

J U D G M E N T:

This is an appeal against conviction and sentence in the Magistrates' Court at Melbourne on 4 December of 2015.

The Appellant was convicted on one charge of being an owner of a commercial passenger vehicle and operating that vehicle on 19 August 2014 for hire and reward without being so authorised by licence, permit or authority contrary to s.158(1) of the *Transport (Commercial and Miscellaneous) Act 1983*, and on one charge of driving a commercial passenger vehicle on 19 August 2014 without being accredited contrary to s.165(1A) of the *Transport (Commercial and Miscellaneous) Act 1983*.

The facts of this case are not really in dispute. On 19 August 2014 Mr David Morris, an authorised Taxi Compliance Officer used an Uber Application on his smart phone to enter his location and requested a vehicle. He had previously established an Uber identity and provided credit card details. He received confirmation on the Uber application that his driver, Nathan, was en route in a Chrysler 300 Registration TVV700. A copy of that confirmation is Exhibit C. That vehicle arrived driven by the appellant. Morris got into the passenger front seat of the vehicle and his partner Robinson got into the rear

1 of the vehicle. Morris directed the appellant to drive  
2 to the Como Hotel in South Yarra. Upon arrival Morris  
3 asked the appellant, "How much is that going to be?" The  
4 appellant replied, "Nine dollars." Morris identified  
5 himself and Robinson to the appellant and had a  
6 conversation with him. The content of that conversation  
7 is set out in Exhibit G and need not be repeated in full  
8 here.

9 The appellant gave his name and address and his  
10 driver's licence details to Morris, confirmed he was the  
11 owner of the vehicle, but otherwise made effectively a  
12 "no comment" interview.

13 Morris received a receipt for nine dollars via  
14 his Uber application, Exhibit D. This receipt had a  
15 photograph of the appellant and his name on it. Morris  
16 then received an email, Exhibit E, headed "Your morning  
17 trip with Uber". That email displayed the route driven,  
18 the times involved and the fare calculation details.  
19 The appellant's name and photo were again included.

20 The evidence establishes that the credit card  
21 used by Mr Morris was first debited with the sum of  
22 \$9.09 and then credited the following day with \$9 by  
23 Uber. See Exhibit F. Uber sent Morris an email  
24 asserting that that the trip did not occur with the  
25 words, "Did not ride" upon it. See Exhibit L. That  
26 assertion was clearly untrue.

27 VicRoads certificates tendered demonstrate that  
28 the appellant is the holder of a driver's licence and

1 that he is the registered owner of TVV 700. That is  
2 Exhibit J.

3 The appellant was not licenced nor authorised  
4 to operate a commercial passenger vehicle nor did he  
5 hold appropriate accreditation to drive such a vehicle.  
6 Exhibit M, the statement tendered, establishes that and  
7 is not in dispute.

8 In cross-examination, Mr Morris confirmed that  
9 although both he and Mr Robinson travelled in the  
10 vehicle to South Yarra only \$9 was debited to his credit  
11 card and that there was not a separate charge for  
12 himself and for Robinson for the trip.

13 The appellant did not give evidence nor call  
14 other evidence.

15 Mr Clelland QC who appears with Mr Haag on  
16 behalf of the appellant made two essential submissions.  
17 Firstly, he submitted that the court could not be  
18 satisfied beyond reasonable doubt that there was a  
19 connection between the carriage of passengers by the  
20 appellant on 19 August 2014 and any hire or reward.

21 He submitted that the court must be satisfied  
22 that the carrying of passengers was for hire or reward  
23 and that the absence of any evidence as to what if any  
24 relationship existed between Uber and the appellant made  
25 such a determination impossible.

26 Secondly, he submitted that s.159 of the  
27 *Transport (Commercial and Miscellaneous) Act 1983* must  
28 be construed as providing a defence to the appellant in

1 this case.

2 These two submissions require some examination  
3 of the relevant legislation. The *Transport (Commercial*  
4 *and Miscellaneous) Act 1983* is a substantial piece of  
5 legislation. It has its genesis in historical  
6 legislation dating from 1927. There is the *Motor Omnibus*  
7 *Urban and Country Act* of 1927 followed by the *Transport*  
8 *Regulation Act of 1932*, the *Transport Regulation Amended*  
9 *Act of 1941*, the *Transport Regulation Act of 1955*, the  
10 *Commercial Goods Vehicles Act 1958*, the *Transport*  
11 *Regulation Act 1958*, the *Transport Act 1983* and the  
12 *Transport Amendment Act of 1993*.

13 Mr Clelland QC in what he described as "a walk  
14 down memory lane" took me through the relevant portions  
15 of the current and past legislation.

16 The relevant sections of the current Act are  
17 firstly, s.186, the definition section for Division 1 of  
18 the Act.

19 A commercial passenger vehicle is defined as  
20 meaning "any motor vehicle which is used or intended  
21 to be used for carrying passengers for hire or  
22 reward" but does not include a bus.

23 Operate" is defined in the Act to mean,  
24 relevantly, under sub-s.(A) in the case of a commercial  
25 passenger vehicle other than a taxi cab, "carry  
26 passengers for hire or reward."

27 Section 87 states that:

28 "A motor vehicle shall be deemed to operate as a  
29 commercial passenger vehicle if passengers are  
30 carried therein for hire or reward."

1                   The offence section for the first charge is  
2                   s.158. That section reads:

3                   "Subject to sub-s.(2) the driver and the owner of  
4                   any commercial passenger vehicle which operates as a  
5                   commercial passenger vehicle on any highway without  
6                   being authorised to do so operate by a licenced  
7                   permit or other authority required under this  
8                   division shall be severally guilty of an offence  
9                   against this division. In any prosecution against  
10                  the driver pursuant to sub-s.(1) it shall be a good  
11                  defence if the driver satisfies the court hearing the  
12                  prosecution that he didn't know that the vehicle was  
13                  not authorised so to operate. (3) The driver and the  
14                  owner of any licenced commercial passenger vehicle  
15                  which operates otherwise then in accordance with the  
16                  provisions or conditions of any licence permit or  
17                  other authority shall be severally guilty of an  
18                  offence against this division. (4) In any  
19                  prosecution under this section it shall be a good  
20                  defence if the accused satisfies the court that (a)  
21                  the commercial passenger vehicle operated in  
22                  contravention of this section without his knowledge  
23                  or the vehicle was used only in a case of emergency  
24                  for the purpose of completing a journey."

25                  Relevant parts only being read. Immediately  
26                  following s.158, one has s.159 which Mr Clelland  
27                  described as "delicious." That reads:

28                  Onus of proof on accused in certain cases. "In  
29                  any prosecution against the owner or driver of a  
30                  commercial passenger vehicle the onus shall lie upon  
31                  the accused proving that the passengers carried upon  
32                  such vehicle were not carried for reward at separate  
33                  and distinct fares for each passenger but the accused  
34                  shall not be under any obligation to discharge such  
35                  onus until the informant first is charged with the  
36                  onus of proving that the passengers carried upon such  
37                  vehicle were carried for reward."

38                  It should here be noted that this section has been  
39                  amended twice in 2009. The first amendment inserted the  
40                  current heading and the second substituted the word,  
41                  "accused" for the word, "defendant." Much of this appeal

1 has revolved around the scope and meaning of this  
2 section and I will return to that matter subsequently.

3 Section 165 of the Act creates the offence  
4 provision the basis of the second charge. That is  
5 headed, "Offence to drive certain vehicles without  
6 accreditation. A person must not drive a commercial  
7 passenger vehicle unless the person holds a driver  
8 accreditation" and the penalty is then prescribed.

9 Turning to the defence contentions and dealing  
10 first with the first submission, I reject the submission  
11 of Mr Clelland QC that there is no evidence to establish  
12 a Nexus between the carriage of passengers and hire and  
13 reward. I am satisfied beyond reasonable doubt (1) the  
14 carriage of Mr Morris and, indeed, Mr Robinson on 19  
15 August 2014 was for hire and reward.

16 I accept that the contract for carriage was  
17 between Uber and Mr Morris. I accept that there is no  
18 direct evidence of any financial arrangement or  
19 agreement between Uber and the appellant. However, I am  
20 satisfied by the drawing of inference that such a  
21 financial agreement or arrangement existed. I do not  
22 need to determine whether the appellant personally  
23 received financial benefit or the amount thereof. I am  
24 satisfied beyond reasonable doubt that there was a  
25 reward connected to the carriage of Mr Morris and,  
26 indeed, Mr Robinson, to South Yarra.

27 Firstly, the only relevant contract related to  
28 the conveyance of Mr Morris from East Melbourne to South

1 Yarra. Uber organised such conveyance. Secondly, the  
2 appellant provided all skill and labour to effect that  
3 conveyance. Thirdly, the documents, Exhibit D and E  
4 establish the payment of \$9 in connection with that  
5 conveyance. Fourthly, the bank records demonstrate that  
6 \$9 was paid to Uber for such conveyance. Fifthly, the  
7 High Court in *Blyth v Hudson* 1929 41 Commonwealth Law  
8 Reports 465 p.473 made it clear that the prohibition  
9 prescribed by the Act as it then was and, I interpret,  
10 still is, is a general prohibition affecting the use of  
11 such a vehicle irrespective of the person's beneficially  
12 receiving the paid fares.

13 At page 473, line 19, Justice Isaacs said:

14 "If the owner for his own reasons chooses to  
15 permit other persons to put the fares in their  
16 pockets that in no way obliterates the fact that he  
17 has authorised his vehicle to be used in the manner  
18 described in the statute."

19 Sixthly, the expression, "for hire or reward" is not  
20 confined to hire and reward to the owner or driver. I  
21 am satisfied beyond reasonable doubt that the carriage  
22 of Morris and Robinson was for hire and reward by both  
23 Uber and the appellant. As I said to Mr Clelland, I can  
24 only infer that the appellant was not driving the  
25 informant out of generosity. Accordingly, I reject Mr  
26 Clelland's first proposition.

27 His second proposition and s.159 create  
28 different problems. The learned prosecutor argued that  
29 s.159 created only an evidentiary onus and didn't relate  
30 to any element of either offence. He submitted that the

1 provision would have relevance in circumstances where,  
2 for example, an accused was charged with two separate  
3 offences relating to two separate passengers conveyed on  
4 the one journey.

5 Mr Clelland in reply pointed to the first words  
6 of the section "in any prosecution". I note they are  
7 the same words that are used in s.158 which contains  
8 defences to the alleged offence. Mr Clelland submitted  
9 that such a submission, that is the prosecutor's  
10 submission, strained proper interpretation and submitted  
11 that sensible application of the section gave rise to a  
12 defence to the charge brought. He submitted the section  
13 was left in the legislation despite subsequent amendment  
14 for some purpose. This court, he submitted, is obliged  
15 to give s.159 purpose and work.

16 Mr McKay, the prosecutor pointed out that the  
17 Act contained specific defences in s.158(4) and he  
18 submitted if s.159 were intended to create a defence it  
19 would have been included in that sub-section.

20 Mr Clelland, on the other hand, argued that  
21 such an argument requires this court to effectively  
22 repeal s.159 when parliament has chosen not to do so.

23 In the final analysis, this appeal will be  
24 determined by this court's determination of the scope  
25 and effect of s.159. In the context of the legislation  
26 that imposes penalty upon an offender, I am of the view  
27 that I am obliged to interpret the provision in a way  
28 most favourable to the appellant.



1                   It is clear that historically it was a defence  
2 to charges brought for a defendant to demonstrate that  
3 any reward or hire was not for separate or distinct  
4 fares for each passenger. Such used to be an element  
5 for each of the offences charged. It is no longer.  
6 Indeed, since 1941 that phrase has been abolished or  
7 repealed as far as an element of the offence is  
8 concerned. However, s.159 continues to thrive like a  
9 thistle. Parliament chose to amend it rather than slash  
10 it. It exists and must be given some meaning.

11                   As I said earlier, the learned prosecutor  
12 submitted that s.159 was nothing more than an  
13 evidentiary onus and had no relevance to this case. I  
14 can see no purpose for an evidentiary onus that is  
15 irrelevant to any offence. Clearly, s.159 has its  
16 genesis in the earlier versions of the current  
17 legislation. It may be an unintended anachronism but I  
18 cannot ignore it. It is no part of my function to amend  
19 or repeal sections of legislation. It is my task to  
20 give meaning to legislation. It is clear that the  
21 intention of s.158 is to capture the conduct of the  
22 appellant on 19 August 2014. But for the existence of  
23 s.159 I would have no problem finding the case proved.

24                   However, s.159 must have a purpose. It  
25 preserves what historically was a defence to previous  
26 versions of the current s.158. True it is that the  
27 issue of separate and distinct fares has been removed as  
28 an element of offending in the current Act. However,

1 the concept has been preserved in s.159. Why that is so  
2 has been central to this appeal.

3 I am satisfied beyond reasonable doubt that the  
4 appellant was the owner of a commercial passenger  
5 vehicle that was operated in a relevant sense on 19  
6 August 2014. Secondly, the operation was for hire or  
7 reward. Thirdly, the passengers carried by such a  
8 vehicle at the relevant time were not carried for reward  
9 at separate and distinct fares for each passenger.  
10 Fourthly, the appellant therefore has a defence to both  
11 charges by virtue of s.159 of the Act.

12 I set aside the orders of the Magistrates'  
13 Court and in lieu thereof both charges shall be  
14 dismissed.

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