

[HIGH COURT OF AUSTRALIA.]

BARCLAY APPLICANT ;
INFORMANT,

AND

LINNANE RESPONDENT.
DEFENDANT,

ON APPLICATION FOR LEAVE TO APPEAL FROM THE
SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. *Railways—Offence—“ Person employed upon the railway ”—Under influence of*
1956. *intoxicating liquor—Officer in charge of lost property section—Found on railway*
SYDNEY, *siding—Whether “ employed upon the railway ”—Government Railways Act*
April 9, 18. 1912-1955 (N.S.W.) (No. 30 of 1912—No. 27 of 1955), s. 133 (1) (a).
Dixon C.J.,
Williams,
Fullagar,
Kitto and
Taylor JJ.

Section 133 (1) of the *Government Railways Act 1912-1955* (N.S.W.) provides :
“ If any person employed upon the railway or in repairing or maintaining the
works of the said railway—(a) is found drunk or under the influence of intox-
icating liquor or any drug whilst so employed upon the said railway . . . ”
then he may be apprehended by the persons and in the manner therein men-
tioned.

Held, that the words “ person employed upon the railway or in repairing
or maintaining the works of the said railway ” are not restricted in meaning
to persons actually employed in working on the lines or tracks and on those
services ancillary and auxiliary to the actual running of the trains but include
every employee whose work takes an immediate part in the working of the
whole operating portion of the railway system.

Decision of the Supreme Court of New South Wales (*Clancy J.*), reversed.

APPLICATION for leave to appeal from the Supreme Court of New
South Wales.

James Henry Linnane was charged pursuant to s. 133 (1) (a) of
the *Government Railways Act 1912-1955* (N.S.W.) that he was at
Sydney in the State of New South Wales on 17th May 1955, being
then a person employed upon the railway, to wit a station assistant,

found under the influence of intoxicating liquor whilst so employed upon the said railway. He pleaded "not guilty" and at the close of the informant's case the presiding magistrate upheld a submission by his counsel that at the time of the alleged offence he was not "employed upon the railway" within the meaning of the section under which he was charged. He was accordingly discharged.

Upon the informant's application the learned magistrate stated and signed a case pursuant to s. 101 of the *Justices Act* 1902-1955 (N.S.W.) in which the facts as found by him were as follows:—

1. That on 17th May 1955, Linnane was an officer employed by the Railway Commissioner for New South Wales in accordance with the *Government Railways Act* 1912-1955.
2. That on the said date he was an officer employed at Lucas siding within the Darling Harbour railway yards as a station assistant by the Commissioner for Railways.
3. That Lucas siding is vested in the said Railway Commissioner.
4. That the Lucas siding installation, *inter alia*, consists of a railway platform adjacent to railway lines and offices.
5. That on the said date he was an officer in charge of the lost property section at Lucas siding.
6. That the function of the lost property section is to salvage goods damaged in transit and to collect miscellaneous items of property from various departmental sections within the yards.
7. That the office of the lost property section at Lucas siding in general is not open to the public, although on occasions they may have access thereto.
8. That his duties on the said date did not entail: (a) The working of any part of the railway signalling system. (b) Work upon the permanent way. (c) Work as the member of a train crew; that is to say in the capacity of a locomotive driver or fireman or as a guard. (d) Work as a member of the running staff, e.g. a station master. (e) Contact with the running staff.
9. That he was absent from duty between the hours of 2.40 p.m. and 3.40 p.m. on the said date; his tour of duty having commenced at 7.30 a.m., while he was rostered to be relieved therefrom at 4.15 p.m.
10. That at 3.40 p.m. on the said date he was found by a chargeman at the end of the Lucas siding platform returning from the direction of Liverpool Street, Sydney.
11. That at the time and place aforesaid he was under the influence of intoxicating liquor to such a degree that he could be said to be in fact in a drunken condition.

The question for the opinion of the Supreme Court was whether the learned magistrate had erred in law in upholding the submission made at the conclusion of the informant's case.

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The case stated came on for hearing before *Clancy J.*, who held that the learned magistrate had not erred in law by so upholding the submission, and accordingly the question submitted for the opinion of the Supreme Court was answered in the negative.

The informant sought leave to appeal from this decision to the High Court.

R. Chambers Q.C. (with him *H. Jenkins*), for the applicant. The section is not concerned with the duties performed by the person charged but with the proximity of such person to the railway, i.e. to the running line. Locality is the test. The history of the section shows that the legislature is not concerned with the actual duties performed. [He referred to the *Railway Regulation Act* 1840, s. 13; *Railway Regulation Act* 1842, s. 17; *Railways Act* 1858, s. 132; *Government Railways Act* 1888, s. 92.] This review shows that the legislature has deliberately departed from specifying the particular duties performed and has regard to the location of the person charged at the time of the alleged offence. The respondent here falls within the scope of the section upon this view. Alternatively, the words “employed upon the railway” refer to the status of the person charged—an employee of the commissioner. The matter is one of some consequence to the commissioner in his running of the department, for as the matter now stands it means that no offence is committed unless the person charged is a member of the running staff. The case is a proper one for the grant of special leave.

M. E. Pile Q.C. (with him *W. K. Fisher*), for the respondent.

M. E. Pile Q.C. Special leave should not be granted. The matter may fairly be regarded as trivial. That the decision of the court below may cause the commissioner some concern is not a factor to be considered, particularly as it may involve placing an acquitted person in jeopardy.

W. K. Fisher. The *Government Railways Act* in many places distinguishes between the railway and other places vested in the commissioner. [He referred to ss. 11, 15A, 17 (1), 33, 48 and 134A of such Act.] *Clancy J.* held that both on the duties test and the locality test the respondent could not be said to be “upon the railway” and his Honour’s view is here adopted. The respondent cannot be said to be “employed upon the railway” unless he has

something to do with the actual working of the railways system, i.e. the running of the trains. The word “upon” should be interpreted literally. By “railway” is meant a certain type of way or road, i.e. one constructed of rails or lines. The section is aimed at conduct which is a danger to the safe working of the railways.

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Cur. adv. vult.

THE COURT delivered the following written judgment :—

April 18.

This is an application for special leave to appeal by an informant in a prosecution under s. 133 (1) (a) of the *Government Railways Act* 1912-1955. The information was dismissed by the magistrate. The informant appealed from the dismissal to the Supreme Court by way of case stated but this appeal was dismissed by *Clancy J.* It is from the order dismissing the appeal that the informant now seeks special leave to appeal.

The defendant is a station assistant in the employ of the Railway Commissioner of New South Wales. Section 133 (1) provides that : “If any person employed upon the railway or in repairing and maintaining the works of the said railway—(a) is found drunk or under the influence of intoxicating liquor or any drug whilst so employed upon the said railway . . . any railway officer or agent, or any special constable duly appointed, and all such persons as any of them may call to his assistance, may seize and detain such person so offending, or any person counselling, aiding or assisting any such offence, and convey him with all convenient despatch before any magistrate, or two justices of the peace, without any other warrant or authority than this Act, to be dealt with according to law.” Sub-section (2) of s. 133 fixes a maximum penalty of six months’ imprisonment or a fine of fifty pounds.

It appears from the findings of the magistrate that the defendant was an officer employed at Lucas siding, which is within the Darling Harbour railway yards. Lucas siding is vested in the Railway Commissioner and it consists, among other things, of a railway platform adjacent to railway lines.

The defendant was an officer in charge of the lost property section at Lucas siding. Among the purposes of the lost property section there is included what is called the “salvaging” of goods damaged in transit and the collection of miscellaneous items of property from various departmental sections within the yards. The lost property section at Lucas siding is not open to the public in general, although on occasions the members of the public may have access to it. The defendant’s duties as a station assistant at the lost

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property section did not include any work upon the permanent way or in the signalling system or as a member of the running staff, nor, indeed, any contact with the running staff. The evidence for the informant was to the effect that on the day in respect of which the charge is laid the defendant was absent from his duty at Lucas siding for about an hour and as he returned he was found to be under the influence of liquor to such a degree that he could properly be described as in a drunken condition.

On these facts it was submitted to the learned magistrate on his behalf that the word "railway" as used in s. 133 (1) (a) possessed a restricted meaning. It meant no more than a line or track consisting of iron or steel rails on which carriages or wagons conveying passengers or goods are moved by a locomotive thus constituting a railway train and those things and those services ancillary and auxiliary to the actual running of railway trains, that is to say, signals, turntables and the like. The magistrate in effect adopted this construction of s. 133 (1) (a) and on that ground dismissed the information. In substance *Clancy J.* accepted the same view but expressed the opinion that the description of duties to be performed was to be preferred as a test to that of locality. It is because the Railway Commissioner regards this restrictive interpretation of s. 133 (1) (a) as of importance in the administration of his department that special leave is now sought from this Court.

It is hardly necessary to say that, apart from such a consideration as that put forward by the commissioner, the case is not of a description in which we would be disposed to exercise our power of granting special leave to appeal. But the application was argued before us fully and both parties concurred in the view that no further argument of the matter would be necessary should we give special leave to appeal.

We find ourselves quite unable to agree with the construction which has been assigned to the provision in the Supreme Court and by the learned magistrate. The history of the legislation was referred to but it throws but little light upon the meaning of s. 133 (1). The provision apparently finds its ultimate inspiration in the *Railway Regulation Act 1840* (3 & 4 Vict. c. 97, s. 13), which was supplemented by the *Railway Regulation Act 1842* (5 & 6 Vict. c. 55, s. 17). From this source s. 132 of the *Railways Act 1858* (22 Vict. No. 19) was derived, where the crucial words were much in the same form, that is to say the person found drunk must be one employed upon the railway or in repairing and maintaining the works of the said railway. But in the provision of the Act of 1842 the words were "employed in conducting traffic upon the

railway belonging to the said company". The change from "conducting the traffic" to "employed upon the railway" is possibly significant. We do not think, however, that the provision as it now stands in s. 133 (1) is really ambiguous or that it requires elucidation from the history of the legislation. In our opinion the meaning of the words in s. 133 (1) "any person employed upon the railway or in maintaining the works of the said railway" cannot be restricted so that they have nothing but the extremely limited application given to them by the decision from which it is sought to appeal. It may be conceded that many persons in the employ of the commissioner do not fall within the application of the words of s. 133 (1) in question. Those engaged solely in the over-all administration of the department certainly would not do so. Employees concerned in the procurement or purchase of supplies are hardly likely to fall within them. Employees in the claim agent's office or in a tourist bureau would not fall within the words. But the expression "employed upon the railway" appears to us to look to what may be called the whole operating portion of the railway system and to include all employees whose work takes an immediate part in the work of that operating system. It is, of course, a necessary element of the offence that the offender must be found drunk or under the influence of liquor or a drug whilst so employed on the said railway. This requirement would not be satisfied unless he was upon the premises or other property of the commissioner forming part of the operating system or possibly in some other way identifying himself with that system. We see no reason at all for saying that because the defendant was employed in the lost property section within the railway yards he fell outside the general conception conveyed by the words "employed upon the railway". We are therefore of opinion that the dismissal of the information and the dismissal of the appeal were erroneous.

We have nevertheless had some hesitation in granting special leave to appeal in a matter of this description. For the informant, however, an offer was made to submit to terms as to costs and we are impressed with the possible importance of the matter to the commissioner. We grant special leave to appeal upon the terms of the informant paying the costs of this application limited to one counsel. We treat the application as the appeal, allow the appeal and discharge the order of *Clancy J.* In lieu thereof the order upon the case stated will be that the matter be remitted to the magistrate with the opinion of the Court that the decision dismissing the information was erroneous.

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The applicant having submitted to terms as to costs, order that special leave to appeal be granted upon the terms that the applicant pay the costs of the defendant respondent taxed on the footing that one counsel only be allowed. Order that the application for special leave be treated as the appeal. Appeal allowed. Order of Clancy J. discharged. In lieu thereof order that the matter the subject of the case stated to the Supreme Court be remitted to the magistrate with the opinion of the Court that the decision dismissing the information was erroneous. Order that the applicant pay the costs of the defendant respondent of the application taxed upon the footing that one counsel only be allowed.

Solicitor for the applicant, *Sydney Burke*, Solicitor for Railways.
Solicitors for the respondent, *B. J. Macree, Boyland & Co.*

R. A. H.