear that "if the coils of wire in question had been secured in any other way" the tractor and trailer would have overturned completely spilling the whole load. The load was apparently not secured by any equipment but merely lay in the lorry in a particular way. The acquittal by the justices was upheld. It was said that under reg 90(2) the offence was committed only if there was a likelihood of danger and there was no obligation to secure the load by alternatives provided; for example, instead of securing the load it could be placed in such a position it was unlikely to be moved. The case of *Cornish* was distinguished because there

equipment was used to secure the load. "The Justices were entitled to find that although the liability was absolute, there was no likelihood of the load falling off or shifting having regard to its weight and the way it was positioned on the platform of the trailer. It was important to realise that it was not a simple case of a lorry shedding its load because of some defect in the method by which it was secured or positioned." *Cornish's Case*, was decided by Lord Widgery CJ, Ashworth and Michael Davies JJ. *Friend's Case*, was decided by Lord Widgery CJ, Milmo and Wien JJ. If I had access to the English Regulations I would doubtless get some more assistance from the two English decisions.

In my opinion the Victorian reg 149 is intended to put a strict liability upon those who drive or use or cause to be used a loaded vehicle upon a highway, if and only if the load or part thereof actually suffers one or more of the fates or mishaps set out in the regulation; that is to say, only if the load or part thereof becomes dislodged in a manner likely to cause danger or unreasonable annoyance to any person, or if the load hangs or projects from the vehicle in a manner likely to cause danger or unreasonable annoyance to any person, and so on. If none of the stipulated mishaps can be shown to have actually occurred, no offence can be shown to have been committed, whether the load was in fact "secured" in some positive way or simply allowed to rest with the force of gravity holding it in place (which, in my opinion, still constitutes "securing", if the point matters).

On the other hand, if any of the stipulated mishaps can be shown to have actually occurred, then *res ipsa loquitur*, unless there is some true *novus actus interveniens* like a malefactor cutting the ropes or kicking the drums overboard whilst the load and vehicle are in motion under the use of the unwitting driver. He is liable whether the load is or is not secured by so many chains and ropes that the mishap which occurred was rendered extremely unlikely. He is liable whether or not the load is left lying on the vehicle and held in place only by the force of gravity. He is liable if the load is so secured that there is no explanation available as to why the mishap occurred. If the mishap occurs he is liable, because it follows that the load was not so secured as to prevent it from occurring. If none of the stipulated mishaps can be shown to have occurred, the driver cannot be held liable under reg 149, even if the load is most precariously balanced on the vehicle and most negligently loaded and most negligently carried.

In passing, I draw attention to the contrast between the language of reg 149 and that of other regulations, for example, that of reg 146(2) which reads: "No side-car attached to a motor cycle shall be of such weight or dimensions or be so attached as to prevent or be likely to prevent the driver from safely driving or controlling such motor cycle and side-car." (Emphasis added.)

In reg 149 the draftsman of the regulation could easily have provided, had he wished, that every load shall be safely and securely stowed at all times when the vehicle is in motion, and numerous other alternatives were open. The regulation could have provided that no load shall be so stowed or loaded or secured as to be likely to cause any of the stipulated mishaps or as to leave likely the occurrence of any of the stipulated mishaps, but none of these alternatives was adopted.

The third case to which I was referred on the question of instruction was a decision in this Court by Dunn J, in *Ashton v Bennett and Simoni* (unreported, 21 April 1975). It was argued before me that his Honour has adopted an interpretation of reg 149 different from that which appeals to me. If that did indeed appear, I should probably have either followed his Honour's interpretation or else referred the present order nisi to the Full Court of this Court. On the contrary, however, I think that the decisions and reasoning of Dunn J, are entirely consistent with the view I take of reg 149. At p3 of his typed reasons for judgment his Honour said of the case against both defendants: "Before the Magistrates' Court, there was the uncontradicted evidence of the informant that each of these vehicles was carrying bricks which were loaded in such a fashion that they were becoming dislodged and, accordingly, fell within the terms of the regulation as constituting an offence."

The passage of the judgment immediately following recites evidence in the case against Simoni making it clear there were no ropes or sides holding the bricks, that gravity alone held them and that, although none had yet fallen, some had become so dislodged that first, they might well have fallen off and second, that in any event the driver offered to "push them back". It appears to me to be quite clear that his Honour proceeded on the footing that some of the bricks had suffered

a stipulated mishap in that they had become dislodged with the consequences indicated in the regulation.

I respectfully agree with all that fell from his Honour in p3 of his typed reasons for judgment. It is true that on p4 he recites evidence against the defendant Bennett which, standing on its own, is perhaps not so clearly capable of founding a conviction, but I think the surrounding facts and circumstances not recited by his Honour must have been such that evidence, "that many bricks (on Bennett's vehicle) were observed to be loose and when touched could easily be rolled off on to the ground", was in truth evidence that bricks had started in the process of dislodgement so that they had "become dislodged...in a manner likely to cause danger...to any person..." within the meaning of reg 149. Of course, "dislodgement" does not have to be "from such motor car" and is something quite different from a fall from the motor car which is separately referred to in the regulation. It is, indeed, no more than an alteration of position, a displacement.

In my opinion, the dictionary meanings of "prevent" which are appropriate to reg 149 are as follows, with the emphasis on the last:

> "to forestall, balk... by previous measures; to provide beforehand against the occurrence of (something); to preclude." (Emphasis added.)

In the regulation it is not intended to be an arguable matter of opinion whether the mishap has been precluded— it is intended that the mishap will speak for itself. If the regulation meant what I understood counsel for the informant to contend, then any driver of a high-sided tip-truck filled with fine garden soil would be at the risk of conviction whenever an inspector voiced the opinion that the load was "insecure" or the opinion that it was "likely to be dislodged", although it had suffered no mishap; cases would depend on prognostication of future stipulated events occurring, and their overall likelihood, and would invite a wager of law between experienced inspectors and experienced drivers or loaders. The opinions of each would involve hypothetical bystanders and the risks to them and so on. In my opinion, the words of reg 149 do not lend themselves readily to any such construction and, in my opinion, that is not the intention conveyed by the words themselves or the context in which they occur.

In the present case, there was no evidence that the load or any part thereof had become dislodged in a manner likely to cause danger or unreasonable annoyance to any person; and no evidence that the load or any part thereof was hanging or projecting from the vehicle in a manner likely to cause danger or unreasonable annoyance to any person; and no evidence that the load or any part thereof had fallen from the vehicle. In my opinion, the expressed *ratio decidendi* of the justices that "there was no evidence that the load had moved from its original position" was merely a compendious summary of the dearth of evidence to which I have just referred.

In the circumstances I am of opinion that the justices were bound to dismiss the information and that they correctly did so for the right reasons. All grounds of the order nisi must fail.

If I had accepted either of what I understood to be the two constructions contended for on behalf of the informant, that the test was whether the load was so stowed or secured that one or more of the stipulated mishaps was likely, or that one or more of the stipulated mishaps was not rendered impossible, then I would have regarded it as at least doubtful whether the evidence in the present case, even then, was sufficient to satisfy a reasonable tribunal beyond reasonable doubt that an offence had been committed. In the result, however, I do not have to decide that question. The order of the Court will be: order nisi discharged. Order accordingly.

Solicitor for the informant: John Connell.
