04/89

SUPREME COURT OF VICTORIA

DAVIES v WALDRON

Southwell J

29 September, 13 October 1988 — [1989] VicRp 43; [1989] VR 449; (1989) 8 MVR 363

MOTOR TRAFFIC – DRINK/DRIVING – IN CHARGE OF MOTOR VEHICLE – ENGINE STARTED – VEHICLE MOVED SHORT DISTANCE – WHETHER "IN CHARGE" – "START" – "ATTEMPTING TO START" – WHETHER PROOF OF INTENTION TO DRIVE NECESSARY: *ROAD SAFETY ACT* 1986, SS48(1)(b), 49(1)(b).

Section 48(1)(b) of the *Road Safety Act* 1986 ('Act') provides:-

"(A) person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle."

D., a police officer, saw W. get into a stationary motor car and put on the seat belt. D. then heard the engine start, saw headlights come on and the motor car move forward about six inches, stopping as if stalled. W. was intercepted, subsequently breath tested (.130% BAC) and charged with being in charge of a motor car whilst exceeding the prescribed concentration of alcohol. On the hearing of the charge, W.'s counsel submitted that the prosecution was required to prove that W. had an intention to drive the motor car; the magistrate agreed and dismissed the charge. Upon order nisi to review—

HELD: Order absolute.
1. The word "start" where used in s48(1)(b) of the Act must be given some meaning, and where it is used in the phrase "attempting to start", must be given a meaning other than "attempting to drive". Therefore it was not necessary for the prosecution to prove that where a person was in charge of a motor car that that person had an intention to drive the motor car.
***Gillard v Wenborn* (MC42/1988), distinguished.**

2. The word "start" means "to cause the engine to fire". As the evidence showed that W. succeeded in his attempt to start the engine, it was open to the magistrate to find that W. was in charge of the motor car within the meaning of s48(1)(b) of the Act.

SOUTHWELL J: [1] Return of an order nisi to review a decision of the Magistrates' Court at Melbourne dismissing an information charging the defendant/respondent with that on 7 April 1987, he was in charge of a motor car while more than the prescribed concentration of alcohol was present in his blood, contrary to s49(1)(b) of the *Road Safety Act* 1986 ("the Act"). The case involves the construction of that sub-section which provides that -

> "a person is guilty of an offence if he or she ...
> (b) drives a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his or her blood..."

[2] Section 48(1) provides that -

> "For the purposes of this Part—
> (a) ...
> (b) a person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle."

The expression "start or drive" is not further defined and must accordingly be given its ordinary meaning. At the hearing in the Court below the informant gave evidence that he saw the defendant get into the stationary car, which was parked on the footpath in Swanston Street, outside the Town Hall, put on the seat belt, he heard the engine start, and saw the headlights come on: another man thereupon ran to the driver's window, put his arm through the window

opening and said "don't be stupid, the cops are over there", where indeed they were. The informant said he saw the car move forward about six inches, stopping as if stalled. When spoken to, the defendant is alleged to have said he intended to park the car around the corner. In due course the defendant was administered a breath test, which produced a reading of .130 per cent.

The defendant in evidence said that he did not put on the seat belt or turn on the light; that he did not intend to drive the car; that his friend who had driven the car to the city had told him he had stalled it and could not restart it, and that he, the defendant, was merely attempting to discover whether it could be started. He denied any admission to the police that he intended to drive **[3]** the car. His evidence was corroborated, at least in part, by the friend who drove the car into the city, stating that he stalled it, could not restart it, and told the defendant of this.

That version of the facts (and later, the Magistrate's findings) are taken from the affidavit of the prosecuting officer: at the hearing before me, I rejected the tender of two affidavits sworn by counsel for the defendant, upon the basis that no good reason was shown why they were not served within the time limited by the order nisi, and their admission into evidence would necessarily have involved taking the matter out of the list in order that the Magistrate might be served with them, and the applicant given the opportunity to give instructions concerning them.

Counsel for the defendant succeeded in persuading the Magistrate that the information should be dismissed upon the basis that an element of the offence had not been proved, namely, that the defendant had the intention to drive the car. The Magistrate is said to have stated -

> "That the prosecution had to prove that the defendant was both in charge of the vehicle and had an intention to drive. He said that he was satisfied that the defendant was in charge of the vehicle but was not so satisfied beyond reasonable doubt in relation to his intention to drive the vehicle. He said that s47 of the *Road Safety Act* set out the purpose of this part of the Act and in his opinion related to drivers."

Section 47 of the Act provides -

> "47. The purpose of this part are to—
> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
>
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
>
> **[4]** (c) provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol."

For the applicant in this Court Mr Bick submitted that the Magistrate, having found that the defendant was in charge of the car, was in error in ruling that an element of the offence was an intention to drive the car. It was said that on any view, a person who gets in the driving seat of his own vehicle and starts the engine, was in the absence of some extraordinary circumstances not here present, "in charge" of that vehicle. It was said that s47 and s48 were concerned not only with persons who drive, but persons who perform acts preliminary to driving: that the Act deals not only with actual danger caused by drivers, but also with potential danger from potential drivers. He submitted that s48(b) should be construed as if it reads "a person may be taken to be in charge of a motor vehicle if that person is attempting to start or drive ...".

Mr Cook, for the respondent, agreed with that latter submission, which I am prepared to accept as correct. It might be said that another construction could be "a person shall be taken to be in charge ...". However, Parliament did not so put it, and since this is a penal statute, the more draconian interpretation should not be adopted.

Mr Cook submitted that when the purposes of the legislation as set out in s47 are considered, the term "in charge of a motor vehicle" in s49(1)(b) should be construed as applying only to a person who is intending to drive the vehicle. It was at first submitted that s48 should be **[5]** ignored in deciding in the first instance whether a person was "in charge": however, as I understood him, Mr Cook eventually conceded that one could scarcely ignore such an interpretative provision: but it was said, since s48(1)(b) is not expressed in imperative terms, the fact that there has been an "attempt to start" does not lead necessarily to the conclusion that the person is "in

charge" of the vehicle. Mr Cook referred to a number of authorities in support of the proposition that the Magistrate was not only not bound to find the defendant was "in charge" of the car, but that he was in error in so finding, for the reason that the Magistrate did not, so it appears, reject the defendant's version that he had no intention of driving the car.

In *Pryor v Morgan; ex parte Pryor* [1970] QWN 13; (1970) Queensland Law Reporter 29, the intoxicated owner of a motor vehicle was seated in the passenger seat while M, his employee, drove. The owner was convicted as being in charge of the vehicle. It was held that he was clearly in charge, and that although it was not impossible under the relevant legislation for two people to be in charge, this could be so only in the most exceptional circumstances, not there existing. Mr Cook submitted that in the present case, the defendant's friend having been entrusted with the car, and having driven it to the Town Hall, and then being present at the time the defendant was apprehended was still "in charge" of the car: it was said that *Pryor v Morgan* was authority for the proposition that the defendant could not also be "in charge". In my opinion, that case is very different: the **[6]** defendant owner of the car, had regained possession of the keys, had entered the car, sat in the driving seat, started the engine, and clearly enough, as against his friend, could have exercised his right to control the car by driving it. Unassisted by authority, I could scarcely imagine a clearer case of a person being "in charge" of a motor vehicle.

In *Haines v Roberts* (1953) 1 All ER 344; [1953] 1 WLR 309 a young man left his motor cycle at the rear of a garage: he later became inebriated, and his friends arranged for someone else to take the motor cycle to the owner's home. The owner was unaware of this arrangement, and was apprehended a few feet from the motor cycle; when asked whether he intended to ride it, the owner became truculent and aggressive, stating "if I want to ride that bike, I will ride it, and no one in town will stop me". It was held on appeal that the owner was "in charge" of the motor cycle. Lord Goddard CJ said at All ER p345:

> "How can it be said that in those circumstances the respondent was not in charge of the motor cycle? He had not put it into anybody else's charge".

Mr Cook sought to draw comfort from the passage following that, where His Lordship went on:

> "It may be that, if a man goes to a public house, and leaves his car outside or in the car park, and, getting drunk, asks a friend to go and look after the car for him or take the car home, he has put it in charge of somebody else...".

His Lordship did not, of course say that if the owner left the hotel and performed the acts which were here proven, he would not have been "in charge". It may be conceded that when earlier in the evening the defendant gave **[7]** the keys to his friend to enable the friend to drive the car to the Town Hall the friend was "in charge" of it; it may be conceded that there may have been an intention that the friend should again take charge of it: be that as it may, the case cited is not authority for the proposition that the present defendant was not "in charge" of the car at the relevant time.

Crichton v Burrell (1951) Scots Law Times 365 was a case where the inebriated owner of the car arranged for an employee to drive the car: the owner stood by the car, with the key in his hand, waiting for the employee. The Lord Justice-General, with whom Lord Russell and Lord Keith agreed held that in those circumstances "of rare occurrence", the owner was not "in charge of the car. His Lordship praised "the exercise of a prudent foresight as commendable as it is rare", and held that "the only fair and just inference is that from the time arrangements were made for chauffeuring, the chauffeur was the person in charge". His Lordship said at p366 that the person in charge "is the person in *de facto* control". Lord Keith observed that the owner in that case "did not intend to take any control of the car".

It surely cannot be doubted that in the present case the defendant was in *de facto* control. In *Macdonald v Bain* (1954) Scots Law Times 30, the inebriated accused decided not to drive his car and arranged for someone else to do so. He was standing by the car, the key in the ignition. The Sheriff substitute entertained a doubt as to whether the accused was "in charge as driver": he said "If the words 'in charge of' are to be **[8]** read under reference to proper driving control it seems to me that they mean in charge as driver, not as car park attendant, or mechanic, or watcher"; once again a very different set of facts.

Mr Cook was able to point to no case where an owner or any person lawfully entitled to possession and control who performs the acts here performed by the defendant, has not been held to have been "in charge" of the vehicle. What was said to be the strongest authority for the proposition here relied upon, was the judgment of Marks J in *Gillard v Wenborn*, unreported, 27 July 1988. There, the applicant was convicted pursuant to s82(1)(b) of the *Motor Car Act* (the precursor to s49 of the Act) of being under the influence of liquor while in charge of a motor car. His Honour was critical of the inadequacy of the material before him, but the facts may be summarised as follows:

At about 6.00 a.m., police saw the applicant's car in a road in Williamstown, its lights on and engine running: the applicant was asleep in the front seat, but woke after several minutes of police knocking on the car window: the applicant then appeared confused and ill. The applicant told the Court that earlier in the morning, realising that he was too intoxicated to drive, he arranged for a female friend to drive from Hawthorn; he fell asleep on the back seat at about 2.00 a.m. He woke at 3.00 a.m., alone, in Williamstown. He unsuccessfully telephoned for assistance, using the car telephone: in the course of telephoning he turned on he engine to heat the car, the temperature being **[9]** about 9°C: he fell asleep at about 5.00 a.m. His evidence was corroborated by his friend.

Marks J said at p6:

> "The words 'in charge' without more are vulnerable to a wide interpretation. They could, for example, encompass a sole occupant of a motor car asleep on the back seat being 'in charge' in a like sense of a watchman asleep on duty. Section 82(1)(c) however provides the 'something more' and requires the prosecution to link occupancy with some threat or apprehended threat to the public, in other words, to link the intoxicated person in charge of the unfit state. It is clear enough that this is the object of s82(1)(c). On 28 September 1949 on the second reading of the Bill which contained the amendment, the Chief Secretary (Lieutenant Colonel Leggatt) said:-
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> > 'The last sub-clause limits the interpretation of being in charge of a motor car to attempting or apparently intended to start or drive the car. That is adopting a suggestion made previously that a person could be in his club and yet still be held to be in charge of his motor car. I think that is a clearer definition.' (*Hansard*: Parliamentary Debates, Vol. 230, p2395).'

I should add that a perusal of *Hansard*, concerning the lengthy debates upon the second reading of the *Road Safety Bill* in the 1986 Spring Session of Parliament, and of debates in the Committee stages, throws no light upon the present problem. *[His Honour then referred to other passages from Gillard v Wenborn, and continued]* ... **[11]** In my opinion, *Gillard v Wenborn* is distinguishable from the present case. It is to be observed that Marks J did not express the view that if the defendant in that case had been seen at 5.00 a.m., starting the engine of the car, he could have escaped conviction. If an inebriated man is seen to be sitting in the driver's seat of a car at the side of a highway, attempting to start the engine, there is, to use Marks J's words, a "link" between that person and "a risk that he will drive it": there is a "threat or apprehended threat to the public". In my opinion, giving the words "in charge of a motor vehicle" in s49(1)(b) of the Act their ordinary meaning, it is clear that the defendant was "in charge": it was his car, he had the keys in his possession, he sat in the driver's seat, and he started the engine. Apart from the question of intoxication or blood alcohol level, he had the right and opportunity to control the car: no other person had the right to interfere with that control (apart from those entitled to prevent offences against the Act). I would reach that finding without recourse to s48(1)(b): however I think reference to that sub-section reinforces the interpretation I would give to s49(1)(b).

[12] It is clear that Parliament had in mind that some action less than an attempt to drive would or might suffice to lead to a finding that a person was "in charge" of a motor vehicle. The expression in s48(1)(b) "attempting to start" must be given some meaning other than "attempting to drive". Intentionally to put the car in motion while seated in the driver's seat and in a position to control the movements of the car is to "drive" the car (*Tink v Francis* [1983] VicRp 74; (1983) VR 17). To start the car is something less: in my opinion, the expression to "start the motor vehicle" must in this context mean to cause the engine to fire, or in ordinary parlance, to start the engine.

In the present case the defendant not only attempted to start the engine, he succeeded in that attempt, although it would not have been necessary for the prosecution to prove that

success. If the defendant had turned the ignition lock with the intention that the engine would fire, he would have "attempted to start the motor vehicle" within the meaning of s48(1)(b). In the present case, in my opinion it was not necessary for the prosecution to prove that the defendant intended to drive the car.

Parliament makes it clear by the words of s49(1)(b) that no distinction is to be drawn between "driving" and "being in charge" of a motor vehicle. Section 48(1)(b) in turn makes it clear by the use of the words "start" or "drive" that it is not necessary to prove an intention to drive. To hold otherwise would give no meaning to the word "start" where it twice appears in **[13]** s49(1)(b). The submission which was accepted by the Magistrate was, in reality, a submission that the use of the word "start" had no relevant meaning or effect. That cannot be right. I should add that even were the Magistrate to be affirmatively satisfied that the defendant did not intend to drive, nevertheless the defendant must be held to have been "in charge" of the vehicle. However such a finding would of course be relevant on the question of penalty. The order nisi must be made absolute with costs. The matter will be referred to the Magistrates' Court to be further dealt with according to law.

Solicitor for the applicant: Victorian Government Solicitor.
Solicitors for the respondent: James J McCarthy and Associates.
