45/91

SUPREME COURT OF VICTORIA

GOODFELLOW v HALL

Brooking J

25 September 1991

MOTOR VEHICLES – TOW TRUCK – VEHICLE USED TO PICK UP DAMAGED VEHICLE FOR REPAIRS – NO CHARGE MADE FOR TOWAGE – ISOLATED OCCASION – WHETHER PICK-UP VEHICLE A TOW TRUCK – WHETHER OPERATOR UNLICENSED: *TRANSPORT ACT* 1983, SS171, 183(1); *MAGISTRATES' COURT ACT* 1989, S130.

Section 171(2) of the *Transport Act* 1983 ('Act') provides:

"A motor vehicle is deemed not to operate as a tow truck if it is lifting and carrying or towing a motor vehicle otherwise than—

(a) for hire or reward or for any consideration; or

(b) in the course of any trade or business."

Using a utility with trailer attached, H., a panel beater picked up a friend's damaged motor vehicle and conveyed it to his panel works where it was later repaired. No charge was made for towage. Subsequently, H. was charged with being the owner of a tow truck which operated on a highway without being licensed under the Act. At the hearing, the magistrate accepted evidence that the picking up of damaged vehicles was not a part of H's trade or business and dismissed the charge. Upon appeal—

HELD: Appeal dismissed.
In accepting the evidence as to the extent of H's trade or business namely, that the act of picking up the damaged vehicle was an isolated occasion, it was open to the magistrate to find that there was a reasonable possibility that the vehicle was being conveyed otherwise than in the course of H's trade or business and accordingly, dismiss the charge.

BROOKING J: [1] Mr Barry Hall runs a panel beating business at Numurkah. On 22 August 1990 he towed a damaged motor car along the highway to his panel beating works, where it was some months later repaired, the damage having in the meantime, it seems, been assessed by a loss assessor for insurance purposes. He was unsuccessfully charged under s183(1) of the *Transport Act* 1983 with being the owner of a tow truck which operated on a highway without being authorised so to operate by licence granted under the Act.

Section 171 of that Act is in the following terms:

"171. (1) A tow truck shall not operate on any highway unless it is authorized to so operate by a licence granted in accordance with this Division.

(2) A motor vehicle is deemed not to operate as a tow truck if it is lifting and carrying or towing a motor vehicle otherwise than—
(a) for hire or reward or for any consideration: or
(b) in the course of any trade or business.

(2A) Notwithstanding sub-section (2), a motor vehicle being operated in the course of a business of automotive wrecking only operates as a tow truck for the purposes of this Division if it lifts and carries or tows a motor vehicle—
(a) which is not owned by the proprietor of the business; or
(b) from the scene of an accident."

Subsection (2A) of that section throws some light on the scope of subsection (2). Section 86 contains an unsatisfactory definition of "tow truck" in terms which include the vehicle that was here used – a Holden utility with a trailer designed to carry motor vehicles.

The defendant's case was that he had made no charge for picking up the car, either as a

separate towage charge made **[2]** at about the time of the tow, or by way of an additional charge made when an account was rendered for the repair work, and that he had picked the car up only to accommodate a friend, its owner, in unusual circumstances, the damage having apparently been sustained in an incident which occurred at a time when the owner's premises were, according to material at which I have looked without objection, the scene of a "standoff" between 40 former employees of the owner and their families and repossession agents, large numbers of police officers also being present.

The affidavit of the investigating inspector of the Roads Corporation, on which the order of the master was made, has been in some sense answered by an affidavit of the respondent. That affidavit is, unfortunately, in very unsatisfactory terms and no adjournment has been sought to enable a more satisfactory affidavit to be supplied. Unfortunately, the affidavit fails properly to distinguish between what the respondent says are the facts so far as the alleged offence is concerned and what he says was the evidence given in the Magistrates' Court. I do not think it is necessary to discuss that affidavit at length. It will suffice if I say that in my view the only parts of that affidavit which except by confirming the affidavit being answered tend to show what evidence was given in the Magistrates' Court are what appears in para.4 and the second sentence of para.6. I am not persuaded that any part of para.3 deals with the evidence, as opposed to the underlying facts. As to para.6, it may be that the deponent intended in the whole of that paragraph, and in the next following paragraph, to deal with the evidence, but I do not think **[3]** that that sufficiently appears.

It is to be noted that in para.8 the deponent begins a sentence with the words "I again state" and it is accepted that this sentence is to be taken as dealing not with the evidence but with the facts. If by that part of para.8 the deponent has reached the stage of dealing with the facts and not the evidence, then I find it impossible to say with sufficient confidence at what point earlier and after the sentence in para.8, which begins "To the best of my recollection and belief, my evidence" he had ceased to deal with the evidence and begun to deal with the facts. This view of the answering affidavit means that the only way in which the appellant's material is added to, for present purposes, for it is not contradicted, is to be found in para.4, where the deponent says that Mr Pilkington said in evidence that there was no suggestion that he had removed a vehicle, as I would understand the deponent to be saying, from the scene of an accident in the past.

It is submitted on behalf of the appellant, and accepted on behalf of the respondent, that subsection (2) of s171 – which is not, if I may say so, expressed as clearly as one would wish – does lay down an exception, exemption, proviso, excuse or qualification within the meaning of the provision now to be found in s130 of the *Magistrates' Court Act* 1989, a provision which, if I may say so, lacks the pleasing simplicity of the section which it replaced. Both counsel accept that for present purposes, so far as the question whether the defendant should have been convicted is concerned, the question was whether the defendant may be said to have presented or pointed to evidence that suggested a reasonable possibility of the existence of facts which, if **[4]** they existed, established the exception, exemption, proviso, excuse or qualification. That means, for present purposes, that the question was whether there was evidence that suggested a reasonable possibility of the existence of facts establishing that the car concerned was being towed otherwise than in the course of any trade or business, it being clear on the evidence that there was no hire or reward or consideration.

The learned magistrate was, it seems, not referred to s130, a provision of which he was doubtless well aware. His Worship expressed himself in terms of making a positive finding, saying this: "I do not believe a commercial transaction has taken place but rather, this was an arrangement which had occurred through the association of Friends. The fact that the vehicle had been repaired some seven months later is of little consequence to the situation whereby Mr Hall had only helped Mr Trease." It has not been suggested that I should consider remitting the case to the Magistrates' Court and very sensibly, if I may say so, both counsel have argued the appeal on the basis that the question for me is whether it was open to the magistrate, having regard to the evidence and the view taken of it by the magistrate, to treat the defendant as having presented or pointed to evidence answering the requirement of s130 of the *Magistrates' Court Act*.

It seems to me that notwithstanding that the language used in s171(2) of the *Transport Act* 1983 is not the same as the language used in the cases to which I shall refer in a moment, there

is no material difference between the **[5]** provisions there considered and the present provision, and it seems to me therefore that, in the light of the decision of Lowe J in *Bolton v Moore* [1949] VicLawRp 40; [1949] VLR 215; [1949] ALR and in the light of the observations of Martin J in the earlier case of *Knight v Walker* [1936] VicLawRp 52; [1936] VLR 307; [1936] ALR 444, I should take the view that this vehicle by which I mean, of course, the respondent's vehicle – would not be being used in the course of any trade or business if, by way of an isolated instance, it was being used to pick up a vehicle for repair. When I speak of an isolated instance I am concerned not only with the past but also with an incident which is not, having regard to the intention of the actor, one which is going to be repeated in the future.

After some hesitation, I think that it was open to the learned magistrate to take the view that the evidence suggested a reasonable possibility that the alleged operating tow truck was not being used in the course of any trade or business because it was not in the course of the defendant's business, that being the only business which falls for consideration, to pick up either from the scene of accidents or from anywhere else a vehicle for the purpose of repairing its damaged panels. There was, it is true, evidence that in answer to the question "Was this load carried in your course of trade as a panel beater?" the respondent had answered "Yes". On the other hand, there was evidence, accepted by the magistrate, that the respondent had picked up the car by way of doing a favour and because he just wanted to help the owner out, and there was evidence that the respondent had said, after referring to the owner, Trease, "If it had been anyone else **[6]** I certainly would not have been involved. I have operated tow trucks and I know the requirements." In addition, there is the passage which may, as I have said, be salvaged from the respondent's affidavit, the passage according to which Pilkington said that there was no suggestion that he, the respondent, had removed a vehicle from the scene of an accident in the past.

From the appellant's point of view, it is perhaps unfortunate that the respondent was not asked why he had this vehicle trailer and what use he made of it and whether he did not use it in the course of his business as a panel beater but he apparently went through the witness box without being vexed by that question. In the result, I am not satisfied that the respondent should have been convicted and I dismiss the appeal, with costs, and affirm the order of the Magistrates' Court.
