

18/96

SUPREME COURT OF VICTORIA

MEGAY v COOK and AVONDALE WAY PTY LTD

O'Bryan J

13, 19 October 1995

MOTOR CAR TRADERS – SIXTEEN VEHICLES SOLD IN LESS THAN 12 MONTHS – ELEVEN VEHICLES DAMAGED – VENDOR NOT LICENSED AS A MOTOR CAR TRADER – CHARGED WITH BREACH OF ACT – NO CASE SUBMISSION UPHeld – TEST TO BE APPLIED – WHETHER VEHICLES INTENDED TO BE USED ON A HIGHWAY – OBJECTIVE TEST – WHETHER DISMISSAL OF CHARGES APPROPRIATE – WHETHER *PRIMA FACIE* CASE ON EVIDENCE: *MOTOR CAR TRADERS ACT 1986*, SS3, 5, 7.

C. and AWP/L (who were not holders of a motor car traders licence) sold 16 motor cars in a period of less than 12 months. Eleven of the motor cars were advertised as being damaged. Subsequently, a charge against C. and AWP/L was laid alleging that they carried on the business of trading in motor cars without being the holder of a motor car trader's licence. On the hearing the magistrate upheld a 'no case' submission and dismissed the charge on the ground that the prosecution had not established that the cars were intended to be used on a highway. Upon appeal—

HELD: Appeal allowed. Dismissals set aside. Remitted for further hearing.

1. **The mere fact that the vehicles were damaged did not determine whether they were intended to be used on a highway. In order to determine this question the magistrate was required to apply an objective test of whether a reasonable person looking at the vehicles with full knowledge of their characteristics would say that one of their users was use on a highway.**

Siciliano v Acme Knitter & Dyers Pty Ltd [1994] VicRp 44; [1994] 1 VR 632, applied.

2. **The magistrate applied the wrong test and omitted to give any effect or meaning to the words in s3 of the *Motor Car Traders Act 1986* ('Act') "whether or not in working condition or complete".**

3. **S5(2) of the Act provides that a finding may be made that a person is a motor car trader notwithstanding that the person has bought, sold or exchanged less than six motor cars in a 12-month period. In the present case, it would have been open to the magistrate to have found that the evidence established a *prima facie* case of carrying on a business of buying and selling motor cars on a continuous and repetitive basis for profit and accordingly, being a motor car trader within the meaning of the Act.**

Hope v The Council of the City of Bathurst [1980] HCA 16; (1980) 144 CLR 1; (1980) 29 ALR 577; (1980) 12 ATR 231; (1980) 54 ALJR 345; (1980) 41 LGRA 262, applied.

O'BRYAN J: [1] This is an appeal from an order made on 7 June 1995 by the Magistrates' Court at Ringwood dismissing informations alleging an offence against s7(1) of the *Motor Car Traders Act 1986* against Stuart Graham Cook, a director of Avondale Way Pty Ltd and Avondale Way Pty Ltd. The informations against Cook and Avondale Way were in identical terms:

"Between 30 July and 17 December 1994 at Bayswater you were guilty of an offence pursuant to s7(1) of the *Motor Car Traders Act 1986* in that you did carry on the business of trading in motor cars without being holder of a motor car trader's licence and in so doing sold or offered for sale 16 motor cars in contravention of s7(1) of the *Motor Car Traders Act 1986*."

Section 7 of the Act prohibits a person carrying on a business of trading in motor cars unless that person is the holder of a motor car trader's licence. It was common ground that neither Cook nor Avondale Way held such a licence at the relevant time. The main issue at the hearing was whether Cook and/or Avondale Way sold or offered for sale 16 motor cars during the relevant period. It is not an essential element of the offence created by s7 for the informant to prove that 16 motor cars were sold or offered for sale during the relevant period. Motor car trader is defined in s3 of the Act to mean "a person who otherwise than in the capacity of an employee carries on the business (whether or not that person carries on any other business) of trading in motor cars or holds out in any way as carrying on the business of trading in motor cars". Section

5(1) of the Act deems a person to be a motor car trader if a person buys, sells or exchanges six or more motor cars other than from, to, or with a licensed motor [2] car trader in any period of 12 months and casts an onus upon such a person to prove that he or she did not in that period trade in motor cars or hold out as carrying on the business of trading in motor cars. Section 5(2) of the Act provides:

"Sub-section (1) does not prevent a person who buys, sells or exchanges less than six motor cars in any period of 12 months from being a motor car trader within the meaning of this Act."

The effects of s5 are:

(a) A person who buys, sells or exchanges six or more motor cars other than from, to, or with a licensed motor car trader in any period of 12 months is deemed to be a motor car trader.

(b) A person deemed to be a motor car trader may prove that he or she did not in that period trade in motor cars notwithstanding that he bought, sold or exchanged six or more motor cars in a period of 12 months.

(c) A person who buys, sells or exchanges less than six motor cars in any period of 12 months may be found to be carrying on the business of a motor car trader within the meaning of the Act.

(d) The question whether a person is a motor car trader is a question of fact to be decided upon the evidence adduced.

(e) If the evidence adduced shows that a person bought, sold or exchanged six or more motor cars in any period of 12 months he or she is deemed to be a motor car trader but if the evidence adduced shows that a person bought, sold or exchanged less than six motor cars in any period of 12 months the onus is upon the informant to prove the person carried on the business of trading in motor cars.

[3] The relevance of s5(2) to the hearing in the Magistrates' Court will be elaborated upon in due course. Critical to the determination of these informations is the definition of "motor car" in the Act. By s3 "motor car" means –

"a motor vehicle within the meaning of the *Road Safety Act* 1986 (whether or not in working condition or complete) but does not include—

(a) an engine constructed for use as a motor tractor; or

(b) a motor vehicle so constructed that its engine is used to drive or operate an agricultural implement forming an integral part of the motor vehicle; or

(c) an exempt vehicle; or

(d) a vehicle that is not, and is not intended to be, used on a highway."

For present purposes only sub-clause (d) is relevant. By s3 of the *Road Safety Act* 1986 "motor vehicle" means—

"a vehicle which is used or intended to be used on a highway or in a public place and which has its own motive power (other than human or animal power) but does not include—

(a) a vehicle intended to be used on a railway or tramway; or

(b) a motorised wheel-chair capable of a speed of not more than 7 kilometres per hour which is used solely for the conveyance of an injured or disabled person; or

(c) a vehicle that is not a motor vehicle by virtue of a declaration under sub-section (2)(b)."

For present purposes sub-clauses (a), (b) and (c) are irrelevant. The combined definitions of motor car mean that a motor vehicle which is used or intended to be used on a [4] highway or in a public place and which has its own motive power (whether or not in working condition or complete) is a motor car. It follows that:

(a) A motor vehicle which is used on a highway whether or not in working condition or complete is a motor car.

(b) A motor vehicle that is not used on a highway whether or not in working condition or complete

is not a motor car.

(c) A motor vehicle which is intended to be used on a highway or in a public place whether or not in working condition or complete is a motor car.

(d) A motor vehicle that is not intended to be used on a highway or in a public place whether or not in working condition or complete is not a motor car.

The question whether a particular vehicle is a motor car within the meaning of the Act is a question of fact to be decided upon the evidence adduced. *Siciliano v Acme Knitters & Dyers Pty Ltd* [1994] VicRp 44; [1994] 1 VR 632. The test of whether a particular vehicle was intended for use on a highway is, in general, an objective test of whether a reasonable man looking at the vehicle with full knowledge of its characteristics would say that one of its users was use on a highway. (*Siciliano* at 640-641). In the Magistrates' Court the informant carried the onus of proving firstly, that a particular vehicle was a motor car within the meaning of the Act and secondly, that the defendant carried on the business of trading in motor cars during the relevant period. The evidence adduced in the Court below was principally in the form of a record of interview between an [5] inspector with the Motor Car Traders Licensing Authority and Cook on 16 February 1995 in which Cook answered a number of questions concerning 20 motor cars advertised for sale in *The Age* and sold by Avondale Way between 30 July and 17 December 1994. The advertisements were placed and paid for by Avondale Way and the telephone numbers published with the advertisement was a mobile telephone number owned by Cook or by an employee of Avondale Way. Four of the 20 motor cars advertised were shown to be privately owned and were disregarded by the learned Magistrate for the purposes of the informations. At the end of the prosecution case a no case submission was made that none of the 16 motor cars was a motor car as defined by the Act. The learned Magistrate upheld the submission in respect of 11 motor cars. Five of the motor cars advertised between 30 July and 3 September 1994 were found by the learned Magistrate to be motor cars as defined by the Act. In reasons for decision the learned Magistrate said:

"The *prima facie* implication from the advertisements of 30 July, 13 August (2), 20 August and 3 September (2) were that the cars could reasonably be supposed if not to be used, intended to be used (on a highway)."

Counsel for the respondents in this appeal did not contest the finding made in respect of five of the motor cars. Nor indeed could he do so, for each advertisement described an undamaged motor car either currently registered or the subject of a roadworthy certificate. Eleven of the motor cars advertised between the relevant period were found by the learned Magistrate not to be motor cars as defined by the Act because each vehicle was [6] advertised as damaged and the prosecution did not establish "at least on a *prima facie* basis ... that the cars were intended to be used on a highway." It is clear from the learned Magistrate's reasons he formed the opinion that, if a car advertised for sale was advertised as damaged, the prosecution had to prove "whether there was any intention to place the damaged cars in a condition where they would be used on a highway." Counsel for the appellant submitted that the learned Magistrate applied a subjective test and not the test proposed by Newton J in *Newton v Incorporated Nominal Defendant* [1970] VicRp 32; [1970] VR 257 at 262: "In my opinion a sufficient test of whether a vehicle is 'intended for use on any highway' is whether a reasonable man looking at the vehicle with full knowledge of its characteristics would say that one of its users was use on a highway ..." This test was restated by the Full Court in *Siciliano v Acme Knitters and Dyers Pty Ltd* [1994] VicRp 44; [1994] 1 VR 632.

In my opinion, the learned Magistrate applied the wrong test and in doing so omitted to give any effect or meaning to the words defining motor car in the Act which are in brackets: "Whether or not in working condition or complete." The test applied by the learned Magistrate assumed that because a vehicle was damaged, further evidence was required as to the nature and extent of the damage in order to determine whether someone intended to use the vehicle on a highway as distinct from use as parts. The task of the Magistrate was to consider the evidence relating to each vehicle and in that regard, evidence of its condition at the time of purchase and sale, would be relevant to the [7] question whether a particular vehicle was intended to be used on a highway. However, the mere circumstance that a vehicle was damaged or not currently registered or not the subject of a roadworthy certificate by itself could not determine whether the particular vehicle was intended to be used on a highway.

It is regrettable that the learned Magistrate's attention was not directed to the recent

decision in *Siciliano* which was in point. It clearly does not follow that simply because a particular vehicle is damaged when it is purchased or sold it is not a motor car for the purposes of s7 of the Act. Counsel for the defendants argued in the Court below that, if 11 vehicles were not prima facie motor cars within the definition of the Act, the prosecution had failed to prove that the defendants carried on the business of motor traders without a motor car trader's licence and the informations should be dismissed. The argument proceeded upon the premise that unless the prosecution proved the respondents traded in six or more cars within a 12 month period, a finding could not be made that the defendants carried on a business of motor traders. This is plainly wrong and flowed from a misunderstanding of the purpose and effect of s5(2). When the learned Magistrate determined that 11 vehicles were not motor cars, he assumed that s5(1) had no operation and neglected to consider the significance of s5(2). When the hearing began, counsel for the informant had referred to s5(1) in the context that trading in 16 cars would be proved by the informant and stated that sub-section [8] (2) was not being relied upon. No one adverted to the consequence of a finding that 11 vehicles were not motor cars. Section 5(1) had no operation once the learned Magistrate upheld the submission as to 11 vehicles not being motor cars. However, ss(2) then became important but was ignored in the ruling upon the no case submission. Unlike s5(1), ss(2) is not an evidentiary provision. It simply states that when the evidence for the prosecution proves that a person has bought, sold or exchanged less than six motor cars in any period of 12 months, a finding may be made that such a person is a motor car trader.

The consequence of the learned Magistrate ignoring the effect of ss(2) is that he never considered the question whether the evidence established a *prima facie* case based upon the buying and selling of five motor cars in a period of three months. Had he considered ss(2), I am of the opinion that he must have found a prima facie case of carrying on a business of trading in motor cars against the defendants. In *Hope v The Council of the City of Bathurst* [1980] HCA 16; (1980) 144 CLR 1; (1980) 29 ALR 577; (1980) 12 ATR 231; (1980) 54 ALJR 345; (1980) 41 LGRA 262 the High Court considered the meaning of the word "business" in the expression "carrying on the business of grazing". Mason J, in whose judgment Gibbs and Stephen JJ agreed, held the expression "denotes grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis" (pp8-9). In the present context, the evidence established a prima facie case of carrying on a business of buying and [9] selling motor cars on a continuous and repetitive basis for profit. In my opinion, the decision of the learned Magistrate should be set aside on the ground that at the end of the prosecution evidence a *prima facie* case of breach of s7 of the Act had been made out in respect of 16 motor cars and the learned Magistrate erred in dismissing the informations at that stage. The questions of law raised by the appeal are not aptly expressed. A *prima facie* case was established, in my opinion, and the order dismissing the informations and the payment of costs should be set aside. This matter should be referred back to the Magistrates' Court at Ringwood to be determined according to law. The costs of the appeal are to be paid by the respondents.

APPEARANCES: For the Appellant: Mr M Adams QC, counsel. Solicitors: Office of Fair Trading and Business Affairs. For the Respondents: Mr N Franzi, counsel. Solicitors: Strauss & Associates.