31/69

SUPREME COURT OF VICTORIA

WARREN v HASTINGS TRANSPORT PTY LTD

Little J

3 November 1969

PRACTICE AND PROCEDURE – INFORMATION ALLEGED OFFENCE TOOK PLACE ON 6 FEBRUARY 1968 – CHARGE FOUND PROVED – UPON APPEAL THERE WAS NO EVIDENCE OF AN OFFENCE ON 6 FEBRUARY – INFORMATION AMENDED BY JUDGE TO "ON OR ABOUT THE 2ND FEBRUARY" – MATTER REMITTED TO THE MAGISTRATE FOR RE-HEARING.

LITTLE J: In orders to review numbered 6398 and 6399 respectively, in each of which the informant was Robert John Warren and the defendant was Hastings Transport Pty Ltd, two informations were laid by Warren against Hastings Transport Pty Ltd, alleging offences under s37 H(2) of the *Motor Car Act* 1958.

Section 37H(2) provides:

> "Any person who causes or permits any other person to drive any motor car in Victoria otherwise than in accordance with the requirements of this Division shall be guilty of an offence against this Division."

The substance of the allegation made by the information was that the defendant company had on the 6 February 1968, caused or permitted one Brace to drive a motor car used for the carriage of goods, for hire or for reward or in the course of trading, otherwise than in accordance with the requirements, in one case of s37B(b) and in the other case s37B(a) of the Act.

Section 37B provides,

> "a person shall not drive a motor car at any time if, immediately prior to that time
>
> (a) ... ;
>
> (b) he has driven a motor car for continuous periods amounting in the aggregate to more than twelve hours in the period of twenty four hours immediately before that time;
>
> (c) he has not had at least ten consecutive hours for rest in the period of twenty-four hours immediately preceding that time."

On both of those informations the defendant was convicted and fined.

The Order nisi to review was obtained in each case on the ground, if, I may summarise it, that there was no evidence on which the Stipendiary Magistrate could properly find that the defendant had caused or permitted the contravention in question by Brace.

In order to establish the offence alleged against the Company, it was necessary for the informant to prove a contravention by Brace of the relevant statutory requirements. The evidence and the only evidence relied upon by the informant for that purpose in the Court of Petty Sessions consisted of a copy of entries in the log-book kept by Brace. Those entries are made admissible as against the defendant company by virtue of the provisions of s37F(2) of the Act. That evidence showed offences by Brace between the 1st and the 3rd February. There was no evidence of an offence by Brace on the 6 February or thereafter. The informations against the company, however, alleged a permission by it on the 6 February, and plainly neither information, as so framed, could be supported by evidence of an offence committed by Brace prior to that date. In the absence of an amendment being made to the date of the permission alleged, the informations accordingly should have been dismissed in the Court of Petty Sessions.

It would appear, however, that in that Court neither the Prosecutor nor the solicitor for the defendant adverted to this aspect, and accordingly the attention of the Stipendiary Magistrate was not directed thereto. Unfortunately, also, it was not brought to my attention during argument on 24 September 1969. Having noticed it for myself, however, in the course of considering these matters, I have had those two orders nisi again listed for further argument this day. In the result, Mr Charles has this morning applied to me for leave to amend the information by deleting the date, namely 6 February assigned therein as the date of the alleged offence and inserting in lieu thereof the words, "on or about the second February".

The problem at the outset is whether I should grant that leave, and this, I think, is a matter for the exercise of the court's discretion. The informations are not artistically drawn, but the case is not one in which the informations fail to disclose an offence and the amendment sought would not present the defendant with a charge essentially different in character from that on which it appeared and was legally represented in the Court below. I think, having regard to the conduct of the case in the Court of Petty Sessions, that there is no real room for doubt that if an application for an amendment as now made had been made to the Stipendiary Magistrate, it would have been granted.

That does not necessarily, I think, conclude the matter, although it is an important consideration. In the meantime, of course, the statutory period prescribed by the *Justices Act*, within which the informant could issue a new information, has expired, and it would be not open, accordingly, for the informant, at this point of time to institute fresh proceedings.

As to that, however, it is proper to bear in mind that the hearing in the Court of Petty Sessions took place on the 6 August 1968, and if the order nisi had been promptly obtained it can reasonably be assumed, I think, that it could have been determined in this court within the statutory limitation period of twelve months. The application for the order nisi was not made until the 3 September 1968, and it was then, at the request of the solicitor for the defendant, adjourned pending decision of the Full Court and an application to the High Court for special leave in *Chappell's case* [1969] VicRp 48; [1969] VR 376. It was adjourned to a date to be fixed, and the orders nisi were finally granted on the 15 April 1969. I think, in all these circumstances, that no injustice would be done to the defendant if I were to grant leave to amend the information as now sought, and I accordingly do give leave to the informant to amend the date in each information by deleting the date "the 6th" and inserting in lieu thereof the words "on or about the 2nd February".

That, however, leaves another aspect of matter to be considered, and I have listened to argument from counsel as to the appropriate course for me to take. I think, in the light of the discussion that has ensued between counsel and me in relation to that matter, it is sufficient for me to say that my conclusion is that the proper course for this court to take is to make the order nisi absolute in each case and remit the information as amended for re-hearing. I think that is my proper course for this reason: there is no finding one way or the other by the Stipendiary Magistrate as to the offence now alleged, of permitting on or about the 2 February 1968, and that is so simply because he was not asked to determine, and, accordingly, did not direct his mind to any such question. This court cannot know what findings of fact the magistrate would have made in relation to the offence as now alleged in the amended information, and it is not open to this court to make any such findings on the evidence adduced before the magistrate. That function is the prerogative of the magistrate and is not one to be usurped by this court.

In the result, accordingly, the order which I think should be made, is that the order nisi is made absolute in each case; the information is amended in each case; the order of the Court of Petty Sessions is set aside, and the information in each case, as amended, is remitted to the Court of Petty Sessions at Stawell for re-hearing. The informant to pay the defendant's taxed costs in Order to review 6398, including reserved costs. There will be no order as to costs in order to review 6399.
