

DISTRICT COURT OF QUEENSLAND

CITATION: *Rayney v RT & BF Turner Pty Ltd* [2008] QDC 95

PARTIES: **1203/07**

WILLIAM ARTHUR RAYNEY

Appellant

AND

RT & BF TURNER PTY LTD

Respondent

1204/07

WILLIAM ARTHUR RAYNEY

Appellant

AND

BARBARA FAYE TURNER

Respondent

1205/07

WILLIAM ARTHUR RAYNEY

Appellant

AND

RONALD THOMAS TURNER

Respondent

1206/07

WILLIAM ARTHUR RAYNEY

Appellant

AND

GEOFFREY DESMOND TURNER

Respondent

FILE NO/S: Appeal No 1203/07; 1204/07; 1205;07; 1206/07
 DIVISION: Appellate
 PROCEEDING: Appeal pursuant to s 222 of the *Justices' Act*
 ORIGINATING COURT: District Court, Brisbane
 DELIVERED ON: 1 May 2008
 DELIVERED AT: Brisbane
 HEARING DATE: 30 August 2007 and 8 October 2007
 JUDGE: Nase DCJ
 ORDER: Appeal dismissed
 CATCHWORDS: APPEAL – APPEAL FROM MAGISTRATE – EVIDENCE

– SEARCH WARRANTS – whether Magistrate erred in excluding evidence recorded during the execution of search warrant – whether search warrant was valid

Transport Operations (Road Use Management) Act 1995

Transport Operations (Road Use Management – Fatigue Management) Regulation 1998

Cases considered:

Beneficial Finance Corporation v Commissioner of

Australian Federal Police (1991) 103 ALR 167

State of New South Wales v Corbett (2007) HCA 32

Stevenson Transport Pty Ltd v State of Queensland & Ors
 (2003) QSC 278

COUNSEL: Mr AJ McSporran SC with him Mr CFC Wilson for the appellant
Mr PA Freeburn SC for the respondent

SOLICITORS: Crown Solicitor on behalf of the appellant
Cranston McEachean on behalf of the respondent

Introduction

- [1] On 28 March 2007, Mr WJ Smith, Magistrate, found RT and BF Turner Pty Ltd (the Company) not guilty of three fatigue offences laid under the *Transport Operations (Road Use Management – Fatigue Management) Regulation 1998*.¹ Consistently with the dismissal of the charges against the company, he thereupon dismissed secondary charges laid against the executive officers of the company (Barbara Faye Turner², Ronald Thomas Turner³ and Geoffrey Desmond Turner⁴) under the extended liability provisions in the Act.⁵
- [2] The appeal before me is from the Magistrate’s findings of not guilty. The prosecution in the appeal sought to ventilate two arguments. The first is a complaint the magistrate wrongly excluded certain disputed evidence. In response, the respondent has sought to reargue its objection to the search warrant. As the magistrate’s unexpected exclusion of the disputed evidence in the course of his decision cannot be maintained, the real issue, as I see it, is the validity of the search warrant. The second argument put by the prosecution is that the Magistrate, in reaching his ultimate conclusion, applied a wrong test to the evidence.

The first point

¹ S 72.

² Respondent in 1204/07

³ Respondent in 1205/07

⁴ Respondent in 1206/07

⁵ S 57(2) *Transport Operations (Road Use Management) Act 1995*

- [3] The investigators had obtained a search warrant under s 28 *Transport Operations (Road Use Management) Act 1995*. Armed with the warrant, they entered and searched the company's premises at Palmwoods. During the search one of the officers assisting in the execution of the warrant recorded the search on video. In this way, various conversations between the investigators and officers, and employees of the company were recorded. At trial the prosecution relied on a conversation with Mr Ronald Turner as containing admissions against the company. The evidence was initially admitted, but in the course of his reasons for decision the magistrate without warning excluded the conversation.
- [4] The reason the magistrate excluded the evidence is that he did not think the warrant authorised the recording of Mr Turner's statements. Or, put more precisely, he did not believe the investigators were entitled to use a video recorder to record the execution of the search warrant.
- [5] The general powers which may be exercised on executing a search warrant include a power to "... inspect, measure, test, photograph or film the place or anything in the place ..."⁶. Like Mr Smith, I doubt these words authorise the use of a video recorder to record the execution of a search warrant. While the recording of the search, and the incidental conversation with Mr Turner, was not authorised by the section, it was not unlawful for the search to be recorded.
- [6] As neither the warrant nor the Act authorise recording a search (including incidental conversations with others), the position is governed by common law principles. In principle it is not unlawful to record any event, no more than it is to speak to another person (or, as in this case, to record the conversation with the other person). The precise location of objects found during a search, and statements made about

⁶ S 30(2)(b) *Transport Operations (Road Use Management) Act 1995*

those objects may be important. An electronic record of such details is normally the most reliable and complete form of evidence, and consistently with the general trend of the law⁷ is to be encouraged.

- [7] Excluding the evidence of the admissions on the basis there was no power to record the execution of the search warrant was an error by the Magistrate. However, it is necessary to consider also whether the Magistrate erred in concluding the warrant was valid.

The search warrant

- [8] The respondents unsuccessfully challenged the validity of the warrant at the outset of the trial. Mr Freeburn SC revived the objection to the warrant in defending the magistrate's decision to dismiss the charges.
- [9] The authority to issue a warrant is found in s 28 *Transport Operations (Road Use Management) Act* 1995. The section is in these terms:

“28 Warrants to enter

- (1) An authorised officer may apply to a magistrate for a warrant to enter a place.
- (2) The application must be sworn and state the grounds on which the warrant is sought.
- (3) The magistrate may refuse to consider the application until the officer gives the magistrate all the information the magistrate requires about the application in the way the magistrate requires.

⁷ See the *Police Powers and Responsibilities Act 2000*

Example – The magistrate may require additional information supporting the application to be given by statutory declaration.

(4) The magistrate may issue a warrant only if satisfied there are reasonable grounds for suspecting-

- (a) there is a particular thing or activity (the “evidence”) that may provide evidence of an offence against a transport Act; and
- (b) the evidence is, or may be within the next 7 days, at the place.

(5) The warrant must state-

- (a) that as an authorised officer may, with necessary and reasonable help and force, enter the place and exercise the officer’s powers under this Act; and
- (b) the offence for which the warrant is sought; and
- (c) the evidence that may be seized under the warrant; and
- (d) the hours when the place may be entered; and
- (e) the date, within 7 days after the warrant’s issue, the warrant ends.”

[10] In *Stevenson Transport Pty Ltd v State of Queensland and Ors* (2003) QSC 278 Holmes J considered the validity of a similar warrant. The broad challenge to the warrant in *Stevenson* was that it failed to describe in sufficient particularity the documents to be seized, and the offences alleged to have been committed. Holmes J, in analysing the warrant, noted that it is appropriate to interpret the

requirements in the section as “having the purpose of enabling those involved in its execution to know at least the bounds to the area of search”.⁸

[11] In *Stevenson* the warrant was declared to be invalid because:

- (a) the warrant did not identify any individual, or class of persons as the subject of the inquiry;
- (b) the description of the offences was unclear and confusing;
- (c) the documents and items described as the search object were unlimited; and
- (d) the intended area of inquiry was not apparent on the face of the warrant.

[12] In drafting the warrant in this case, an effort was made to remedy the defects in the warrant before the court in *Stevenson's* case.

[13] The terms of the warrant are reproduced in an appendix to the judgment. The statement of “the evidence” is set out in a series of 12 dot points. On the assumption the time period specified at the end of the dot points applies to each category of “evidence”, the warrant does identify with reasonable certainty the bounds to the area of search which execution of the warrant involved.

The offences

[14] The warrant sets out five categories of offences, again in dot point form. The first category satisfactorily identifies as the subject of inquiry a class of persons (“drivers employed to drive heavy vehicles”) and the offences said to be committed (that is, breaches of maximum driving times (regulation 15), maximum work times (regulation 16), and minimum rest times (regulation 17)).

⁸ At paragraph 11, citing a phrase used by Burchett J in *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 103 ALR 167 at 178.

- [15] The second category shifts from driver offences to any employer offences committed as a consequence of the driver offences. The offences are stated to be breaches of s 72 *Transport Operations (Road Use Management) Act 1995*.
- [16] The third category of offences specified relate to the obligations on an employer to keep daily driving records. The employer is specified and the relevant provisions of law are identified.
- [17] The fourth category shifts from fatigue management offences (categories 1, 2) and record keeping offences (category 3) to offences setting the mass limits of particular classes of heavy vehicles. The *Transport Operations (Road Use Management) Regulation 1995* ss 14, 15, and 16 impose on a person in control of a vehicle, an obligation to comply with the mass requirements applying to it. There are no other details in this category apart from the description of “persons in control of a vehicle” and the particular regulation said to be breached.
- [18] The fifth category identifies Mr Turner as the offender, and specifies offences committed by him in his capacity as an executive officer of the company. The offence section is nominated as s 57 *Transport Operations (Road Use Management) Act 1995*. This section imposes an obligation on the executive officers of a company to ensure the corporation complies with a transport Act, and provides that, subject to a defence, if a corporation commits an offence against a provision of a transport Act, each executive officer also commits an offence. Section 57 of *Transport Operations (Road Use Management) Act 1995* applies to all transport Acts and offences committed by a corporation against a provision of a transport Act. This category is not limited by the earlier categories. At common law the assertion of such a broad category of offence (offences) would be too imprecise to found a warrant.

Discussion

- [19] If it is accepted that Holmes J is correct in applying common law principles to s 28⁹ then a strict compliance with the statutory conditions governing the issue of search warrants is required. The High Court very recently confirmed the strictness of the application of common law principles.¹⁰
- [20] The warrant in this case identifies not actual offences but types of offences which might have been committed, and in the case of the fifth category the possible offences are so broad as to be unpredictable. While the boundaries of the “evidence” sought is limited by time, and by the general descriptions of the categories, what is sought are the records of the company, from the examination of which it is hoped to discover proof of offences of the kind set out in the warrant.
- [21] The common law rules grew out of a hatred of the general warrant, which was first used by the Star Chamber for the purpose of controlling the writing and printing of seditious or radical political works.¹¹ Although much time has passed since then, the shadow of the common law hangs over the interpretation of search warrants. One question which arises from the use of the warrant in this case is whether s 28 may be used to gain access to the business records of a trucking company in order to search for evidence it has operated in breach of the law. The answer to this question may turn on what is meant by “evidence” in s 28(5)(c). If the section is interpreted strictly then I doubt the section may be used to seize the company’s records generally in order to determine whether the law has been breached. If the term

⁹ *Stevenson Transport Pty Ltd v State of Queensland & Ors* (2003) QSC 278 at para 11.

¹⁰ *State of New South Wales v Corbett* (2007) HCA 32.

¹¹ See the brief discussion of this by Callinan and Crennan JJ in *State of Queensland v Corbett* (2007) HCA 32 from para 89.

“evidence” in s28 (5)(c) is interpreted strictly it, and therefore the warrant, is limited to what is or may be tendered in a legal proceeding.

[22] There may well be a social value in the effective supervision of the trucking industry. If a wider power than that conferred by s28 is required to investigate breaches of the Act and Regulations, that is a question for parliament not the courts.

[23] Whether or not those comments are correct, the conclusion I have reached is that the warrant in this case is bad for generality.

The approach of the magistrate

[24] In the circumstances I shall state briefly my conclusions on Mr McSporrans SC’s argument the magistrate applied a wrong test to the evidence

[25] The section under which the company was prosecuted provides¹²:

“Special obligation of employers

An employer must not allow an employed driver to drive a heavy vehicle for the employer if the employer knows, or reasonably ought to know, that by driving the vehicle the driver would, or would be likely to, commit a core driving hours offence.”

The gist of the offence is knowledge or constructive knowledge on the part of the employer. In determining whether an employer ought to have known, the court may consider its position as an employer and the means it had at its disposal as an employer to know whether the employee was likely to commit a core driving hours

¹² S 72 Transport Operations (Road Use Management – Fatigue Management) Regulation 1998

offence on the particular occasion. If the correct approach is to pose the question whether “there existed facts and circumstances that would have alerted the defendant company to the fact that the company’s employed driver, Mr Tunnah, was likely to commit a core driving hours offence on his journey from Liverpool to Acacia Ridge on 9 November 2004 to 10 November 2004”,¹³ then the facts and circumstances include the circumstance that the defendant company occupied a position as the driver’s employer, and the opportunity and means the defendant had as employer to know whether the employee was likely to commit a core driving hours offence. I suspect the magistrate did apply a wrong test, although it is not altogether clear from his reasons whether that is the case or not.

In this case, for example, I am not in a position to know whether the magistrate should have taken into account the employer’s access to the GPS system. The fact that the system had its limitations is not to the point as it was used for some purposes, and I was told it was capable of revealing whether a driver had committed a core driving hours offence. A capacity, I assume, of which the company would have been aware.

[26] In the circumstances, however, it is perhaps unnecessary for me to make any further comments.

[27] In all of the circumstances the appeal is dismissed.

Appendix ATRANSPORT OPERATIONS ROADE USE MANAGEMETN) ACT 1995
(Section 28)

WARRANT TO ENTER A PLACE

To, Andrew Allan Archibald as an officer duly authorised by the Chief Executive Officer of the Department of Transport in the State of Queensland.

Whereas an application has been made this day upon oath before the undersigned, a Magistrate for the said State that there are reasonable grounds for suspecting there is (or there may be within the next 7 days) in or on the premises comprising business office, dwelling house, surrounding yard, outbuildings, sheds or vehicles or RT & BF Turner PTY LTD, situated at, number 28 Palmwoods-Montville Road, Palmwoods in the said State, certain things ("the evidence"), namely:

- Weighbridge docketts or copies thereof relating to the weighing of heavy vehicles and or freight at a particular date and time
- Fuel records relating to heavy vehicles refuelled at a particular date, time and location
- Telephone records and accounts that indicate the location of heavy vehicles at a particular date and time
- Driver rosters/schedules and vehicle schedules relating to the movement of heavy vehicles and fatigue management of heavy vehicle drivers
- Heavy vehicle driver logbooks and or duplicate pages or copies therefore
- Job orders and or any other document that records customer requirements for the movement of customer freight
- Employment agreements and or pay records relating to the employment of heavy vehicle drivers or heavy vehicle sub-contractors
- Heavy vehicle driver personnel files
- Policy procedures and training records relating to heavy vehicle drivers
- Global Positioning Systems (GPS) data relating to heavy vehicles
- Electronic engineer management system records relating toe heavy vehicles
- Any other documents that record the movement of heavy vehicles under the control of Ronald Thomas Turner, RT & BF Turner PTY LTD between the thirty first day of January 2004 and the twenty second day of February 2005.

which may be in hard copy or electronic form and which may afford evidence of the commission of the following offences against the Transport Operations (Road Use Management) Act 1995 namely

- Offences committed by drivers employed to drive heavy vehicles in contravention of :-

regulation 15	Regulated hours – maximum driving times
regulation 16	Regulated hours – maximum work times
regulation 17	Regulated hours – minimum rest times

of Part 2 of the Transport Operations (Road Use Management – Fatigue Management) Regulation 1998 as permitted by Section 171 of the Transport Operations (Road Use Management) Act 1995.

- Offences committed by Ronald Thomas Turner, RT & BF Turner PTY LTD in the capacity as an employer of employed drivers under Section 72 of the Transport Operations (Road Use Management – Fatigue Management) Regulation 1998 (Special obligation of employers) as permitted by Section 171 of the Transport Operations (Road Use Management) Act 1995.
- Offences committed by Ronald Thomas Turner, RT & BF Turner PTY LTD in the capacity as an employer under Section 56(1) and 56(2) of the Transport Operations (Road Use Management – Fatigue Management) Regulation 1998 (Non-local area work records to be kept) and Section 57(1) and 57(2) of the Transport Operations (Road Use Management – Fatigue Management) Regulation 1998 (Local area work records to be kept) as permitted by Section 171 of the Transport Operations (Road Use Management) Act 1995.
- Offences committed by persons in control of heavy vehicles under Section 14 (Compliance with requirements – vehicles), Section 15 (Compliance with requirements – trailers), Section 16 (Compliance with requirements – combinations) of the Transport Operations (Road Use Management) Regulation 1995 as permitted by Section 171 of the Transport Operations (Road Use Management) Act 1995.
(Offences relating to Mass)
- Offences committed by Ronald Thomas Turner in his capacity as an Executive Officer under Section 57 of the Transport Operations (Road Use Management) Act 1995 (executive officers must ensure corporation complies with transport Act)

AND WHEREAS it appears to me there are reasonable grounds for so suspecting.

This warrant therefore authorises you with such assistance and by such force as is both necessary and reasonable, to enter the said premises of the said Ronald Thomas turner, RT & BF Turner PTY LTD, between the hours of 7:00am and 7:00pm to exercise the powers of an authorised officer under the aid Act and if the evince (or any part thereof) is found, to seize the same, and further deal with it according to law.

This warrant shall cease to have effect at 7.00pm on the Twenty Seventh day of February 2005.

Given under my Hand, at Inala Magistrates Court in the said State, this Twenty First day of February 2005

Magistrate