61/76

SUPREME COURT OF VICTORIA

ROSS v KENNY

Murphy J

28 June 1976

MOTOR TRAFFIC – DRINK/DRIVING – "DRIVING" – MEANING OF – DEFENDANT GOT INTO CAR BUT COULD NOT MOVE CAR DUE TO ITS POSITION ON RAILWAY LINES – WHETHER DEFENDANT DRIVING – CHARGE FOUND PROVED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

The motor car in question was positioned straddling two railway lines, at right angles. The defendant got into the car, started the engine, put the car in gear, attempted to move it from its position; however although the wheels revolved, the car remained positioned straddling the lines moving neither forwards, backwards or sideways. The magistrate found the charge of drink/driving proved. Upon Order Nisi to Review—

HELD: Order absolute. Conviction quashed.
The intention of the defendant was not relevant. The question was one of objective fact. Did he actually drive the car? No. The defendant had no control over the means of propulsion and the car did not move. Both movement and control appear on the authorities, to be necessary ingredients of driving.
***Caughey v Spacek* [1968] VicRp 78; (1968) VR 600; and**
***Wallace v Major* (1946) 2 All ER 87, followed.**

MURPHY J: ... Mr Uren submitted that the intention of the person in the driving seat is irrelevant, if the car is incapable of being moved. If the car is upon blocks, for example, or on a hoist, it cannot be driven, for it is not capable of propulsion. Again, if the engine cannot be started because some piece is missing, then it cannot be driven.

He referred in support to *McGrath v Cooper* [1976] VicRp 54; [1976] VR 535 a decision of Gillard, J delivered on the 16th March 1976. In that case, one car was being pushed by another. The car being pushed was being guided by the defendant who was seated in the driving seat. This car had defective timing gear and was being pushed to "Whirly Wilson's Garage" at Ararat, to be repaired. His Honour found that it was immaterial to his decision whether the vehicle being pushed was at all times being pushed or at some times was rolling under its own momentum.

His Honour relied upon the definition of motor car contained in s3 of the *Motor Car Act* 1958. This reads 'motor car means any vehicle propelled by internal combustion, steam, gas, oil, electricity, or any other power and used or intended for use on any highway'.

Gillard J held that to 'Drive a motor car' does not simply mean 'to control' a motor car (*Cornelius v Jones* (1936) 38 WALR 62) nor 'being in charge of' a motor car (*Doyle v Harvey* (1923) NLR 271 P.275, s82 of the *Motor Car Act* 1958).

After reviewing certain of the English authorities, which he found, 'difficult of reconciliation', (and I agree with him) Gillard J turned to consider *Doyle v Harvey* (*supra*) in more detail and adopted Macfarlan J's test, namely, 'the driving consists in propelling or causing the vehicle to be propelled, the guiding and the stopping of the vehicle. Those are all important steps in the process of act of driving'.

He held that the underlying notion of driving is the control over propulsion and said,

> 'The whole concept is that the person must have control of the force that pushes the vehicle backwards or forwards. He must have control of the mode of moving the vehicle. The means of propulsion and their control are necessary attributes of driving.'

It seems clear that in England and in Victoria, a person guiding a broken-down vehicle that is being

towed, does not drive a motor car. *Wallace v Diala* (1946) 2 KB 473 and *Caughey v Spacek* [1968] VicRp 78; (1968) VR p600. The 'robust common-sense' that led Sir Henry Winneke to adopt Lord Goddard's test laid down in *Wallace v Major* (*supra*) may be most material in the instant case. The fact that the respondent's lack of control over the operation and movement of the car in that case prevented the court from saying that he was driving the car, appears to me to be material here.

In my opinion, the intention of the respondent is not relevant. The question is one of objective fact. Did he actually drive the car? I think not.

The respondent had no control over the means of propulsion and the car did not move. Both movement and control appear to me, on the authorities, to be necessary ingredients of driving.

The example given by Macfarlan J of stopping at a traffic light appears to me to involve moving the car up to the light and controlling it by stopping it there. If the defendant in such a case as Macfarlan J contemplates could have proven that he got into the car after it had been stopped (even with the engine running) by someone else at the lights, and he was then apprehended before the car moved in any way again, I myself doubt very much whether it could be held that he drove the motor car within the meaning of s81A.

Accordingly, in the present case, on the facts found by the magistrate, and on which this case was argued before me, I am of the opinion that it was not open to the magistrate to find that the car was driven by the respondent. It could be said that he attempted to drive it, but it could not be driven.
