26/02; [2002] VSC 342

SUPREME COURT OF VICTORIA

MOUNSEY v LAFAYETTE

Nettle J

20 August, 6 September 2002 — (2002) 37 MVR 256

TRANSPORT – STATUTORY OFFENCE – FAILING TO PRODUCE A VALID TICKET UPON REQUEST – REASON FOR FAILING TO PRODUCE TICKET – DEFENDANT SAID HE HAD NO CHANGE – ONLY HAD NOTES IN HIS POSSESSION AND INTENDED TO PURCHASE TICKET AT END OF JOURNEY – CHARGE LAID – DISMISSED BY MAGISTRATE – DEFENCE UPHELD BY MAGISTRATE – TEST OF 'ALL REASONABLE STEPS' – WHETHER MAGISTRATE IN ERROR – WHETHER DEFENCES OF HONEST AND REASONABLE MISTAKE AND DUE DILIGENCE AVAILABLE TO DEFENDANT – WHETHER GAZETTAL OF COIN ONLY MACHINES REQUIRED – WHETHER CONSTITUTION INVALIDATES THE USE OF COIN OPERATED MACHINES: *TRANSPORT ACT* 1983, S221 (1A), (2) and (4).

L. whilst travelling on a tram, failed to produce a valid ticket upon request. L. said that his reason for failure to produce the ticket was that he had no change (notes only) and that he intended to purchase a ticket at the end of his journey. On the tram at the time in working order were "coin only machines". L. was charged with an offence under s221(4) of the *Transport Act* 1983 ('Act'). When the charge came on for hearing, L. gave evidence that it was his intention to purchase a ticket with legal tender at the conclusion of his journey. He had notes to buy such a ticket and he gave effect to his intention. In dismissing the charge, the magistrate said that no evidence had been led as to the availability for L. to pre-purchase a ticket, that he had no reasonable opportunity to purchase a ticket on the tram because he had no coins and that no gazette had been tendered to say that coins were necessary. Upon appeal—

HELD: The magistrate was in error in holding that L.'s intention to purchase a ticket was not enough, without more, to satisfy the requirements of s221(2) of the Act.

1. Section 221(2) of the Act lays down three things which must occur before a ticketless journey will be authorised and until and unless each is shown to have occurred, it treats the ticketless journey as unwarranted. This section takes the form of an exemption and accordingly, L. bore the onus of proving on the balance of probabilities that the exemption applied. Therefore, the magistrate was in error in holding that it was incumbent upon the prosecution to adduce evidence of steps which L. could reasonably have taken before the journey to buy a ticket.

2. The question whether L. took all reasonable steps to purchase a ticket was essentially a question of fact. If there were steps which could have been taken before the commencement of the journey and if, having regard to the expense and difficulty, it was not unreasonable to undertake them, s221(2)(a) would not be satisfied unless all those steps were taken. The test of 'all reasonable steps' may perhaps require an intending traveller to walk to the shop at the end of the street where tickets are commonly sold. On the evidence there was nothing to show that L. had taken any steps to buy a ticket before the journey and nothing to show why there were no steps which could reasonably have been taken. Also, there was nothing to show that L. reasonably believed that he had the right change. L.'s intention to buy a ticket at the end of the journey, without more, was not capable of establishing on the balance of probabilities that L. had taken all steps to secure the purchase of a ticket which he ought reasonably to have taken in advance of the journey.

3. The purpose of the Act is to motivate people to ensure that they buy a ticket. There is no room in s221(4) of the Act for a defence of honest and reasonable mistake or a defence of due diligence.

4. The existence on board of a properly functioning accessible coin operated machine constitutes a reasonable opportunity for the traveller to purchase a ticket on board. The question of reasonable opportunity to purchase is not to be decided by reference to the denominations of currency which a traveller carries. It cannot be a defence that the traveller only has notes in his possession.

5. It was not necessary that a condition mandating the use of coin only machines be gazetted under s221(1A). The section is directed to the conditions of eligibility and carriage upon which tickets may be issued, not means of fare collection. Further, the opportunity to purchase a ticket on the tram would not be made any more or less reasonable by the gazettal of a condition under s221(1A) of the Act. Finally, there was no constitutional problem as suggested by the magistrate and no inconsistency between the State and Commonwealth statutory provisions.

NETTLE J:

1. This is an appeal from a final order of the Magistrates' Court at Melbourne, made on 5 March 2002, whereby the respondent, Lev Lafayette, was acquitted of a charge of failing to produce a valid ticket on request, contrary to s221(4) of the *Transport Act* 1983.

2. So far as is relevant for the purposes of this appeal, s221 of the *Transport Act* provides that:

> "(1) In this section—
> (a) 'carriage' means any passenger vehicle operated by or on behalf of a passenger transport company or bus company;
> (b) 'ticket', in relation to a journey or land or premises the property of a passenger transport company, means a ticket, pass, symbol or other thing issued to a person entitling that person to make that journey or be on that land or those premises; and
> (c) 'authorized person' means a person who is authorised in writing by the Secretary for the purposes of this section.
>
> (1A) A passenger transport company or bus company may—
> (a) with the approval of the Secretary or the Director, determine conditions to which a ticket of a specified class issued by or on behalf of it is to be subject; and
> (b) publish those conditions in the Government Gazette. ...
>
> (2) A person may make a journey in a carriage, or be on land or premises for entry to which a ticket is required, without a ticket if—
> (a) prior to commencing the journey or entering that land or those premises he takes all reasonable steps to purchase a ticket; and
> (b) while making the journey or being on that land or those premises he has no reasonable opportunity to purchase a ticket; and
> (c) on completion of the journey or on leaving that land or those premises he takes all reasonable steps to purchase a ticket.
>
> (3) Subject to sub-section (2), a person who makes a journey in a carriage, or is on land or premises for entry to which a ticket is required, without having in his possession a ticket that is valid for that journey or entry is guilty of an offence.
> Penalty: 5 penalty units
>
> (4) A person who makes a journey in a carriage, or is on land or premises for entry to which a ticket is required, and, not being entitled to make that journey or entry without a ticket, fails, upon request being made by a member of the police force or an authorized person, to produce a ticket that is valid for the journey or entry is guilty of an offence.
> Penalty: 5 penalty units. ..."

THE PROCEEDINGS BEFORE THE MAGISTRATE

3. Before the Magistrate evidence was given by an authorised officer, Solomon Kebede, and a second authorised officer, Beverley Joy Synan, and by the respondent, Lafayette.

4. Kebede's evidence was in substance that he was an authorised officer and on 23 October 2000, he was engaged in checking tickets with the Revenue Protection Officer, Bev Synan, on a tram going from East Brunswick to the city. In the course of those duties he asked a passenger, Lafayette, to produce a valid ticket and Lafayette could not do so. When asked for a reason for failure to produce a ticket, Lafayette said that he had no change. At that time there were coin only machines in working order on board the tram and the words "coin only" were printed on the outside of the tram.

5. Synan's evidence was in substance that she was an authorised officer employed pursuant to the *Transport Act* by Yarra Trams, stationed at the Kew Tram Depot and on 23 October 2000, she was performing revenue protection duties on the East Brunswick to Melbourne trams in company with Officer Solomon Kebede. She said that they were on Tram 2117 at the corner of Nicholson Street and Johnson Street, Carlton, when Officer Kebede approached a male person and asked to check his ticket. The male person was unable to produce a valid ticket for the journey and when asked for an excuse he replied that he had no change. Officer Kebede then informed that person that he was going to report the matter, and it was ascertained that the person's name was Lev Lafayette. Synan also said that there were coin only machines on the tram in working order and that the words "coin only machines" were printed on the outside of the tram.

6. Lafayette's evidence was not inconsistent with Kebede's and Synan's. Lafayette said that he got onto the tram and then realised he had no change. He said, however, that it was his intention to purchase an All Day Ticket with legal tender at Parliament Station at the conclusion of his journey. He had notes to buy such a ticket, and he gave effect to his intention.

7. The Magistrate did not deliver any reasons for judgment as such. But he did express some views in response to submissions made by the authorised officer and I think that those views may be taken as expressing his Worship's process of reasoning. In the course of the authorised officer's final submissions, the following exchange appears:

> "MR GOSLAND: Yes. I would be submitting, sir, that therefore that the defendant – the *Transport Act* sets out three conditions upon which a person may travel without having a valid ticket.
> HIS WORSHIP: To A, B and C.
> MR GOSLAND: Yes.
> HIS WORSHIP: And they are all ands.
> MR GOSLAND: Yes, sir.
> HIS WORSHIP: But there is no – you haven't put in the gazette.
> MR GOSLAND: Sir, I would be submitting, if I can, the defendant getting on board the vehicle is immediately making a quantum leap to step B. He is not making any attempts to fulfil the conditions under step A.
> HIS WORSHIP: Prior to commencing the journey or entering that land or those premises he takes all reasonable steps to purchase a ticket.
> MR GOSLAND: Yes, sir.
> HIS WORSHIP: Well, you have led no evidence there was any availability for him to purchase a ticket where he got on. So I am afraid for your point of view you have lost that point A. Point B, while making the journey or being on that land or those premises he has no reasonable opportunity to purchase a ticket, and he didn't because he had legal tender but not coins. But you have not tendered any gazette to say that coins were necessary, and even if they were there may well be a constitutional point there, which I am not going to go into and don't feel I have to for the purposes of this case. You might be well advised to think on future cases.
> MR GOSLAND: Yes, sir.
> HIS WORSHIP: And C, on completion of the journey or on leaving that land or those premises he takes all reasonable steps to purchase a ticket. He wasn't given that right to do that. But I accept, as I have already found, that that is what he intended to do. In all the circumstances I dismiss the action.
> MR GOSLAND: As your Worship pleases.
> HIS WORSHIP: Do you seek costs? I don't suppose you have lost any costs. It would be an interesting point if somebody raises that constitutional issue, Mr Prosecutor, as to the inter-relationship between the Federal Act and the Reserve Banking Act.
> MR GOSLAND: It will be the subject of many discussions from this point, sir.
> HIS WORSHIP: Yes. And also you say that there is no gazetted condition.
> MR GOSLAND: No, sir, not specifically in relation to those machines, no sir.
> HIS WORSHIP: Yes, very well. The matter is dismissed."

THE QUESTIONS FOR APPEAL

8. By order of a Master made on 3 April 2002 it was directed that the following questions of law are to be decided on this appeal, namely:

> "(a) Did the Magistrate err in holding that pursuant to s221(2) of the *Transport Act* 1983 an intention to purchase a ticket at the conclusion of a journey constituted a defence to a charge under s221(3) [1]; and (b) is it open to a vendor of goods and services to require payment of legal tender in the form of coins only."

9. The appellant submits, and the respondent does not disagree, that in order properly to answer those questions it is necessary to decide the following:

> (a) first, whether the Magistrate erred in law in relying upon the provisions of s222(1A);
>
> (b) secondly, whether the Magistrate erred in law in misapplying s221(2) to find that the defendant could make a journey without a ticket;
>
> (c) thirdly, whether the Magistrate erred in law in holding that s221(2) constitutes a defence to a charge under s221(4);
>
> (d) fourthly, if s221(2) may provide a defence to a charge under s221(4), whether the Magistrate erred in law in finding that the defendant had discharged the onus of establishing the application

of s221(2)(b), on the basis that he was prepared to pay with notes where the machine provided accepted coins only;

(e) fifthly, did the Magistrate err in law by finding that notes, being legal tender, need not be accepted to avoid conflict with Commonwealth laws.

10. I intend to proceed on that basis, although with some modification. I will deal at the outset with whether s221(2) may afford a defence to a charge under s222(4), and then with the question of whether the Magistrate erred in the application of s221(2). I will put aside until later the question concerning s222(1A), and deal with that at the same time as the point about legal tender.

IS SECTION 221(2) A DEFENCE TO S221(4)?

11. Inasmuch as s221(2) provides for the circumstances in which a person may make a journey without a ticket, and s221(4) is directed to persons who make a journey in circumstances where they are not entitled to make the journey without a ticket, I consider that s221(2) can afford a defence to a charge under s221(4). That is to say, where s221(2) applies to a person making a journey, the person to whom it applies is entitled to make the journey without a ticket. Hence, when it comes to s221(4), it cannot be said of that person that he or she is not entitled to make that journey without a ticket.

12. So much might seem obvious. But it has been suggested there is a problem with that analysis, because of s221(2)(c). How can it be, it is asked, that the requirement imposed by s221(2)(c) (to take reasonable steps to purchase a ticket on completion of a journey) applies to an offence under s221(4) (of failing to produce a ticket during the journey)?

13. Mr Redlich QC, who appeared with Mr Burns for the appellant, submitted that the answer to that conundrum is to read the paragraphs of s221(2) as applying selectively, according to whether the charge under consideration is one under s221(3), of making a journey without a ticket, or one under s221(4), of failing to produce a ticket during the journey. In his submission, where a charge is brought under s221(3), a defence under s221(2) may not succeed unless the defendant satisfies each of the requirements of paragraphs (a), (b) and (c) of s221(2), but where a charge is brought under s221(4), a defendant need only satisfy the requirements of paragraphs (a) and (b) of s221(2) in order to succeed in a defence under s221(2).

14. Mr Redlich says that one gets to that conclusion by reading down the word "journey", where it appears in sub-s(4), and construing "journey" as meaning only so much of the journey as has been completed up to the point at which the traveller is asked to produce a ticket. In that way, it is said, so much of the journey is authorised to be undertaken without a ticket, provided paragraphs 221(2)(a) and (b) are at that point satisfied.

15. But another way of solving the conundrum is to view s221(2)(c) as intended to operate notwithstanding that it is concerned with events which may take place only after completion of a journey, and thus as requiring a defendant to satisfy the requirements of paragraphs (a), (b) and (c) regardless of whether the charge is brought under s221(3) or (4). I prefer that approach to the problem.

16. Mr Redlich submitted that so to hold would constitute a remarkable jurisprudential proposition (meaning, as I understood him, one which was jurisprudentially suspect), for in his submission it would amount to saying that a defendant who has already committed all of the elements of an offence under sub-s221(4) may acquire a defence by subsequent action. But I do not consider that one has to go to those lengths in order to conclude that s221(2)(c) was intended to apply. It is possible instead, and I think preferable, to read s221(2) as infusing ss221(3) and (4) with the meaning that a person commits an offence under those sections only if they do the things provided for in those sections and there is not established by way of defence all the things provided for in ss221(2)(a), (b) and (c).

17. That is not a remarkable way of construing s221. There is adequate authority to support the approach of reading a section that provides a defence to an offence as in a sense informing the meaning of the offence[2]. Just as importantly, it accords far better with the apparent intention of s221(2) of the Act to motivate the purchase of tickets. In terms, s221(2) lays down three things

which must occur before a ticketless journey will be authorised and until and unless each is shown to have occurred, it treats the ticketless journey as unwarranted. And, it is the third of those three things, the purchase of a ticket, or at least reasonable steps to purchase a ticket, which is almost certainly the most important. The section prohibits travel without a ticket and it imposes sanctions against those who contravene. But in the end it is directed to promoting the purchase of tickets. It is therefore difficult to conclude that a traveller was intended to be excused from an offence of failing to produce a ticket unless the traveller has taken reasonable steps after journey's end to purchase the ticket required.

18. It is true that the construction which I prefer means that it will not always be possible to know until after a journey is completed whether a defendant is liable to be charged with an offence under sub-s(3) or (4). There will be no such problem in the case of defendants who fail to satisfy s221(2)(a) or (b), because it will be known before journey's end that they have failed to comply with those requirements and thus are liable to be charged with an offence. But in the case of defendants who have satisfied the requirements of s221(2)(a) and (b), it will be necessary to wait until after completion of the journey to see whether they comply with s221(2)(c) (in which event they will not have committed an offence) or do not (in which event they will be liable to be charged).

19. That may be regarded as inconvenient, although when it comes to preventing fare evasion, it is less inconvenient than holding that a defendant need satisfy only s221(2)(a) and (b) in order to establish a defence. But, in any event, inconvenience borne of the need to wait and see is not unprecedented in the law of statutory defences. It is the inevitable consequence of a statutory *locus poenitentiae*[3].

20. Mr Redlich submitted that the conclusion which I prefer is also to be avoided because, he said, it would be unfair to expect of people who have been charged under sub-s221(4) that they then take steps to purchase a ticket in order to avoid a conviction. It should be enough, he submitted, that they meet the requirements of s221(a), (b). I do not consider that there is any unfairness in that. The starting point is that travellers are not to travel without a ticket and if they choose to do so they are to be liable to be convicted of an offence. If they seek to be excused from a failure to have a ticket, it is only to be expected that they will have to take steps to buy one as soon as the opportunity presents.

ERROR IN THE APPLICATION OF S221(2)

(a) Error in the Assignment of Burden of proof

21. It will be remembered that in the course of the Magistrate's exchange with counsel (in which I take the Magistrate to have expressed his reasons), his Worship made the following observations:

> "Well you have led no evidence that there was any availability to him [the defendant] to purchase a ticket where he got on. So I am afraid from your point of view you have lost point A (ie s221(2)(a)). Point B (ie s221(2)(b)), while making the journey or being on that land or those premises he has no reasonable opportunity to purchase a ticket, and he didn't because he had legal tender but not coins. But you have not tendered any gazette to say that coins were necessary...".

22. Insofar as those observations are directed to s221(2)(a), I think that they show that the Magistrate thought it was incumbent upon the prosecution to adduce evidence of steps which the defendant could reasonably have taken before the journey to buy a ticket, and that because the prosecution had not adduced evidence of that kind the proof of the offence alleged was to that extent deficient.

23. If so, it is plain that the Magistrate was in error. Section 221(2) takes the form of an exemption from the effects of ss221(3) and (4) and accordingly, as a matter of ordinary principle and because of s130 of the *Magistrates' Court Act* 1989, there rested upon the respondent the onus of proving on the balance of probabilities that the exemption applied[4].

24. It is perhaps not as clear that the Magistrate made a similar error in relation to s221(2)(b). The way in which he dealt with burden of proof under s221(2)(a) makes it likely that he made the same error when he dealt with s221(2)(b). But it is also possible to construe his Worship's observations on s221(2)(b) as meaning that, although the defendant bore the burden of establishing that he did not have reasonable opportunity to buy a ticket during the journey, the Magistrate was

satisfied that the defendant had done so (by proving that the only means of buying a ticket on the journey was a coin only machine and because the Magistrate considered that, in the absence of proof of gazettal of relevant conditions under s221(1A), a coin only machine could not be regarded as a reasonable opportunity of purchasing a ticket). I will come to those matters later in these reasons for judgment.

(b) Error of Law under s221(2)(a)

25. The question of whether a defendant has taken all reasonable steps to purchase a ticket is essentially a question of fact. Nevertheless, in this appeal the question is whether the Magistrate made an error of law in deciding that question of fact.

26. What I have said about the burden of proof is probably enough to dispose of the question. It has, however, been argued by Ms Batrouney SC, who appears with Ms Schoff for the respondent, that I would be wrong to conclude that the Magistrate misconstrued the burden of proof on s221(2)(a). Moreover, both parties have made detailed submissions as to what it is that must be shown by way of reasonable steps to attract the operation of s221(2)(a). It is therefore appropriate that I say something more about the problem.

27. In *S v Crimes Compensation Tribunal*[5], Phillips JA laid down and developed three propositions and the order in which they may best be employed to ascertain whether the handling of facts by a fact finding tribunal amounts to error of law. They are that: first, the proper meaning, as a matter of construction, of the relevant statutory provision is a question of law; secondly, the question of whether the particular circumstances of the case fall within the relevant statutory description is essentially a question of fact; and, thirdly, if in determining whether the particular circumstances fall within the relevant statutory description, the fact finding tribunal arrives at a conclusion which is simply not open to it, that is an error of law and the question of whether it amounted to a conclusion which was not open to it is also a question of law. Callaway JA and Hedigan AJA disavowed the need to form a concluded opinion on the application of those tests to the facts of the matter. But there is nothing in their Honours' judgments that throws doubt upon the principles. I propose to apply them.

(i) The meaning of s221(2)(a)

28. In *Rolfe v Willis*[6], the High Court was concerned with a question of whether a landlord had taken "reasonable steps to prevent drunkenness" on licensed premises. It was held that:

> "'Reasonable steps to prevent drunkenness' means such steps as ought reasonably to be taken by way of precaution against the occurrence of drunkenness on the premises under any circumstances that may reasonably be anticipated and to prevent its continuance when its existence is discovered."

29. In *Young v Paddle Brothers Pty Ltd*[7], Herring CJ was concerned with the question of whether a motorist had exercised "reasonable diligence" in attempting to identify the driver of a vehicle, and his Honour adopted the following test, which had been laid down in *The Europe*[8] in discerning whether the owners of a damaged vessel had used reasonable diligence to discover her whereabouts:

> "... the meaning of such expression (ie, 'reasonable diligence') is not the doing of everything possible, but the doing of that which, under ordinary circumstances and with regard to expense and difficulty, could be reasonably required...".

30. Similar aphorisms have been employed to explain the meaning of "reasonable steps" and "all reasonable steps" in other statutory contexts: see, for example, *Australian Meat Industries Employees Union v G & K O'Connor Pty Ltd*[9]; *Deputy Commissioner of Taxation v Pejkovic*[10]. The essential idea is that reasonable steps are what a reasonable man or woman would regard as being reasonable steps in the circumstances which apply.

31. According to that conception, the test imposed by s221(2)(a) seems clear enough. If there were steps which could have been taken before the commencement of the journey and if, having regard to the expense and difficulty, it was not unreasonable to undertake them, s221(2)(a) would not be satisfied unless all those steps were taken. Thus, for example, while the test of all reasonable steps may not require an intending passenger to walk to the next suburb to purchase a ticket before beginning his or her journey, it may perhaps require him or her to walk to the shop at the end of the street where tickets are commonly sold.

32. But then it is said by the respondent that it would be grossly unreasonable ever to expect of tram travellers that they take steps to buy a ticket before commencing a journey and that it cannot be thought it was the intention of Parliament to impose that burden upon them. It is also pointed out that when s221 was first enacted in 1983 it was not possible to buy a tram ticket otherwise than from the conductor on the tram. Hence, it is contended it is impossible to conclude that s221(2)(a) was directed to prior purchase.

33. I do not think that there is much in the point about the circumstances which existed when the section was first enacted. For even if it were the case that one could not buy a tram ticket except on the tram, and I cannot now remember, the section was plainly directed as much to trains as to trams, and train tickets certainly could be and were purchased before the journey began. It may be that there were no steps which one could then take to buy a tram ticket before the journey began, in which case it would have been an easy task for a defendant then to satisfy the requirements of s221(2)(a). But that does not mean that s221(2)(a) remained incapable of application to tram travel after tram tickets were made available for purchase before the start of a journey.

34. One possible view is that when s221 was enacted it was the contemplation of Parliament that s221(2)(a) would have application to trains alone (because there were then no means of buying a tram ticket before getting on the tram) and that s221(2)(b) would have application principally to trams, and perhaps also to country trains, but not to metropolitan trains (because there were then no means of buying a train ticket on board a metropolitan train). But the presumption is that an Act is always speaking[11] and thus that s221(2)(a) was intended to be capable of application to trams, when and if facilities for prior purchase became available, just as much as s221(2)(b) was intended to be capable of application to metropolitan trains when and if facilities for on board ticket purchase were installed. I see nothing in the connotation of s221(2)(a) which precludes a denotation that embraces both trains and trams; circumstances permitting.

35. Whether it is unreasonable or grossly unreasonable ever to expect tram travellers to buy a ticket before the journey is no less problematic. Entrenched attitudes about service levels may mean that some people would say it is unreasonable. I suspect that could be the case amongst a few older members of society. But I consider that the majority of persons and in particular those who have grown up in an era of lower service levels, coin operated machines and ticket sales in shops, would not think it unreasonable that in some circumstances an intending traveller must attempt to buy a ticket before he or she gets on. Accordingly, I reject the respondent's contention.

36. Mr Redlich submits that the true view of the matter may be somewhere in the middle. He suggests that it would not be necessary for a would-be traveller to endeavour to buy a ticket before the journey begins, so long as the traveller has taken reasonable steps to ensure that he or she has coins in the right amount and denomination to purchase a ticket from the machine on board. Mr Redlich accepts, I think, that there is some apparent difficulty in squaring that approach with the ordinary meaning of the words of s221(2)(a). But he submits that the difficulty is to be overcome by holding that the requirement to take reasonable steps is a requirement only to take such steps as *ought* reasonably to be taken in the circumstances. And he suggests that if a traveller is ready and willing to buy a ticket on the tram, or is willing and has taken reasonable care to ensure that he or she is ready, there are no other steps which ought reasonably to be taken.

37. I accept that the requirement imposed by s221(2)(a), to take all reasonable steps, is a requirement to take such steps as ought reasonably to be taken in the circumstances. I also accept that there will be circumstances in which there are no steps which can reasonably be taken and, in those circumstances, it will follow that there are no steps which ought reasonably to be taken. I do not, however, consider that there is some sort of via media where there are steps which can reasonably be taken but none which ought reasonably to be taken. In my view what is reasonable to be done and what ought reasonably to be done are one in the same thing.

38. So to say is not to exclude the possibility of it ever being held that there are no other steps which ought reasonably be taken to buy a ticket before the journey. But whether that will be so will always depend upon the particular circumstances of the case. It is not a matter of *a priori* logic that, if a traveller boards a tram with the means and intent of buying a ticket on board, there

are no other steps which ought reasonably to have been taken to buy a ticket before getting on board. It is a question of fact, to be decided by the tribunal of fact in the particular circumstances of the case, according only to the test of what steps ought reasonably to have been taken in those circumstances.

39. Mr Redlich suggests that there are possibly thousands if not hundreds of thousands of tram travellers that each day board trams, armed with the right coins and with the intent to buy a ticket on board, but without making any sort of effort to buy a ticket in advance of the journey. He submits that the conclusion should be irresistible that there are not any other steps which such travellers ought reasonably to take to buy a ticket in advance. If it were otherwise, he says, each would be liable to be convicted under s221(4), and it is inconceivable, he says, that such was ever intended.

40. But I am not persuaded by that submission. If it is unreasonable to expect travellers of that kind to take steps to buy a ticket in advance of the journey, it is to be expected that it will be so held by the tribunal of fact that comes to hear any prosecution. But it is not for me to make that judgment, as it were in advance, for all possible cases which might arise. The test is one of fact of what ought reasonably to be done in all the circumstances of the case. I cannot exclude the possibility of circumstances where having the right coins and the intention to purchase a ticket on board do not amount to all of the steps which ought reasonably to be taken to buy a ticket in advance.

(ii) The Application of s221(2)(a)

41. As I have observed already, the Magistrate dealt with the application of s221(2)(a) erroneously, by holding that it was incumbent upon the prosecution to adduce evidence to exclude the application of the section. The correct approach was to ask whether the respondent had established on the balance of the probabilities that the section applied to the facts of the case.

42. Furthermore, as far as the evidence went there was nothing to show that the respondent had taken any steps to buy a ticket before the journey, and nothing to show why there were no steps which could reasonably have been taken. The respondent did not have the right change and there was nothing to show that he reasonably believed that he had the right change. On the contrary there was evidence, and the Magistrate found at page 17 of the transcript at line 10, that the respondent had not turned his mind to the question of what cash he had with him until he was on board the vehicle.

43. The only thing which was said by the respondent in support of the contention that he had taken the steps which he ought reasonably to have taken was that he intended to buy a ticket at the end of the journey and that he had enough legal tender in the form of notes to be able to do so. I do not consider that that evidence, without more, was capable of establishing on the balance of probabilities that the respondent had taken all steps to secure the purchase of a ticket which he ought reasonably to have taken in advance of the journey.

(iii) Was it open to conclude that s221(a) applied?

44. In *S v Crimes Compensation Tribunal*[12], Phillips JA explained that there are at least two ways in which a tribunal of fact may arrive at a conclusion which was not open to be reached and thus commit an error of law: either by misapplying a statutory description in a case where the facts as found could lead only to the conclusion opposite that reached by the tribunal, or because the tribunal's conclusion depends upon a finding which was not open to it on the evidence. Phillips JA also explained[13] that when one asks whether a finding of fact was open on the evidence, it is necessary to bear in mind not only the primary facts established by the evidence but also inferences which might permissibly be drawn from the evidence of primary facts. A finding of fact will not be overturned unless it is not supported by evidence of primary facts or by an inference which may be drawn from the evidence of primary facts.

45. But here for the reasons already expressed, I consider that there was no evidence of primary facts and no inference which might legitimately have been drawn to support the conclusion that the defendant had satisfied the requirements of s221(2)(a). In my view, it was not open to the Magistrate on the evidence before him to conclude that the requirements of s221(a) had been satisfied.

46. Ms Batrouney contended otherwise. She submitted that it should be enough to satisfy the requirements of s221(2)(a) that a traveller has an intention to purchase a ticket on board. But in my view that cannot be right. It is tantamount to saying that *mens rea* is a necessary ingredient of the offence created by s221(4) or that, even if *mens rea* is to be presumed, the offence permits of a defence of honest and reasonable mistake. Neither view is acceptable.

47. Granted that there is a presumption that *mens rea* is an essential ingredient of every offence, the presumption is liable to be displaced either by the words of the statute that creates the offence or by the subject matter with which it deals, or both[14]. Thus it is generally accepted that statutes which create offences for the purposes of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more readily be regarded as imposing absolute liability[15].

48. Further, and although in the case of common law offences and some statutory offences, it may be a defence to show an honest and reasonable belief in the existence of circumstances which, if true, would make the act charged an innocent act[16], that will not apply if the purpose of the statute is to make an act an offence regardless of intent.

49. A great deal has been written upon the subject of strict liability and absolute liability offences and quite a lot of it is repetitive[17]. It is unnecessary and undesirable that I add to that repetition by further extensive observations of my own. Given the clarity with which the precepts have now been established by the cases, I confine myself to this: that whether the matter is approached via the language of the section, the subject matter of the statute, the consequences for society of an offence or the consequences of conviction for an accused, I see no room in s221(4) for a defence of honest or reasonable mistake. The purpose of the statute is evidently to motivate people to ensure that they buy a ticket. That objective is likely to be frustrated if mistake is allowed to excuse.

50. I add for the sake of completeness that the defence of honest and reasonable mistake has also been said in some of the authorities to embrace a defence of due diligence and, in turn, that due diligence for that purpose is constituted of taking all reasonable care to avoid the event the subject of charge[18]. But even allowing that such a defence is in some sense sometimes available, I think it clear that there is no room for it in the present context. Parliament has gone to considerable lengths in s221(2) in describing with precision the defences which will be allowed. It is not to be supposed that Parliament also intended to allow for something larger and less well defined.

51. The history of the legislation bears that out. Section 221 derives from s31 of the *Railways Act* 1958, as amended by s2 of the *Railways (Offences) Act* 1969 and, before that, s31 of the *Railways Offences Act* 1928 (which re-enacted without change s31 of the *Railways Act* 1915)[19]. In its original form, s31 of the *Railways Act* was directed to the intentional evasion of payment of a fare and thus intent to evade payment was an essential element of the offence which s31 created. The amendments made in 1969, however, removed the necessity for intent, and made the offence one of strict or absolute liability, subject only to a defence for a traveller who proved that he intended to obtain a ticket valid in respect of the journey in question and that he took all reasonable steps to obtain such a ticket. When the *Railways (Offences) Bill* was read a second time, the Minister explained that the changes were indeed intended to overcome the need to prove intent, and thus to aid conviction, and that the defence of taking all reasonable steps was being included to cover the position of those passengers – whom he described as a small percentage of total passengers – who board a train at a station where the booking office is not open[20].

52. As has been seen, s221 of the *Transport Act* 1983 eschewed the requirement for a passenger to prove that he or she had the intent of purchasing a ticket, but it maintains the essential structure of the strict liability offence created by the *Railways (Offences) Act* and it adds as essential elements of the statutory defence both that reasonable efforts to purchase a ticket be made *prior* to commencing the journey and that there be no reasonable opportunity to purchase a ticket on board.

(c) Error of Law under s221(2)(b)

53. I turn again to the question of whether the Magistrate held for the application of s221(2)(b) because he erroneously considered that it was incumbent upon the prosecution to negative the application of the section or because he considered that the existence of a coin only machine

was not a reasonable opportunity to purchase a ticket on board (at least if an applicable condition under s221(1A) had not been proved). If the decision were that it was incumbent on the prosecution to negative the application of s221(2)(b), it was an error of law. But if it were that a coin only machine is not a reasonable opportunity to buy a ticket on board, the question is slightly more complex.

54. The evidence established that the coin operated machine on the tram was functioning properly and there was no evidence of any impediment, such as a large crowd on the tram, to the respondent's free access to the machine. According to the respondent he did not have a reasonable opportunity to purchase a ticket on board simply because the machine which was provided was a coin only machine.

55. In my opinion, unless a traveller suffers from such a physical or intellectual disability as to make it unreasonable to expect that he or she should use a coin operated machine, the existence on board of a properly functioning coin operated machine, to which in the circumstances which obtain the traveller may have access with relative ease, constitutes a reasonable opportunity for the traveller to purchase a ticket on board.

56. I reject the submission made on behalf of the respondent that such a traveller who carries only notes does not have a reasonable opportunity to purchase; for I do not consider that the question of reasonable opportunity to purchase is to be decided by reference to the denominations of currency which a traveller carries, any more than it can be decided by reference to whether he or she carries any money at all. It is not a defence to a charge of travelling without a ticket that a passenger has no money with which to buy a ticket. Equally, in my view, it cannot be a defence that the only money which the traveller has is in notes of $500 denomination or even of $5 denomination.

57. I do not accept the submission made on behalf of the respondent that because s221(2)(b) uses the words "*he* has no reasonable opportunity", it poses a subjective test. I think instead that the word "he" denotes that the section is directed to the circumstances with which the traveller is presented, in the sense of those over which *he* has no control, and not to variables, such as money carried, which it is within the power of the traveller to influence. If it were otherwise, it would be enough to attract the operation of s221(2)(b) that a traveller was penniless, and it is not enough. That is not to say that the section is insensitive to individual difficulties. A physical or intellectual disability is ordinarily to be regarded as a circumstance over which a traveller has no control. Hence it is to be taken into account in determining what is reasonable. But carelessness or forgetfulness or inattention to detail will seldom if ever be a sufficient answer.

58. It remains to mention the Magistrate's observation that a coin operated machine could not be regarded as a reasonable opportunity to purchase a ticket unless it were proved that a condition mandating the use of coin only machines had been gazetted under s221(1A). There are three things to say about that. The first is that it is unlikely that the use of coin operated machines would ever be made the subject of a condition of issue pursuant to s221(1A). The section is directed to the conditions of eligibility and carriage upon which tickets may be issued, not means of fare collection. The second thing is that the opportunity to purchase afforded by the availability of a coin operated machine is, as a matter of logic, incapable of being made any more or less reasonable by the gazettal of a condition under s221(1A). Gazettal may give the coin operated machine some status or authorisation which in the absence of gazettal it would not necessarily have. But it cannot make its provision as an opportunity to purchase a ticket any more or less reasonable than it was already. The third thing is that I do not consider that there was any substance in the Magistrate's suggestion of a possible constitutional problem. I take his Worship's observation as suggesting some sort of inconsistency between the provision of coin only machines, or at least the authorisation of their use by some State statute, and the provisions of the *Currency Act* 1965 (Cth) and the *Reserve Bank Act* 1959 (Cth), and thus a concern that s109 of the Constitution may invalidate the use of coin operated machines. I cannot see any such inconsistency.

59. It follows, in my view, that it was not open to the Magistrate on the evidence which was before him to conclude that s221(2)(b) applied.

(d) Error of Law under s221(2)(c)

60. I have set out already my views on the meaning of s221(2)(c) and it is unnecessary to say more on the subject. Although the Magistrate said at page 18 of the transcript that the defendant was not given the opportunity to purchase a ticket upon completion of the journey, the respondent's uncontradicted evidence at page 9 of the transcript, was that he had purchased a ticket at Parliament Station at the end of the journey.

61. In the circumstances the Magistrate was entitled to come to the view that the conditions of s221(2)(c) had been made out. But his Worship's process of reasoning was erroneous.

CONCLUSION

62. For the reasons stated I consider that the questions posed by the Master should be answered as follows:

> "(a) Yes, the intention to purchase a ticket was not enough, without more, to satisfy the requirements of s221(2).
>
> (b) It is unnecessary to decide, but the existence of a coin only machine amounted to a reasonable opportunity for the defendant to purchase a ticket while making his journey.

63. I will hear counsel on the orders to be made.

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[1] Presumably s221(4).
[2] See for example, *BT Australia Ltd v Bell Bros Pty Ltd* (1981) 27 SASR 557; (1981) 6 ACLR 138; *TNT Australia Pty Ltd v Normanby Resources NL* (1989) 53 SASR 156; (1989) 15 ACLR 99; (1989) 1 ACSR 1; (1989) 7 ACLC 309.
[3] Compare *Southern Cross Exploration NL v Peter Thomas Myers* [1989] ACTSC 13, esp at [10].
[4] *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136, 140; [1952] ALR 1001; *Pye v Metropolitan Coal Co Ltd* [1934] HCA 9; (1984) 50 CLR 614, 622-3; *Darling Island Stevedoring and Lightridge Co v Jacobson* [1945] HCA 22; (1945) 70 CLR 635, 638; *Evrard v Opperman* [1958] VicRp 62; [1958] VR 389, 392; [1958] ALR 847; *Killeen v Sharp* [1988] VicRp 86; [1988] VR 954, 957.
[5] [1998] 1 VR 83 at 88-93.
[6] [1916] HCA 26; (1916) 21 CLR 152 at 155.
[7] [1956] VicLawRp 6 [1956] VLR 38 at 42; [1956] ALR 301.
[8] [1863] EngR 835; (1863) 2 Moore PC (NS) 1; 15 ER 803.
[9] (1999) 96 IR 266.
[10] [2000] NSWSC 881; 45 ATR 139; (2000) ATC 4825.
[11] See Pearce and Geddes, *Statutory Interpretation in Australia,* 5th Ed at [4.6]-[4.10] and [9.10].
[12] *Supra*, at p89.
[13] At p90)
[14] *Sherras v DeRutzen* [1895] 1 QB 918 at p921; 11 TLR 369; *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523 at 528; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[15] *He Kaw Teh*, at p594-5.
[16] *R v Tolson* [1886-90] All ER 26; (1889) 23 QBD 168 at 181; 9 WR 709; *Maher v Musson* [1934] HCA 64 (1934) 52 CLR 100 at 104; [1935] ALR 80; 89 P 7; *He Kaw Teh v R*, *supra* at 532.
[17] See, as well as *He Kaw Teh*, *supra*, *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173 at 178 and 186, and the authorities there cited; *Allen v United Carpet Mills Ltd* [1989] VicRp 27; [1989] VR 323 at 327-329; *Griffin and Elliot v Marsh* 122 ALR 552; (1994) 34 NSWLR 104; (1994) 28 ATR 355; *Hawthorne (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120; 65 A Crim R 227; *Leask v The Commonwealth* [1996] HCA 29; (1996) 187 CLR 579 at 598; (1996) 140 ALR 1; (1996) 70 ALJR 995; (1996) 18 Leg Rep 2; 35 ATR 91; *Llandilo Staircases Pty Ltd v WorkCover Authority of New South Wales* (2001) 104 IR 204; *R v Scott* (1996) 131 FLR 137; (1936) 137 ALR 347; *Selectrix Pty Ltd v Humphrys* [2001] VSC 45; (2001) 159 FLR 348; *Tomazin v Ward*, 6/97, SCWA, 1117/93.
[18] See *R v Sault Ste Marie* [1978] 2 SCR 1299 at 1325-1326; 3 CR (3d) 30; *He Kaw Teh*, *supra* at 533; *Allen v United Carpet Mills Pty Ltd*, *supra* at 327; cf *Australian Iron and Steel Pty Ltd v Environment Protection Authority* NSWCCA, unreported, 18 December 1992.
[19] Section 118 of the *Tramways Act* 1958 made it an offence to avoid or to attempt to avoid payment of a fare, but the provision was couched in very different terms to s221 of the *Transport Act*.
[20] See *Hansard*, Legislative Council, 26 November 1969 at 2109 and 2110.

APPEARANCES: For the appellant Mounsey: Mr RF Redlich QC with Mr AG Burns, counsel. Victorian Government Solicitor. For the respondent Lafayette: Ms JJ Batrouney SC with Ms GL Schoff, counsel. Baker & McKenzie, solicitors.
