02/69

SUPREME COURT OF VICTORIA

DOSSER v JAMES

Newton J

1 May 1969

MOTOR TRAFFIC – FAILURE TO SHOW IN AN AUTHORISED LOG BOOK A CERTAIN AMOUNT OF TIME SPENT IN A MOTOR VEHICLE – DEFENDANT DRIVEN TO BALLARAT AS A PASSENGER IN A MOTOR CAR AND THEN HE DROVE A LOADED TRUCK FROM BALLARAT TO BROOKLYN – TIME SPENT BY DEFENDANT AS A PASSENGER NOT NOTED IN THE LOG BOOK – WHETHER THE PERIOD SPENT BY THE DEFENDANT IN A MOTOR VEHICLE DRIVEN FROM NARACOORTE TO BALLARAT WAS "DRIVING" AND SHOULD HAVE BEEN RECORDED IN THE LOG BOOK – WHETHER THE VEHICLE WAS A "MOTOR CAR" AS DEFINED – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS37A(2), 37B, 37C(1).

HELD: Order nisi discharged.
1. Since, so far as appears from the evidence the defendant did not himself drive the Hastings car on the journey from Naracoorte to Ballarat, he was not obliged by s37C(2) to show in his log book the time spent upon the journey from Naracoorte to Ballarat as a period spent by him "in driving". It was unnecessary to decide what the position would have been if the defendant had himself driven the Hastings car. This was because the word "driving" in s37C(2) was confined to the driving of "motor cars" as defined in s37A(1). The word "drive" in s37C(2) means "actually drive".

2. Having regard to the considerable difficulties of interpretation to which both the notional driving clause and s37C(2) gave rise, the decision in this case received some support from the well established rule that where statutory provisions imposing penalties were ambiguous, then out of the various possible interpretations which were equally open, that interpretation should be chosen which was most lenient and in favour of a defendant.

NEWTON J: This is the return of an Order Nisi to review a decision of the Court of Petty Sessions at Footscray given on 12 August 1968, whereby an information was dismissed. The Court of Petty Sessions was constituted by Mr Pfeiffer, Stipendiary Magistrate, sitting alone.

By the information the defendant was charged in substance with failing to comply with s37C(1) and (2) of the *Motor Car Act* 1958. Failure to comply with these provisions constitutes an offence: see s37H(1). At the conclusion of the informant's case the defendant's solicitor submitted that there was no case to answer. The Stipendiary Magistrate accepted this submission and dismissed the information.

The relevant facts, as appearing from the evidence for the informant, were as follows:-

The defendant was a driver working for Hastings Transport Pty Ltd. His mode of remuneration was "trip money". On 13 September 1967, the defendant drove a semi-trailer motor truck from Footscray to Naracoorte, South Australia, leaving Footscray at 12.30 a.m. and arriving at Naracoorte at 9.30 a.m. but with half-hour breaks at Ararat and Horsham. The unladen weight of the truck was about 8 tons.

The truck was later loaded with 65 bales of wool and was then driven by another driver from Naracoorte to Ballarat, where this second driver became ill. The defendant was then taken to Ballarat to take over the truck and drive it to Melbourne. He travelled from Naracoorte to Ballarat as a passenger in a car belonging to one Tom Hastings, who was apparently an executive in Hastings Transport Pty Ltd. This car left Naracoorte at 10.30 p.m. (E.S.T.) on 13 September 1967, and arrived at Ballarat at 4.30 a.m. on 14 September 1967, with half-hour breaks at Horsham and Ararat. The defendant slept for most of the journey.

The defendant then drove the truck from Ballarat to Brooklyn, leaving Ballarat at 5 a.m.

on 14 September 1967, and arriving at Brooklyn at 7 a.m. on that day. (The fact that the truck which the defendant drove from Ballarat to Brooklyn was the same as the truck which he had earlier driven from Footscray to Naracoorte appears from the copies of the pages in the defendant's Authorised Log Book relating to 13 and 14 September 1967, which were put in evidence).

Section 37C(1), (2) and (3) of the *Motor Car Act* 1958 are as follows:-

"37C(1) A person shall not drive a motor car unless he has in the motor car in his possession an authorized log book which has been issued to him and duly completed in accordance with the requirements of this section.

(2) The holder of an authorized log book shall enter in duplicate in the log book in accordance with the directions contained in the log book such particulars as are required to show a complete record of the times and places at which periods spent by the holder in driving, in resting from driving (distinguishing between time resting in the sleeping compartment of a sleeper-cab motor car and time resting elsewhere) and periods spent off duty began and ended.

(3) The holder of an authorized log book shall use the pages of the log book serially in chronological order and shall complete each page of the log book in accordance with the directions in the log book."

Section 37C is part of Division 3 (ss37A to 37A(1) ("Hours of Driving") of Part IV of the *Motor Car Act* 1958. Section 37A(2) is as follows:-

"(2) For the purposes of this Division in calculating any period of driving—
(a) driving whether inside or outside Victoria shall be taken into account;

(b) any two or more periods of time shall be deemed to be a continuous period unless separated by an interval of not less than half an hour in which the driver is able to obtain rest and refreshment;

(c) any time spent by the driver on or in a motor car whether driving or not, or on any other work in connexion with a motor car or the load carried thereby, including in the case of a motor car used for the carriage of goods any time spent on another moving vehicle unless the time spent on that other moving vehicle is in no way for the purpose of or incidental to any journey of the motor car used for the carriage of goods, shall be reckoned as time spent in driving;

(d) in the case of a motor car owned by a primary producer and used by him in connexion with his business as such a person shall not be deemed to be driving the motor car or to be spending time on work in connexion with a motor car or the load carried thereby so long as the motor car is not in motion on a public highway:

Provided that in calculating any period of driving for the purposes of this Division time spent by a person in the sleeping compartment of a motor car which is described in the certificate of registration of that motor car issued in any State or Territory of the Commonwealth as a sleeper-cab motor car and in respect of which two drivers are employed at all times while the motor car is in motion if it is proved that each of the drivers had at least twenty-four consecutive hours of rest and refreshment outside the sleeper-cab motor car during the ninety-six hours immediately preceding the end of the period in respect of which the calculation is being made shall not be regarded as time spent in driving."

By s37A(1) "motor car" is defined for the purposes of Division 3 as follows:-
"Motor car" means a motor car of an unladen weight of more than two tons which is used or intended to be used for the carriage of passengers or goods for hire or reward or in the course of any trade or bulginess whatsoever."

Thus the truck which the defendant drove from Ballarat to Brooklyn was a "Motor car" within the meaning of ss37A(2) and 37C(1). It was also a "motor car" within the meaning of s37B, which, as in force at the relevant time, was as follows:-

"37B. A person shall not drive a motor car at any time if immediately prior to that time—

(a) he has driven a motor car for a continuous period of more than five hours;
(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; or
(d) he has not had at least one period of twenty-four consecutive hours for rest during the seven days immediately preceding that time."

The car in which the defendant travelled from Naracoorte to Ballarat (which I shall call "the Hastings car") was not a "motor car" within the meaning of ss37A(2), 37B or 37C(1).

In his authorized log book the defendant showed the whole of the period from his arrival at Naracoorte at 9.30 a.m. on 13 September 1967, until his departure from Ballarat at 5 a.m. on 14 September, as falling under the printed heading in the log book – "Off Duty and Rest Periods".

It was contended on behalf of the informant in the Court of Petty Sessions and in this Court that the defendant ought in his log book to have shown the period between 10.30 p.m. (E.S.T.) on 13 September and 4.30 a.m. on 14 September, which the defendant spent in travelling from Naracoorte to Ballarat, as falling under the printed heading – "Driving", except perhaps for the breaks at Horsham and Ararat; it was contended that because the defendant did not do this he had committed the offence alleged. In these contentions the Informant relied entirely on s37A(2)(c) (which I shall call "the notional driving clause"). It was said that the time spent by the defendant in travelling from Naracoorte to Ballarat in the Hastings car was "time spent on another moving vehicle" and that it was "for the purpose of or incidental to" the later journey of the truck from Ballarat to Brooklyn or, alternatively, the journey of the truck from Naracoorte to Brooklyn via Ballarat.

Mr Skewes appeared for the defendant in the Court of Petty Sessions and in this Court. He submitted on each occasion that the words in the notional driving clause "another moving vehicle" covered only a "motor car" as defined in s37A(1) (which the Hastings car was not), and that at worst the notional driving clause was very ambiguous and all ambiguities should be resolved in favour of the defendant.

I was told by Mr Kendall, who appeared before me for the informant, that although the *Motor Car (Hours of Driving) Regulations* (SR 119 of 1967) *inter alia*, prescribe a form of statement and particulars for the purposes of s37D(2)(b)(ii), no form of authorized log book has been prescribed by regulations, the authorized log books in use being in fact in a form determined upon by the Transport Regulation Board: compare the definition of "Authorized Log Book" in s37A(1): see also ss37C(7) and 37D(1): and see too Regulation 217 of the *Motor Car Regulations* 1966 as set out in Regulation 3 of SR 119 of 1967. It is, perhaps, curious that the form of authorized log book as devised by the Transport Regulation Board has a combined heading "Duty and Rest Periods", instead of showing separately periods spent by the holder in resting from driving, and periods spent off duty, as appears to be contemplated by s37C(2). The only other two headings in the authorized log book are "Driving" and "Occupying the Sleeper-berth".

It appears from para 6 of the affidavit of John Asty in support of the Order Nisi that a duplicate of an authorized log book was tendered in evidence in the Court of Petty Sessions on behalf of the informant: cf. s37C(7). But this book was not put in evidence before this Court. I assume that sufficient information as to the contents (including directions) of an authorized log book is to be found in the two pages of the defendant's log book, copies of which are in evidence before me.

In dismissing the information the Stipendiary Magistrate gave the following reasons:-

> "In calculating what is the intention of the Legislature, the Court must pay attention to the wording of the legislation and if that wording is ambiguous then the benefit of that ambiguity must be given for the Defendant. It is unambiguous in this case that the driver the defendant, drove to Ballarat as a passenger in a private car and it is ambiguous whether he had to record the time spent in that private car. As a result the case will be dismissed."

The grounds of the Order Nisi are as follows-

> "1. That the Stipendiary Magistrate should have held in the circumstances that there was a *prima facie* case for the Defendant to answer.
>
> 2. That the Stipendiary Magistrate should have held that s37A(2)(c) of the *Motor Car Act* 1958, as amended, in the circumstances required the Defendant to record in his Authorised Log Book the time spent by him travelling in a private car from Naracoorte to Ballarat on the 13th and 14th days of September 1967.

3. That there was no evidence on which the Stipendiary Magistrate could have found that the time spent by the Defendant in a motor car in which he travelled from Naracoorte to Ballarat was in no way for the purpose of or incidental to the journey later made by him on the 4 September 1967 in motor car registered number SA.544.437 from Ballarat to Brooklyn."

In my opinion the Order Nisi should be discharged.

I do not agree with Mr Skewes' submission that the words "another moving vehicle" in the notional driving clause are confined to a "Motor car" as defined in s37A(1), For they would then be redundant, since by the first part of the notional driving clause time spent on or in a "motor car" (as defined) is already caught. Also the change of language from "motor car" to "another moving vehicle" is significant.

But I must confess that I have found the notional driving clause a most puzzling provision. Why is the last part restricted to "the case of a motor car used for the carriage of goods"? On the informant's argument the defendant would have committed no offence if he had driven a large passenger bus from Ballarat to Melbourne, instead of his truck; this seems remarkable. Would a train fall within the description "another moving vehicle"? And why should time spent on another moving vehicle be caught only if in some way for the purpose of, or incidental to, any journey of the "motor car" in question? One would have supposed that time spent by the driver in another moving vehicle would be equally tiring for him, whatever the purpose of the journey in that vehicle.

It appears to me that a serious question exists whether the notional driving clause covers time spent by a driver "on another moving vehicle"; if during that time the driver was not engaged in "work". For the words "on any other work in connexion with a motor car or the load carried thereby" may indicate the scope of the notional driving clause, and in the context the later provision beginning with the word "including" may not extend its scope in the case of time spent on another moving vehicle. This view may be supported by the circumstance that s37C(2) in terms requires "periods spent off duty" to be shown separately from periods spent "in driving". Indeed otherwise the expression "periods spent off duty" in s37C(2) would appear to be redundant. See also the word "employed" in the proviso to s37A(2). And it might perhaps be thought rather odd if time spent by a driver of a "motor car" (as defined), used for the carriage of goods, in travelling by passenger car or tram or train from his home to the truck depot were to be caught by the notional driving clause. In *Broadhurst v Haywood* [1938] VicLawRp 55; [1938] VLR 250; [1938] ALR 465, Lowe J (at p254) rejected a similar contention in relation to earlier legislation, but the relevant language used was different in material respects.

If the true view were that the notional driving clause covers time spent by a driver "on another moving vehicle" only if he was then "working", the question would arise in the present case whether the defendant was "working" during his journey from Naracoorte to Ballarat in the Hastings car, notwithstanding that he slept for most of the journey, and notwithstanding that there was no evidence that he was paid for his time upon the journey: cf. *Prior v Slaithwaite Spinning Co Ltd* (1898) 1 QB 881; *Napieralski v Curtis (Contractors) Ltd* (1959) 1 WLR 835; and *Ingham v Hie Lee* [1912] HCA 66; (1912) 15 CLR 267; 18 ALR 453.

But I find it unnecessary to pursue these matters further. For, in my opinion, even if it be assumed that the notional driving clause has the wide meaning attributed to it by the informant, this is irrelevant to the present problem, because s37C(2) must be interpreted according to the natural meaning of the words used therein, without recourse to the notional driving clause.

The principal provision in Division 3 of Part IV of the *Motor Car Act* 1958 is s37B, which I have already set out. Its policy and purpose are plainly to prohibit drivers of large commercial vehicles from driving without sufficient rest. In the opening words of s37B the word "drive" in my opinion means "actually drive" and is in no way affected by the notional driving clause, which applies, however, to paras. (a) and (b) of s37B. (How far the notional driving clause also affects para.(c). and (d) is not a matter which I have considered).

The contrary view to that which I have just expressed would involve the consequence that if a man drove a heavy truck (being a "motor car" as defined in s37A(1)) for four hours and then travelled in it as a passenger for the next two hours, he would commit an offence under s37B(a),

even if he thereafter rested at home for the next 24 hours; see the words in the notional driving clause – "any time spent by the driver on or in a motor car whether driving or not". (Other like examples could be given in relation to s37B(a) and (b)).

But this result would be quite contrary to the purpose and policy of s37B, which are simply to ensure that persons do not actually drive large commercial vehicles when suffering from excessive fatigue. See, for example, *Durston v Beqir* [1948] VicLawRp 74; [1948] VLR 418; [1949] ALR 66 (1948) VLR 418 at p420. Further the words in the notional driving clause are "shall be reckoned as time spent in driving", not "shall be deemed to be time spent in driving".

But on what I consider to be the correct interpretation of s37B, if a driver travelled as a passenger in a heavy truck for four hours and then drove it for two hours, he would commit an offence under s37B(a), because the notional driving clause applies to par (a). This is in accordance with the policy of s37B, because travelling as a passenger can be tiring.

These conclusions are strongly supported by the decision of *Durston v Beqir*, *supra*, upon corresponding, although simpler, provisions in earlier legislation. Similarly, I consider that the word "drive" in s37C(2) means "actually drive".

And I further consider that the word "driving" in the expression in s37C(2) "periods spent by the holder in driving", and also in the expression "resting from driving",) has its natural meaning and refers only to actual driving. Otherwise, for example, a driver who drove a heavy truck (being a "motor car" as defined) for four hours, and then travelled in it as a passenger for two hours, would be required to show the whole period of six hours in his logbook as time spent in driving, as it would be under the notional driving clause, and it would be irrelevant if the driver had spent the next 24 hours resting at home. But under s37F(2) an entry in those circumstances of six hours as having been spent in driving would be admissible in evidence against the driver in a prosecution under s37B(a), although in fact he would have committed no offence under s37B(a). Such a result cannot, I think, have been intended by Parliament. Other like examples which would give rise to similar and equally remarkable results in relation to s37B(a) and (b) could readily be given.

It may be noted in passing that the copy pages of the defendant's log book which were put in evidence, contain the direction "Particulars below to be entered at the time of each change of activity": see the references to "directions" in the log book in s37C(2) and (3). But the question whether time not spent in actual driving, which was nevertheless to be reckoned as time spent in driving under the notional driving clause, was of any relevance to s37B(a) or (b) might not be known in many cases (on my interpretation of s37B) until some time after the conclusion of the period. For it could depend on whether, and if so when, the driver next actually drove a "motor car", and also in a case like the present, or whether the "motor car" was used for the carriage of goods. As to s37B(a), the provisions of s37A(2)(b) are relevant as showing what time lag could exist; the time lag could be longer in relation to s37B(b).

The explicit references in s37C(2) to "periods spent by the holder ... in resting from driving" and "periods spent off duty", naturally refer in my opinion to periods spent in resting from actual driving and periods spent actually off duty, whether or not all or part of such periods in either case would be reckoned as time spent in driving under the notional driving clause. And this too supports the view that the word "driving" in the expression "periods spent by the holder in driving" means "actual driving", and does not have the extended meaning given by the notional driving clause. For otherwise the same period of time could be a period "spent by the holder in driving" and also a period spent by him in resting from driving, or, a period spent off duty, or both. (I may add that I think that the words in s37C(2) "time resting in the sleeping compartment of a sleeper-cab motor car" include any time so spent, whether or not the conditions referred to in the proviso to s37A(2) are satisfied).

If it be said that a restriction of the words "periods spent by the holder in driving" to periods spent in actual driving could defeat the apparent object of s37C(1) and (2), namely to show whether the driver had committed a breach of s37B, it may be answered that if the words covered periods which could be reckoned as time spent in driving under the notional driving clause, then the log book could, as earlier indicated, suggest that the driver had committed a breach of s37B, when in fact he had not done so. And this too would defeat that object. In truth, as Mr Kendall in the

end agreed, there appears to be little rhyme or reason for the form of words in fact used in s37C.

It may also be observed that the obligation imposed by s37C as to keeping log books is imposed upon ordinary drivers of commercial vehicles who could scarcely be expected to have studied the notional driving clause in detail, even if they sufficiently understood its operation in relation to s37B. Such drivers would naturally regard the heading "driving" in their authorised log books as meaning actual driving. If it had been intended that the log books should show periods of driving within the meaning of the notional driving clause, one would have expected s37C(20 expressly to provide for this: for example some such expression as "periods not spent in actual driving but which by reason of s37A(2)(c) are to be reckoned as time spent in driving" could have been included in s37C(2) in addition to the three classes of periods which are in fact included. In that case, no doubt, authorized log books would contain additional headings covering activities falling within the notional driving clause, but not being actual driving.

I thus consider that since, so far as appears from the evidence the defendant did not himself drive the Hastings car on the journey from Naracoorte to Ballarat, he was not obliged by s37C(2) to show in his log book the time spent upon the journey from Naracoorte to Ballarat as a period spent by him "in driving". It is unnecessary to decide what the position would have been if the defendant had himself driven the Hastings car. This would depend on whether or not the word "driving" in s37C(2) is confined to the driving of "motor cars" as defined in s37A(1). I may say that, as at present advised, I think that it is so confined.

A further and independent reason for my decision in this case might be that even if the notional driving clause has the meaning placed upon it by the informant and is also applicable in the interpretation of the words in s37C(2) "periods spent by the holder in driving" and the words "in resting from driving", nevertheless the words in s37C(2) "periods spent off duty" should be given their natural meaning, so as to override so far as necessary any extended meaning which would otherwise attach to the words "periods spent by the holder in driving" or the words "in resting from driving", by reason of the notional driving clause. On this view, it might be said that so far as appeared from the evidence the defendant was "off duty" during his journey in the Hastings car from Naracoorte to Ballarat, and that therefore it was not established that he contravened s37C(2) in showing the period spent upon this journey under the printed heading in the log book "Off Duty and Rest Periods". But I find it unnecessary to express a final conclusion upon these matters.

Having regard to the considerable difficulties of interpretation to which both the notional driving clause and s37C(2) give rise, it appears to me that my decision in this case receives some support from the well established rule that where statutory provisions imposing penalties are ambiguous, then out of the various possible interpretations which are equally open, that interpretation should be chosen which is most lenient and in favour of a defendant: see, for example, *Tuck & Sons v Priester* (1887) 19 QBD 629; 3 TLR 326 especially at QBD p636 per Lord Esher, and p645 per Lord Lindley; *London and North Eastern Railway Co v Berriman* [1946] AC 278 at pp313-4 per Lord Simonds; [1946] 1 All ER 255; *Chandler & Co v Collector of Customs* [1907] HCA 81; 4 CLR 1719 at pp1734-5 per O'Connor J; *Ingham v Hie Lie* [1912] HCA 66; (1912) 15 CLR 267 at p270 per Griffith CJ and p271 per Barton J; and *R v Adams* [1935] HCA 62; (1935) 53 CLR 563 at pp567-568; [1935] ALR 421; 8 ABC 97.

It may perhaps be observed in passing that in s37B the introductory words "immediately prior to that time" are redundant in their application to paras. (b), (c) and (d), and that in s37D(2)(b)(ii) some such words as "began and ended" appear to have been omitted at the conclusion thereof.

In the course of considering this case I have made some examination of the history of the legislation. It appears to have originated in Victoria with s39 of the *Transport Regulation Act* 1933, which seems itself to have been taken from s19 of the English *Road Traffic* Act 1930. The present Victorian legislation was enacted by the *Motor Car (Hours of Driving Act)* 1964 (Act No.7234), which contained many new provisions, and has been amended in minor respects by the *Motor Car (Hours of Driving) Act* 1967 (Act No.7587), which however was passed after the events in question in the present case. Act No.7234 came into operation on 15 May 1967.

But I do not think that a close examination of the legislative history is of much help in deciding the present case, and I therefore do not propose to embark upon such an examination. I may, however, remark that the comment of Lowe J in *Broadhurst v Haywood* (*supra*) VLR p253, upon the legislation which was then in force that "the language ... is not very happily chosen, and the meaning is far from clear" appears, if I may say so, to be applicable *a fortiori* to those provisions of the present legislation which have required consideration in this case.

I should perhaps add that although the matters upon which I have relied in reaching my decision were not initially advanced by Mr Skewes, I later drew them to the attention of both parties in the course of two further hearings which took place subsequent to the conclusion of the original hearing, and I heard argument thereon from Mr Kendall and received a written memorandum thereon from Mr Skewes. It is, of course, well established, that a respondent in an Order to Review is entitled (subject to certain exceptions not presently material) to support the decision of the Court of Petty Sessions upon any available grounds, whether or not they were the grounds upon which he succeeded in the Court below; see, for example, *Preston Ice and Cool Stores Pty Ltd v Hawkins* [1955] VicLawRp 17; [1955] VLR 89 at p92.

The Order Nisi will be discharged. There will be an order that the costs of the respondent be taxed and paid by the applicant. If the parties agree, I am prepared to vary this costs order by simply ordering that the applicant pay the respondent's costs which I fix at $120. For under s161 of the *Justices Act* 1968 $120 is the maximum amount which the respondent can recover for costs, and I imagine that his taxed costs would exceed this sum.

APPEARANCES: For the appellant Dosser: Mr J Little, counsel. Mr T Mornane, State Crown Solicitor. For the respondent James: Mr E Skewes, counsel. Eggleston, Clifton-Jones & Co, solicitors.
