

12/89

SUPREME COURT OF VICTORIA

MICHELL v FARRUGIA

Murphy J

3 November 1988 — (1988) 8 MVR 158

MOTOR TRAFFIC – OVERLOADING – GROSS MASS WEIGHED AT WEIGHBRIDGE – WHETHER WEIGHBRIDGE MAY BE PRESUMED TO BE ACCURATE – WEIGHBRIDGE OPERATOR TO BE AUTHORIZED IN WRITING – DEEMING PROVISIONS WHERE WRITTEN AUTHORITY – EFFECT WHERE SUCH AUTHORITY NOT PRODUCED: TRANSPORT ACT 1983, SS216(1), 217(4); WEIGHTS AND MEASURES REGULATIONS 1984, R151.

1. Where a measurement is made by an instrument which, as a matter of common knowledge or experience, is expected to be accurate, a court may presume, in the absence of evidence to the contrary, that the instrument and measurement are accurate. However, this presumption does not apply to a public or private weighbridge as such is not an instrument with which persons generally are acquainted.

Mitchell v WS Kimpton and Sons Pty Ltd [1971] VicRp 70; (1971) VR 583, referred to.

2. Where an officer of the Road Traffic Authority is authorized in writing to operate weighbridges, the provisions of s217(4) of the *Transport Act* 1983 may be called in aid of proof that at any relevant time a weighbridge was in proper working order and properly operated. In a prosecution for overloading, where an officer failed to produce a written authority to the court, it was open to the Magistrate not be satisfied as to the accuracy of the weighbridge and to dismiss the information.

MURPHY J: [1] This was the return of an order nisi to review the order of the Magistrates' Court at Moonee Ponds on 20 June 1988, dismissing an information issued by the informant, Peter Michell, against the defendant Joseph Farrugia, alleging an offence against s33(1A)(j)(iii) of the *Motor Car Act* 1958, in that he was, on 12 February 1988, at Westgate Freeway, Spotswood, the driver of a conforming motor car which was used on a [2] highway, the gross mass carried on a tandem axle group of the motor car, such axle group fitted with not less than eight tyres, exceeding 15 tons.

The applicant before me, described in the papers as the plaintiff, was granted an order nisi on 19 July 1988 by Master Evans, calling upon the respondent (described in the papers as defendant) to show cause why the magistrate's order should not be reviewed on the grounds that:

"1. The learned magistrate erred in failing to accept the presumption of the working accuracy of the weighbridge.

2. The learned magistrate misdirected himself in that he should have accepted on the evidence before him that

(a) the weighbridge was in working order; and

(b) the weighbridge was properly operated by the informant;

(c) in relation to the weighbridge, all requirements for the proper operation of it were complied with and such facts were evidence of the facts pursuant to the provisions of s217(4) of the *Transport Act* 1983 (as amended)".

The application is supported by affidavits sworn 14 July 1988, and 19 July 1988 by the informant, Peter Michell, who describes himself as a regulation enforcement officer of the Road Traffic Authority. He had given evidence in the Magistrates' Court that on 12 February 1988 he interviewed the respondent who was driving a conforming five axle articulated vehicle. He said that the vehicle was [3] loaded with scrap metal and was on a journey from Footscray to Laverton. He said "I directed the driver to take his vehicle and load to the SEC weighbridge in McDonald Road, Brooklyn, where I weighed the vehicle and load." He said that the gross mass of the tandem axles of the trailer exceeded that permitted by the *Motor Car Act*. He said that he was not a licensed weighman, but he tendered, without objection by counsel who appeared for the defendant in the Magistrates' Court, a copy letter signed by the Superintendent of Weights and Measures exempting

RTA officers when acting in the course of their official duties, from being licensed as weighmen. Regulation 151 sub-paragraph (c) of the *Weights and Measures Regulations* 1984 prohibits a person from acting as a weighman at a public weighbridge unless licensed as such. But by proviso (e) to that regulation, the superintendent may approve of the exemption from being licensed as weighmen of officers or employees of any Government Department when acting in the course of their official duties.

In the court below, counsel for the defendant submitted that there was no evidence before the court to indicate the weighing procedures or to indicate whether or not the weighbridge was accurate. The prosecutor who was also the informant obtained leave to reopen his case and stated:

"Before the vehicle and load were placed on the platform, I [4] checked and balanced the beam scale. I then observed at the end of the beam, the circular lead seal, which indicated when the weighbridge had been last tested by weights and measures. I do not have in my possession any certificate relating to the accuracy of the weighbridge; I adhered to the correct procedure for the use of the weighing device, and in my opinion, it is a scientific instrument."

The magistrate dismissed the information, saying "No statutory provisions were put forward to show the weighbridge to be accurate". Mr Radford of counsel appeared before me to move the order absolute, and there was no appearance on behalf of the defendant, who, the material reveals, was not personally served with the papers, but leave to serve him by substituted service was obtained and carried into effect in accordance with the orders made in that regard.

Reliance before me was placed upon the fact that the weighbridge, it was said, was a scientific instrument, the accuracy of which should be presumed by the court, and should have been presumed by the magistrate. Reference was made to *Taylor on Evidence*, *Cross on Evidence* in support of this submission, and I was referred to several cases, both in this court and in the South Australian Supreme Court, in which different types of instruments and measures have been said to be such that the court [5] would accept, in the absence of evidence to the contrary, them to be accurate.

In *Mitchell v WS Kimpton and Sons Pty Ltd* [1971] VicRp 70; (1971) VR 583, 585, the court held that a tape measure, that had been used to measure distances, should be assumed to be accurate and the principle which was applied, was as I appreciate the decision, that where something is shown to be a "matter of common knowledge or experience" then a presumption will arise and the tape in that case being the subject of the decision, was assumed to be accurate. Reference was made to decisions of Travers J in South Australia, in *Barker v Fauser* (1962) SASR 176, 179, and *Cheattle v Considine* (1965) SASR 281 where his Honour applied what he referred to as a rule of circumstantial evidence in holding that a weighbridge there referred to in those cases was accurate.

Other decisions of this court were mentioned, such as *Porter v Kolodziej* [1962] VicRp 11; (1962) VR 75, 78-9, relating to the breathalyser and *Thompson v Kovacs* [1959] VicRp 40; (1959) VR 229, 233 relating to a speedometer – in which perhaps the distinction can be seen between accepting that an instrument is, as a matter of common knowledge or experience, to be accepted as accurate and other instruments, the accuracy of which nevertheless do fall necessarily to be the subject of evidence. [6] The *Transport Act* 1983 empowers various officers to enforce the provisions of the Act, and I was referred, as the order nisi itself refers, to s217, and in particular subs4. During the course of the debate before me this morning, I indicated to Mr Radford that in my view, s217(4) was of no assistance to him because the Section related to the powers of an officer of the Road Traffic Authority "Thereunto authorised in writing by that authority", and it was not shown in the present case that the informant, although a regulation enforcement officer of the Road Traffic Authority, was authorised in writing pursuant to s217.

Sub-s4 of that section however, reads "Evidence by an officer or other person authorized to weigh any motor vehicle or trailer or any motor vehicle and trailer pursuant to the provisions of sub-s1(a) that the weighbridge or the device prescribed under the *Road Safety Act* 1986 used by him on any occasion was in proper working order and properly operated by him; and (b) that in relation to the weighbridge or device all requirements of the proper operation of the weighbridge or device were complied with – shall be *prima facie* evidence of those facts".

This sub-section, which is an enabling sub-section for the proof of offences against the [7] Act, does not assist the informant in the present case. But it does go to demonstrate that the accuracy of a weighbridge, the fact that it is in proper working order and that it was properly operated by the officer in question, are matters to which the court should properly give its attention and may be assisted in arriving at a decision if the informant, in any particular case, is able to rely upon s217(4).

Mr Radford was accordingly prepared to concede in the present case, that s217(4) did not apply in the circumstances set out in the evidence before me. He was driven to rely on s216(1) sub-paragraphs (c) and (f) of the *Transport Act*, which provisions are not assisted by any evidentiary enabling sub-section such as 217(4). The only evidence before the court below, with relation to what the informant did when weighing the vehicle in question, was that he "checked and balanced the beam scale" whatever that means, and he "adhered to the correct procedure for the use of the weighing device".

I pointed out to Mr Radford during the course of his submissions to me, that there was no evidence before the magistrate to the effect that the weighbridge in question was a public weighbridge. In fact what evidence there was before the court, was to the effect that it was not a public weighbridge. Regulation 151 of the *Weights and Measures Regulations* 1984 did not apply. There is no evidence given of the weighbridge itself; [8] it is simply called "the SEC weighbridge in McDonald Road, Brooklyn". There is no evidence as to whether it is ever used, how often it is used, what its purpose is, when it was last tested, whether it was in working order, how it operates – none of these matters are dealt with in the evidence and they are matters that are left up in the air. The provisions of the Act dealing with public weighbridges and with regard to the entitlement of individuals to operate them, and the various provisions of the *Weights and Measures Regulations* 1984, which are contained in Statutory Rule 160, demonstrate rather persuasively the care that is to be taken in relation to the use and registration of public weighbridges and I would assume that those regulations are designed to ensure that mistakes are not made by persons who work the weighbridges, and that errors do not occur in assessing the weight of any load that is being weighed.

In my view, the operation of a weighbridge as such is not yet (if it ever will be) a matter of common knowledge or experience so as to give rise to the presumption that any weighbridge, wherever situated, whether public or private, may be assumed to be accurate in the record that it gives of the weight of any vehicle that may be placed upon it. It is not an instrument with which persons generally are acquainted. Its method of operation is not known to me. [9] What the deponent in the material in the court below meant by saying that he checked and balanced the beam scale, is certainly unknown to me, and it may, I think, be assumed perhaps, also unknown to the magistrate.

There is nothing in the material that I have seen which would support the view that the weighbridge was either used generally by the SEC or by anybody else, for that matter, nor as to how it operated, nor as to any matters dealing with its registration, accuracy or working order as such. I have mentioned that the only statutory provision dealing with the proof of a weighbridge's working order and the like is contained in s217(4) of the *Transport Act* 1983 and that these provisions do not apply in connection with the evidence given by the informant in this case, he not being a person authorised in writing by the Road Traffic Authority to exercise the powers given under s216 or any other of the provisions of the *Transport Act* or any other Act relating to transport and the power to weigh any motor vehicle trailer or motor vehicle and trailer, and any load carried thereon.

In my view, the order of the magistrate dismissing the information was an order that he was, on the evidence, entitled to make. He certainly was not required to be satisfied beyond reasonable doubt of the commission of the alleged offence, in the absence of evidence which satisfied him of the accuracy [10] of the weights reflected on this weighbridge simply referred to as the SEC weighbridge on McDonald Road, Brooklyn. It would, of course, have been a simple matter perhaps for the informant either to have obtained authority in writing under section 217, or to call evidence as to the accuracy of the weighbridge, if such evidence could be obtained, but this was not done. In the circumstances, the order nisi shall stand dismissed.