42/73

SUPREME COURT OF VICTORIA

GREEN v CARTER

Dunn J

13, 19 December 1973 — [1974] VicRp 55; [1974] VR 461

MOTOR TRAFFIC – DRINK/DRIVING – DRIVING WHILST UNDER THE INFLUENCE OF INTOXICATING LIQUOR – DRIVER INTERCEPTED IN A MOTOR CAR PARKED AT THE REAR OF A SERVICE STATION – WHETHER SUCH A PLACE WITHIN THE ACT – MAGISTRATE DISMISSED CHARGE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S82.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court to be dealt with in accordance with the law.
1. Paragraph (b) of s82(1) of the *Motor Car Act* 1958 was in perfectly general terms. Accordingly, there was no justification in the Magistrate's importing into it from par. (a) the limiting words of "highway, parking place, drive-in theatre or other like place of public resort".

2. *Obiter*. A parking place is a place where a car may be left. The area of the service station would appear to be a public place or a place of public resort, although it is on private property. However, it was not necessary for the Supreme Court Judge to reach a final conclusion on this ground.

DUNN J: This order nisi has been obtained to review the dismissal of an information by the learned stipendiary magistrate at the Magistrates' Court at Box Hill on 10 July 1973. The charge against the defendant was that on 24 May 1973 at Doncaster he was in charge of a motor car whilst under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of such motor car.

This offence is created by s82 of the *Motor Car Act* 1958. To understand what occurred in the Magistrates' Court, and to appreciate the significance of the grounds of the order to review, it is necessary to refer to the relevant provisions of subs(1) of that section. Section 82(1) provides:–

> (a) Every person in charge of a motor car on a highway or in any parking place, drive-in theatre or other like place of public resort whether dedicated to the public or not who is apparently under the influence of intoxicating liquor or of any drug may be apprehended without warrant by any member of the Police Force and charged with an offence under this Act and such motor car may be driven or conveyed to and detained at any police station pending the admission of such person to bail or (where he is not the owner of the motor car) a demand by the owner thereof.
>
> (b) Every person proved to have been under the influence of intoxicating liquor or of any drug while in charge of a motor car to such an extent as to be incapable of having proper control of the motor car shall be guilty of an offence ...".

and the rest of the paragraph deals with the penalties consequent on conviction.

At the end of the case for the informant, the learned stipendiary magistrate upheld the submission that there was no case to answer because the place where the defendant was arrested was not a "parking place" within the meaning of s82(1)(a) of the *Motor Car Act*, or a "like place of public resort" within the meaning of that sub-section.

So far as is relevant to the issues raised in this order to review, the evidence was that at or about 10.25 p.m. on 24 May 1973, the defendant proceeded across Doncaster Road to the rear of the service station at the corner of Doncaster Road and Wetherby Road. Here the defendant was in a motor car (which inferentially had been parked there) with the engine revving. The police car was driven to the rear of the service station and the defendant was arrested. The service station was private property. The defendant's car was at the back of the service station and was not on that part of the service station where people go to purchase petrol from the petrol bowsers.

Evidence was also given of the defendant's state of insobriety, and a breathalyser test showed that the percentage of blood alcohol in his blood was .250 per cent. The affidavit sworn by the defendant disputes some of the evidence deposed to in the informant's affidavit.

The foregoing summary is taken from so much of the informant's affidavit as is not disputed and from the defendant's affidavit. The submission made to the learned stipendiary magistrate, and repeated by Mr O'Dwyer before me, was that the offence with which the defendant was charged was created by s82(1)(a) and therefore the offence had to be committed on a highway or in any parking place, drive-in theatre or other like place of public resort, and the submission was that the rear of the service station did not fall into any of those categories. This submission was upheld. In my opinion, it ought to have been rejected.

When pars. (a) and (b) of s82(1) are read together, it is clear that par. (a) does not create an offence at all. It provides authority for the arrest of a person and a charging of him with some offence against the *Motor Car Act*. This conclusion is emphasized by the fact that it is sufficient to justify arrest if a person is "apparently" under the influence of intoxicating liquor or of any drug. One would not expect that to be sufficient to justify a conviction.

In *Doyle v Harvey* [1923] VicLawRp 39; [1923] VLR 271; 29 ALR 180; 44 ALT 179, Macfarlan J gave the same construction to s20 of the *Motor Car Act* 1915, holding that subs(1) of that section merely authorized the arrest of the person driving the car who is apparently under the influence of liquor, and that such a person may be charged with the offence created by subs(2) of that section, "of being under the influence of liquor whilst driving a motor car" or any other offence under the Act. The offence with which the defendant in this case was charged was, in my opinion, that created by s82(1)(b).

Paragraph (b) of s82(1) is in perfectly general terms. Is there any justification for importing into it from par. (a) the limiting words of "highway, parking place, drive-in theatre or other like place of public resort"? In my opinion, there is not.

Lord Bramwell in *Cowper Essex v Local Government Board for Acton* (1889) 14 AC 153, at p169; [1886-90] All ER Rep 901, expressed the principle applicable to these circumstances thus:

> "The words of a statute never should in interpretation be added to or subtracted from without almost a necessity."

There is no necessity to add words here. Lord Evershed MR in *Tinkham v Perry* [1951] 1 TLR 91 at p92; [1951] 1 All ER 249, expressed the same principle in these words:

> "Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context."

Paragraph (b) has sense and meaning without the addition of any words. In *Carr v Walukiciwick* [1969] VicRp 97; [1969] VR 758, the Full Court refused to import into s81A of the *Motor Car Act*, which creates the offence of driving with a blood alcohol content of more than .05 per cent, any limitation confining the driving to a highway or other public place. There are two references in the judgment to s82, which might be thought to suggest that the court was minded to confine the operation of s82 to a highway, parking place, drive-in theatre or other like place of public resort, but, in my opinion, a careful examination of the judgment does not bear this out and the general reasoning of the judgment supports the conclusion that I have previously expressed. In the two references, the court was simply drawing attention to the fact that s81A, the section with which the court was there concerned, was preceded by s81 which expressly related to a highway, and was succeeded by s82 which made reference to particular areas or places. The court was not concerned with the construction of s82.

A perusal of the sections in Division 2 of Pt VI of the *Motor Car Act* leads to the conclusion that, in respect of offences which were intended to be confined to a highway or public place, the legislature expressly so provided in the section creating the offence: cf. s80A, s81, s83 with s80B, s81A, s82(1)(b) and s82A.

For these reasons, in my opinion, the learned stipendiary magistrate was in error in

upholding the submission that the offence had to be committed on a highway, any parking place, drive-in theatre or other like place of public resort. That disposes of the first four grounds of the order nisi, and indeed of the matter entirely.

But the fifth ground of the order nisi assumes that those limitations are applicable, and so far as is relevant, the ground is that on the evidence the offence had taken place in a parking place or other like place of public resort. Having regard to the evidence given in this case, to which I have referred, I am disposed to the opinion that the area at the rear of the service station was a parking place for the purposes of s82(1)(a). "Parking a car is leaving a car, and nothing else", said Sir Wilfred Greene MR in *Ashby v Tolhurst* [1937] 2 KB 242, at p249; [1937] 2 All ER 837. A parking place is therefore a place where a car may be left. The area of the service station would appear to be a public place or a place of public resort, although it is on private property: see *Elkins v Cartlidge* [1947] 1 All ER 829; *Dobell v Petrac* [1961] VicRp 13; [1961] VR 70. But it is not necessary for me to reach a final conclusion on this ground.

The order nisi will be made absolute with $200 costs. The order dismissing the information and ordering the informant to pay $75 costs is set aside and the matter is remitted to the Magistrates' Court at Box Hill to be further dealt with according to the law.

The respondent has applied to me for an indemnity certificate pursuant to s13 of the *Appeal Costs Fund Act* 1964. The submission made on behalf of the respondent in the Magistrates' Court was not "plainly without foundation", to adopt the language of Winneke CJ and Newton J in *McLennan v McBroom* [1969] VicRp 70; [1969] VR 566, at p573; (1969) 23 LGRA 113. In all the circumstances I therefore think it proper to grant the certificate. Order nisi made absolute.

Solicitor for informant: John Downey, Crown Solicitor.
Solicitor for defendant: AH Grimes.
