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1983 No. 445 S.S.

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THE DIRECTOR OF PUBLIC PROSECUTIONS

14 JUN 1984 DUBLIN

Complainant

-and-

FRANK MURPHY AND SONS LIMITED

Defendant

Judgment of Mr. Justice Barrington delivered the 18th day of November 1983.

This is an Appeal by way of Case Stated brought by the Director of Public Prosecutions. It raises a difficult point on the meaning of the word "motor vehicle" as defined by Section 21, sub-section 15 of the Finance Act, 1935, as amended.

The facts of the matter are set out by the Learned District Justice in the Case Stated as follows:-

"1. At the Sitting of the District Court held at Kilmainham on the 4th February 1980 the Director of Public Prosecutions (hereinafter called the Appellant) charged one Frank Murphy of Manor Kilbride, Blessington, County Wicklow, on Summons, that the said Frank Murphy did on the 24th day of January 1979 at Dunsink tiphead, County Dublin, within the District Court Area of Kilmainham, keep in the fuel tank of motor vehicle, registration number RIO 925,

hydro-carbon oil chargeable with excise duty under sub-paragraph 1 of paragraph 12 of the Imposition of Duties (No. 221) (Excise Duties) Order, 1975 on which a rebate of duty had been allowed under sub-paragraph 3 of paragraph 12 of the said Order as amended by sub-section 8 of Section 40 of the Finance Act, 1976, contrary to Section 21 (8)(a) of the Finance Act, 1935 as amended by Section 20 sub-section 3 of the Finance Act, 1960.

2. Mr. Charles Moran, State Solicitor, appeared on behalf of the Appellant and Mr. Niall O'Neill of Messrs Brown & McCann, Solicitors appeared on behalf of Mr. Murphy.

3. Mr. O'Neill indicated that he would be contesting that the vehicle in question came within the definition of "motor vehicle" contained in Section 21 sub-section 15 of the Finance Act, 1935. Accordingly, I adjourned the case to the 14th of April 1980 to allow the Appellant to produce evidence in these matters. At the adjourned hearing Mr. O'Neill stated the vehicle was owned and under the control at the material time of Messrs Frank Murphy & Sons Limited (hereinafter called the Respondent) with registered office at 51 Amiens Street, Dublin and on Mr. O'Neill's application to which the Appellant acceded I amended the Summons by substituting the name of the

Respondent for that of the said Frank Murphy. Otherwise the facts as alleged in the Summons were not contested by the Respondent. Photographs of the vehicle were put in evidence on consent.

4. On the adjourned date, namely the 14th of April 1980, Stephen J. Lydon, a member of the firm of Delap & Waller, Consulting Engineers gave evidence on behalf of the Appellant. This witness stated that on the 26th of March 1980 he visited the quarry of Messrs Frank Murphy & Sons Limited at Hempstown, Blessington, County Wicklow and there met Messrs D. O'Carroll and R. Payne of the Revenue Commissioners and Michael Murphy a Director of the Respondent Company. He further stated that on examination of this truck the starting key was not available and his inspection was confined to the truck in its static condition. He gave detailed evidence of the state of disrepair of the vehicle and concluded his direct evidence by stating that the vehicle appeared to have been designed and constructed for use on the public roads but that its maintenance had been neglected to such an extent that it was not suitable for use on the public road in its present condition having regard to the provisions of the Road Traffic (Construction Equipment and Use of Vehicle) Regulations, 1963. He further

stated that the vehicle in its present condition appeared to be suitable as a "work truck" within the meaning of the Road Traffic Acts and that it could be made suitable for use on the public road without much expense. The said Solicitor for the Respondent cross-examined Mr. Lydon with a view to establishing that the vehicle was not designed, constructed and suitable for use on roads, but was designed, constructed and was suitable for use off roads in areas of rough terrain such as quarries and with which general propositions Mr. Lydon agreed. In particular Mr. Lydon agreed that the vehicle had the following characteristics:-

1. A heavy duty quarry body constructed with heavy gauge steel and reinforced with ribbed sides.
2. A special guard over the cab.
3. That it was equipped with special tyres which were not suitable for road use through generation of excessive heat if driven on roads at speeds in the order of 30 miles per hour.
4. That the axle and gear ratios were designed and constructed for great traction and would admit a maximum speed of only 32 miles per hour.

5. That the vehicle was fitted with special heavy duty tipping gear for use on uneven terrain.

6. That the vehicle had an open-ended rear and that this was unusual for trucks designed for use on the road, and

7. That the cost of the vehicle was in the order of IR£40,000 to IR£50,000 as opposed to a cost of between IR£22,000 and IR£25,000 for a road-going truck of comparable load capacity. In general Mr. Lydon agreed that the design and mechanical specifications of the vehicle were of a much higher order than that of a road lorry of the same load capacity.

5. Mr. Robinson, a member of the firm of Edge, Anderson & Company, Consulting Engineers, gave evidence on behalf of the Respondent. He was questioned by the said Solicitor for the Respondent on all the above-mentioned aspects of the truck and stated that the design and construction of the vehicle differed from a road-going lorry in the following respects:-

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1. The body was a heavy duty quarry type constructed of heavy gauge steel and reinforcements.

2. The body was of a type fitted to a dumper truck and had

a special guard over the cab.

3. The vehicle had a top speed of 32 m.p.h. It had twin drive rear axles and the gear and axle ratios were such as provided great traction and of much higher order than would be found in a road-going lorry.

4. The vehicle was fitted with specially constructed tipping gear which permitted, unlike ordinary road trucks, tipping on uneven terrain.

5. An open rear which was unusual in a truck designed for road use.

6. Heavy wearing tyres specifically designed for rough terrain and referred to in the manufacturers brochure (Dunlop) as "off the road tyres" and which were unsuitable for use on roads as the tyres would over-heat on long road journeys. The cost of the tyres was stated to be IR£1,020 each as opposed to a cost of IR£150 to £180 for a normal truck tyre for a vehicle of light road capacity.

7. The cost of the vehicle was between IR£40,000/IR£50,000 as opposed to a price of IR£22,00 to IR£25,000 for a road-going tipper truck of the same capacity.

Mr. Robinson was of opinion, for the foregoing reason, that the vehicle was not designed, constructed and suitable for use on roads but was designed, constructed and suitable for use in quarries and like locations.

6. Mr. Niall O'Neill of Messrs Brown and McCann, Solicitors for the Respondent contended that the vehicle was not "designed, constructed and suitable for use on roads" and accordingly was not a "motor vehicle" as defined by Section 21 (15) of the Finance Act, 1935. Mr. O'Neill argued that the three characteristics of design, construction and suitability contained in the definition of "motor vehicle" were complementary and must co-exist. He urged the view that a vehicle which was not designed or constructed for use on the roads would not come within the definition if it happened to be suitable for use on roads (a matter not admitted by the Respondents in the present case). It was contended for the Respondent that the evidence established that the vehicle was designed and constructed for use off roads in quarries and such like places and that it was not suitable for use on roads and that at best the evidence established that the vehicle was capable of being driven on roads but that this was not the criteria and

did not bring the vehicle within the definition.

7. Miss Carol Connolly, Solicitor for the Appellant contended that the vehicle was a mechanically propelled vehicle and was designed, constructed and suitable for use on the public roads and in particular stressed that it had features of design and construction directed towards use on the roads. She referred to the case of Attorney General .v. Shane Woods and in particular to the unreported Judgment of Mr. Justice Henchy delivered on the 15th of May 1974.

8. I found as facts:-

(a) that the vehicle was mechanically propelled,

(b) that on the 24th day of January 1979 at Dunsink tiphead in the County of Dublin, the Respondent had kept in the fuel tank of the vehicle hydro-carbon oil chargeable with excise duty under sub-section 3 of Section 21 of the Finance Act, 1935 on which a rebate of duty had been allowed as set out in the Summons.

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(c) that the vehicle had several features of design and construction and the characteristics and capabilities as enumerated by Mr. Robinson in his evidence as set out

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in paragraph 5 hereof.

9. From the evidence before me I held that the vehicle was designed and constructed for use in quarries and similar locations where the terrain would be uneven. I was of opinion and held that the vehicle had many features in its design and construction which distinguished it from a vehicle designed, constructed and suitable for use on roads. I was further of opinion and held that the evidence established that the vehicle was not designed, constructed and was not suitable for use on roads, and the fact that it was capable of use on roads did not mean that it was suitable for that purpose. For the foregoing reasons I held that the vehicle was not a "motor vehicle" as defined by Section 21 (15) of the Finance Act, 1935 and accordingly I dismiss the charge."

The learned District Justice then goes on to ask the opinion of this Court as to whether he was right in law in dismissing the said complaint.

There are in the Case Stated many findings of fact and there can be no doubt but that the learned District Justice had before him evidence to make the findings of fact which he made. Under these circumstances I

accept the contention of Mr. David Byrne, Counsel for the Respondent, that this Court is bound by the findings of fact made by the learned District Justice. The Appellant however sought the Case Stated on the basis that the determination of the learned District Justice was erroneous in point of law and this is the matter on which, as I understand it, the opinion of this Court is sought.

Mr. Geoghegan submits that the learned District Justice erred in failing to appreciate the scope of the definition of "motor vehicle" contained in Section 21 sub-section 15 of the Finance Act, 1935. That definition is as follows:-

"The expression "motor vehicle" means a mechanically propelled vehicle designed, constructed and suitable for use on roads".

That definition has however twice been amended by the Oireachtas.

By Section 18 paragraph(c)of the Finance Act, 1940 a new definition in the following wording was substituted:-

"The expression "motor vehicle" means a mechanically propelled vehicle which is designed constructed and suitable for use on roads and which derives its motive power from an internal combustion engine but does not include a tractor which is constructed or adapted for use for agricultural purposes not involving substantial

use on a public road and which has been and is being used exclusively for such purposes."

This amendment is important as illustrating that an agricultural tractor though primarily designed and constructed for use in agriculture might still fall within the definition of the words "motor vehicle" in spite of the use of the restrictive word "means" in the definition. In other words a tractor, designed, constructed and suitable for use in agriculture was not by that fact alone excluded from the category of vehicles designed, constructed and suitable for use on the roads. To be excluded from the definition the tractor had to be "constructed or adapted for use for agricultural purposes not involving substantial use on a public road," and to fulfil other requirements as to its user as well.

Section 8 sub-section 6 of the Finance Act, 1942 substituted a new definition of the word "motor vehicle" for the earlier ones. The new definition which is the one now prevailing is as follows:-

"The expression "motor vehicle" means a mechanically propelled vehicle which is designed, constructed and suitable for use on roads, but does not include a tractor which is designed and constructed for use for agricultural purposes."

Again one is driven to the conclusion that the Oireachtas took the

view that it was necessary specifically to exclude agricultural tractors from the definition of "motor vehicle" and that the mere fact that a vehicle was designed and constructed for use in agriculture did not mean that it was not designed, constructed and suitable for use on the roads. Many people might say that agricultural tractors are not very "suitable" vehicles to be driven on the public roadway and it is clear that the Oireachtas must have used the term "suitable" in a rather different sense. If agricultural tractors have been specifically excluded from the definition the inference is that other tractors or trucks, no less suitable than agricultural tractors to be driven on the public roadway, are caught by the definition.

It appears to me also that when the Oireachtas used the term "suitable" it cannot have been referring to the state of maintenance or repair of the vehicle. Many vehicles may, through bad maintenance or repair e.g. defective brakes, headlights or indicators, not be suitable for use on the public highway but the Oireachtas cannot have been using the term "suitable" in this sense. It appears to me that the Oireachtas is referring to vehicles of a particular type and not to the state of repair or maintenance of such vehicles. I cannot therefore regard the opinion of Mr. Lydon that the vehicle in the present case

appeared to have been designed and constructed for use on the public road "but that its maintenance had been neglected to such an extent that it was not suitable for use on the public roads in its present condition having regard to the provisions of the Road Traffic (Construction Equipment and Use of Vehicle) Regulations, 1963" as excluding the vehicle in the present case from the relevant statutory definition. More important is his opinion that the vehicle appeared to have been designed and constructed for use on the public road and that it could be made "suitable" within the meaning of the relevant Road Traffic Regulations "without much expense." It appears to me that the implication of this is that the vehicle as designed and constructed was of a type of vehicle designed, constructed and "suitable" (within the statutory definition) for use on roads.

Counsel have referred me to three unreported Judgments, all of which were, however, more concerned with the exception in favour of an agricultural "tractor" than with the scope of the term "motor vehicle" in the statutory definition. The Judgments are the Judgment of Murnaghan J. in Attorney General .v. Carroll (dated the 8th of November 1971: that of the Supreme Court (Walsh J., Henchy J. and Griffin J.) in Attorney General .v. Shane Woods dated the 15th of May 1974 and that of the President dated the 21st December 1978 in Director of Public

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In the latter case the learned President refers (at page 7) to "tractors" and comments:-

> "None of the relevant Acts define a tractor simpliciter nor in the decisions to which I have referred is a definition of a tractor as such provided. Quite clearly it would seem to me as a matter of ordinary use of words that a tractor used in reference to a vehicle indicates a vehicle which is capable of or designed for the purpose of drawing another vehicle. Quite clearly it would seem to me that a great number of vehicles coming within this general classification or category such as the breakdown van normally used by garages could be described as a tractor yet could not under any circumstances be described as a tractor constructed and designed for use for agricultural purposes."

It appears to me that the present case is concerned with a tractor or truck which is not a tractor or truck constructed or designed for agricultural purposes. It is not therefore specifically excluded from the definition of "motor vehicle." It appears that it was originally designed and constructed for use on the roadway and if presently "unsuitable" for use on the roadway is only unsuitable for such use by reason of lack of maintenance. It could be rendered suitable for use

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on the public highway within the meaning of the Road Traffic Regulations at very little expense. It therefore appears to me that, when new, it was a vehicle constructed, designed and suitable for use on the public highway and that it has not ceased to belong to that category of vehicle.

Photographs of the vehicle were not proved before the learned District Justice but were admitted in evidence by agreement of the parties. The parties also agreed to admit the photographs before me. From these it is clear that the vehicle in question is what Mr. Lydon described as a "work truck." It has a registered number and is of a kind which can be seen from time to time on the public highway.

The learned District Justice held that the vehicle was designed and constructed for use in quarries and similar locations where the terrain was uneven. But it does not follow from that that the vehicle was not designed, constructed and suitable for use on the roads. An agricultural tractor is designed, constructed and suitable for use in agriculture but would still probably fall within the definition of vehicles designed, constructed and suitable for use on the roads but for the fact that it is the subject matter of a specific statutory exclusion. The vehicle in the present case is not the subject matter

of any such exclusion. It therefore appears to me that despite the fact that it may have been designed, constructed and suitable for use in quarries it is also designed, constructed and suitable for use on the roads. The learned District Justice appears to have been in error in assuming that if the vehicle fell within one category it could not fall within the other.

At paragraph 10 of the Case Stated the Learned District Justice says "the opinion of the Court is sought as to whether I was right in law in dismissing the said complaint."

I would answer this question in the negative, and would remit the case to the Learned District Justice to enter continuances, having regard to the scope of the definition of "motor vehicle" discussed in this opinion.

Approved

Donal Barrington

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