17/90

SUPREME COURT OF VICTORIA

WELSH v ENDERS

Southwell J

5 April 1990 — (1990) 12 MVR 442

MOTOR TRAFFIC – INSECURE LOAD – LOAD DISLODGED WHILST VEHICLE BEING DRIVEN – WHETHER BREACH OF REGULATION – WHETHER DEFENCE OF NEW ACT INTERVENING AVAILABLE: *ROAD SAFETY (TRAFFIC) REGULATIONS* 1988, R1606.

Reg 1606 of the *Road Safety (Traffic) Regulations* 1988 provides, so far as relevant:

> "A person must not drive ... a motor vehicle to which is attached a trailer ... unless any load ... of that trailer ... is secured ... in a manner that will prevent ... the load ... from becoming dislodged or falling from the vehicle."

Whilst E. was driving his prime mover with low loader attached, the load became dislodged as the vehicle was driving through a roundabout. E. was subsequently charged with a breach of Reg. 1606. The information was dismissed. Upon order nisi to review—

HELD: Order absolute. Remitted for imposition of an appropriate penalty.
Once there is proof that a load has become dislodged whilst a person is driving a loaded vehicle, that person is in breach of Reg 1606. However, a new act intervening may provide a defence to the charge, but not in the present case as there was nothing extraordinary which should have prevented the free passage of E.'s vehicle with a properly secured load.
***Foley v Moloney* (1987) 6 MVR 22; MC 63/1987; and**
***Stillmann v Falla* [1977] VicRp 25; (1977) VR 212, applied.**

SOUTHWELL J: [1] This is the return of an Order Nisi to Review a decision of the Magistrates' Court at Moonee Ponds on 9 May 1989, whereby an information brought against the defendant was dismissed. The information was laid under Regulation 1606 of the *Road Safety (Traffic) Regulations* 1988 and was framed as follows:

> "On the 11th day of July 1988 at Keilor-Melton Road, Melton, did drive a motor vehicle to which was attached a trailer without the load on the trailer being secured in a manner that would have prevented the load or any part of it from becoming dislodged or falling from the vehicle."

Regulation 1606 provides:

> "A person must not drive or use, or cause to be driven or used a motor vehicle or a motor vehicle to which is attached a trailer or another vehicle unless any load or any ancillary equipment of that vehicle, trailer or other vehicle is secured—
> (a) by means appropriate to the nature of the load or equipment; and
>
> (b) in a manner that will prevent, or is likely to prevent the load or equipment from—
> (i) hanging or projecting from the vehicle in a manner likely—
> (A) to cause injury or damage to a person or property; or
> (B) to cause a hazard to other road users:
> or
> (ii) becoming dislodged or falling from the vehicle."

[2] For the purposes of the present case, the gravamen of the allegation was that the defendant drove a motor vehicle to which was attached a low loader upon which was loaded a section of a house and that in the course of proceeding through a roundabout on the Keilor-Melton Road on the day referred to, the house section became dislodged.

At the commencement of this hearing I gave leave to the defendant to rely upon an affidavit filed outside the limits of the Order Nisi. A perusal of the affidavit of the informant and of the

defendant shows some significant clashes of evidence as to what occurred in the court below, but for these purposes of course, those clashes must be resolved by acceptance of the defendant's version.

In substance then the facts were that the defendant was driving the prime mover with a low loader attached; that he endeavoured to drive through the roundabout to which I have referred and of which photographs have been tendered in evidence, which show that the carriageway around that roundabout is wide and certainly can carry two normal lanes of traffic proceeding in the same direction, and that at the centre of the roundabout and on the left hand side, or outside, of the carriage, there are sloping concrete kerbs but it is clear that they would not, of themselves, create such an obstacle as would normally be created by a right angled kerb.

The defendant's description, taken from his affidavit, was:

> "I told the court that I had an accident and that the trailer carrying the house section had run on to the centre of the roundabout; that the roundabout was newly constructed with stacks of soil and rubble and these had caused the load to crash down on one side."

[3] There was some issue raised as to whether the house section had in fact fallen right off the low loader or whether it had been placed there by a jacking procedure after it had "crashed down on one side". There was also evidence from the defendant that the house section had been chained and that it had been observed on the morning of the accident by a Road Traffic Authority inspector and by a member of the police force.

The Magistrate, in dismissing the information, could scarcely have been more cryptic in his reasons. They were:

> "The defendant's story is feasible but it could have happened in the way the defendant described it. He must have the benefit of the doubt."

An Order Nisi to Review that decision was granted on 8 June 1989 by Master Evans upon the ground:

> A. No reasonable Magistrate properly directing himself as to the applicable law could have concluded upon the evidence before the court that he could entertain a reasonable doubt as to the guilt of the defendant.
>
> B. The learned Magistrate failed to give sufficient reasons for his decision to enable the plaintiff to exercise his right of appeal from the decision.

Only the first ground was argued before me. For the plaintiff, Mr Bassett of Counsel, submitted that the material put forward on behalf of the defendant did not disclose any defence; that Regulation 1606 created an offence of strict liability and that as long as the dislodging of the load happens as a consequence of the driving, then the charge has been established. There can be no doubt that the load was dislodged, even on the defendant's description of what occurred, within the meaning of Regulation 1606 even if the house section did not **[4]** actually fall to the roadway. If authority for that proposition is required, it may be found in the case of *Jinks v Edwards*, unreported, O'Bryan J 25 June 1980.

Mr Bassett relied principally on a decision of Murphy J in *Foley v Moloney* (1987) 6 MVR 22 where His Honour was called upon to consider whether an offence had been committed in somewhat similar circumstances. The regulation then before His Honour was Regulation 711(b)(2) of the *Motor Car Regulations* 1984 which in part provided that any load shall be secured in such a manner as prevents or is likely to prevent such load or any part thereof becoming dislodged. A failure to comply with Regulation 711 constituted an offence under Regulation 1107(b). It will be seen that the terminology of Regulation 711(b)(2) is, to all intents and purposes, identical to that of Regulation 1606.

Mr Justice Murphy held in that case that once there was proof of the load becoming dislodged while the defendant was driving it, then the defendant was guilty of an offence.
His Honour said:

> "The regulation is framed so as to impose a positive duty upon a person carrying a load on a motor vehicle to secure it by a particular means according to its nature and in a particular manner."

His Honour held that the regulation clearly imposed a continuing duty, not merely a duty to secure the load before the commencement of the journey, let alone merely take reasonable care to secure the load, but that the regulation imposed a continuing duty and His Honour went on a little later to say:

> **[5]** "If a load or part of a load being carried does become dislodged or falls from the vehicle, then, *ipso facto*, it has not been secured in "such a manner as prevents" it from falling and a breach of the duty is demonstrated."

His Honour went on to explain what is meant by the further words of the regulation: "or is likely to prevent such load", by saying:

> "If a vehicle is stopped when carrying a load, which is found not to be secured as likely to prevent the load or part of it from becoming dislodged or falling from it, then again, a breach again is demonstrated."

For the defendant, Mr Herbert submitted that it was open to the Magistrate to make the finding that he did and that the defendant's version which the Magistrate was entitled to accept in effect deposed to an accident and could not be said to be an incident which occurs in the normal driving of the vehicle and it was said this collision with the roundabout could have been held by the Magistrate to have caused the load to crash down on one side. He went on to submit that there is some uncertainty about the use of the words 'in a manner' and furthermore that the regulation really did no more than impose an obligation upon the driver to be, in Mr Herbert's words, "most careful" in the manner in which he loaded the vehicle and secured the load.

I am unable to accept Mr Herbert's submissions as correct. There is, in my view, no evidence here which would suggest a collision or accident which might be regarded as some *novus actus interveniens*. The fact that some *novus actus interveniens* might provide a defence to such an allegation as is here made, is conceded by Fullagar J in *Stillman v Falla* [1977] VicRp 25; (1977) VR 212 at p217. **[6]** There His Honour referred to such incidents as "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." It is not necessary to decide in the present case whether some violent collision with some object by the side of the road or with another vehicle, might constitute such a *novus actus interveniens* as His Honour might there have had in mind.

In my view, the so-called accident involving the roundabout could not by any stretch of the meaning of those words, constitute such a *novus actus interveniens*. The defendant chose to navigate along that road and the photographs, in my view, show clearly that there was nothing extraordinary which should have prevented the free passage of a prime mover hauling a low loader with a properly secured load.

It is difficult to understand precisely what it was that the Magistrate had in mind. Whether he accepted the so-called accident constituted a *novus actus interveniens* or whether he accepted that the load had on that morning been chained and apparently chained satisfactorily and this constituted a defence, is not at all clear and although it is not necessary for me to consider the second ground of the Order Nisi to Review, it must be said that if a Magistrate does not make clear findings of fact in such a case, then difficulties will ensue in trying to understand just what findings were made.

In my view, on the evidence presented, the only course open to the Magistrate was to record a conviction. **[7]** For those reasons, the order nisi is made absolute with costs. The order below is set aside. In its place, the defendant is convicted and the matter is remitted to the Magistrates' Court for an appropriate penalty to be imposed according to law.

APPEARANCES: For the applicant Welsh: Mr E Bassett, counsel. MA Pollard, solicitor. For the respondent Enders: Mr G Herbert, counsel. Legal Aid Commission Victoria.
