02/81

SUPREME COURT OF VICTORIA

THOMSON v HOLCOMBE

Beach J

1 October 1980

MOTOR TRAFFIC – DRIVING A MOTOR VEHICLE AT NIGHT AT A DANGEROUS SPEED – DRIVER OBSERVED DRIVING AT A FAST RATE OF SPEED IN SEYMOUR – DRIVER FOLLOWED BY POLICE CAR TO NAGAMBIE A DISTANCE OF 40 KMS – TRAVELLED ON WRONG SIDE OF ROAD FOR ABOUT 1 KM – VEHICLE TRAVELLED AT SPEEDS WHICH VARIED BETWEEN 140-160 K/MH – TRAFFIC LIKELY TO BE ENCOUNTERED ON HIGHWAY – CHARGE FOUND PROVED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1858, S80A(1).

Where at night a driver of a motor car drove his vehicle from Seymour to Nagambie – a distance of about 40 kms – at a speed which varied between 140-160km/h, and also drove on the wrong side of the road for 1 km passing a stationary vehicle, it was open to the magistrate to find that the driver was guilty of a charge of driving at a speed which was dangerous to the public having regard to all the circumstances of the case.

BEACH J: This is the return of an order nisi to review a decision of the Magistrates' Court at Seymour on 25th June 1979. On that day the applicant was convicted (*inter alia*) of driving a motor car on a highway at a speed dangerous to the public contrary to s80A of the *Motor Car Act* and was fined a sum of $500 in default 50 days' imprisonment.

Order nisi granted to review that decision on the following grounds:

1. That the said conviction was against the evidence and the weight of evidence.

2. That there was no evidence or no sufficient evidence to support the conviction.

3. That the learned Stipendiary Magistrate misdirected himself or alternatively failed adequately to direct himself as to the law applicable and in particular
   (a) as to the standard of proof required;

   (b) as to the ingredients constituting an offence within s80A(1) of the *Motor Car Act*.

4. That the learned Magistrate took into consideration extraneous and irrelevant matters.

5. That the said conviction was wrong in law.

The only material before me relating to the facts on which the conviction was based is the affidavit of the applicant in which he swore that in examination-in-chief the respondent gave evidence that he had first noticed the applicant's car on 21st April 1979 driving at a fast rate of speed west in Anzac Avenue, Seymour; that he did a right-hand turn and followed the applicant's vehicle accelerating to 85 to 90 kilometres per hour but not gaining on the applicant's vehicle; that the applicant's vehicle travelled west on Wallace Street in Seymour and then travelled north on the Hume Highway and on to the Goulburn Valley Highway and that for much of the subsequent trip between Seymour and Nagambie the respondent lost sight of the applicant's vehicle; that the police car travelled at 140 kilometres per hour for a distance of about four kilometres, then for a distance of about six kilometres at about 155-160 kilometres per hour; that the respondent saw the applicant's vehicle after travelling about two kilometres; that at one stage the applicant's vehicle had travelled for about one kilometre on its wrong side of the road passing a stationary vehicle; that the police vehicle travelled at a speed up to 160 kilometres per hour in pursuit of the applicant's vehicle; that when the applicant's vehicle stopped at Nagambie the police vehicle was about 800 metres behind the applicant's vehicle; that during the journey from Seymour to Nagambie the police vehicle had been unable to gain on the applicant's vehicle; that after the applicant's vehicle stopped in Nagambie the respondent went to the driver of the applicant's

vehicle, detailed his observations, and when asked the reason for exceeding the speed limit, the applicant said that he was in a hurry.

At the end of the case for the respondent, the applicant's solicitor submitted to the Magistrate that his client (1) had no case to answer and further (2) submitted that there was insufficient evidence before the court upon which the applicant could be convicted of the charge of driving at a speed dangerous to the public. The Magistrate over-ruling both submissions then proceeded to convict the applicant of the offence.

Before dealing with the substance of the matter I propose to deal with a submission to the effect that the Magistrate had no power to impose a fine of $500 on the applicant in that the maximum fine he was empowered to impose at that time was a fine of $360. It was said therefore that the order made by the Magistrate was a nullity.

The most obvious point to be observed is that there is no ground in the order nisi relating to the matter. Whilst I have power to amend the existing grounds I consider I do not have power to add new grounds. That is sufficient in itself to dispose of the matter. Even if I did have power to add a new ground I would not exercise it in this instance. The material contained in the applicant's affidavit is so meagre I am not prepared to find the Magistrate was in error so far as the monetary fine was concerned. S80A provides (*inter alia*) that for a second or subsequent offence a Magistrate may impose a term of imprisonment of not more than 12 months.

It may well be that in this case the applicant had a prior conviction for this very offence and that instead of sentencing him to a term of imprisonment, the Magistrate chose to exercise his power under s56(1) of the *Magistrates' Courts Act* (and impose a monetary penalty in lieu of imprisonment). The applicant's affidavit is silent in relation to the matter. I am not prepared to assume the Magistrate was in error. I think the probabilities are he was not.

I turn now to what I consider to be the substance of the matter. The submissions made on behalf of the applicant really come down to this. There was no real evidence as to the speed at which the applicant had been driving during the journey from Seymour to Nagambie because for a significant portion of the time he was out of the view of the two police officers. Even if one was to infer from their evidence that he must have been travelling at high speeds over the distance in question, there was no evidence that that speed was potentially dangerous either to himself or others, having regard to all the circumstances of the case and that therefore the Magistrate could not have been satisfied that the charge was made out.

What does the material in the affidavit disclose as being the circumstances of the case? In the first place it establishes that the applicant drove his vehicle along the Goulburn Valley Highway from Seymour to Nagambie. I consider I am entitled, as I have no doubt was the Magistrate, to take judicial notice of the fact that that is a distance of about 40 kilometres. I consider I am also entitled to take judicial notice of the fact that the Goulburn Valley Highway between Seymour and Nagambie is a two-way carriageway and is a highway on which one can expect to encounter traffic 24 hours a day. That it is a two-way carriageway is, of course, supported by the evidence the respondent gave to the effect that at one stage the applicant's vehicle had travelled for about one kilometre on its wrong side of the road while passing a stationary vehicle.

In the second place, it is clear from the reference to the lights burning on the applicant's vehicle that the offence occurred at night.

In the third place, I consider the evidence established that over the bulk of the distance over which the applicant travelled that night whilst pursued by the police vehicle, his vehicle travelled at speeds which varied between 140 kilometres per hour and 160 kilometres per hour. That is not only the inference to be drawn from the evidence the two police officers gave to the effect that those were the speeds of the police vehicle over the distance in question and that even though travelling at speeds of that order they lost sight of the applicant's vehicle from time to time, it is also a conclusion one is entitled to draw from the fact when the police officers apprehended the applicant at Nagambie and detailed their observations of his driving to him, the applicant simply replied that he was in a hurry.

From those facts it would seem to me that it was open to the Magistrate to arrive at the conclusion that what occurred on the evening in question was a high speed chase involving the applicant on the one hand and the police on the other and that that chase took place over a distance of 40 kilometres along a two-way highway in central Victoria on which one could expect to encounter other traffic from time to time. In my opinion it was open to the Magistrate to find that to drive at that rate of speed over that length of that particular highway that night, was to drive at a speed dangerous to the public having regard to all the circumstances of the case.

As Lord Goddard said in *Bracegirdle's case* when considering the driving of a truck driver (see *Bracegirdle v Oxley* [1947] KB 349; (1947) 1 All ER 126 at p130);

> "He may be convicted because he is driving too fast and only because he is driving too fast, but, of course there must be taken into consideration all the circumstances of the case, because a speed which is too fast on one road in certain circumstances may be dangerous when driving on another road in other circumstances."

In my opinion there is no basis for interfering with the decision of the Magistrate in this case and accordingly the order nisi will be discharged.
