16/69

SUPREME COURT OF VICTORIA

JARVIE v HALDEN

Starke J

21 October 1969

MOTOR TRAFFIC – MOTOR VEHICLE BEING TOWED BY AN 'A' FRAME ATTACHED TO ANOTHER VEHICLE – DEFENDANT BEHIND THE WHEEL OF THE VEHICLE BEING TOWED – SUCH VEHICLE NOT INSURED – WHETHER DEFENDANT WAS "USING" THE VEHICLE BEING TOWED – MEANING OF "USE" – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S40(2).

HELD: Order nisi absolute. Dismissal set aside.
1. The point raised in this order to review related to the meaning of the word "uses" in s40(2) of the *Motor Car Act* 1958. It was not unimportant to observe that s40(1) sub-para.(a) provided that the owner shall insure against any liability which may be incurred by him or any person who drives such motor car in respect of the death of or bodily injury to any person caused by or arising out of such use of such motor car. The word "uses" therefore in sub-section (2) of the same section was used in sharp contra-distinction to the word "drives" in sub-section (1) of the same section.

2. It is clear that the word 'use' did not cover any use which was utterly foreign to the vehicle's character as a motor car, and examples would be found in the case of when the apparent use of a motor car was not a use within the meaning of this section. In this case the defendant in sitting in the motor car was using it in its character as a motor car, and this conclusion would be arrived at even if he had not been sitting behind the wheel. It is clear enough, that the motor car was proceeding along the highway in the manner in which it was designed to proceed, and the fact that the defendant was not steering it and was not applying the brakes, did not mean that he was not using it. If one took by way of analogy the provisions in the *Police Offences Act* of illegally using a motor car where the use by the defendant may be a use as a passenger, one was fortified in the view that in this case the defendant was using the motor car within the meaning of the Act.

STARKE J: This is the return of an order nisi to review the decision of the Court of Petty Sessions at Preston on 23 April 1969.

The defendant, who is the respondent before me, was charged that he did on the 29 March at Preston being the owner of a motor car use such motor car there not being in force in relation to such motor car a contract of insurance under Division 1, Part V of the *Motor Car Act* 1958.

This information is laid under s40(2) of the *Motor Car Act* 1958. This section provides:

> "The owner of any motor car who in contravention of this Division uses or causes or permits any other person to use such motor car shall unless there is in force in relation to such motor car a contract of insurance under this Division be liable to a penalty of not more than $200 or to imprisonment for a term of not more than three months."

The information against the defendant was dismissed at the end of the case for the prosecution on the ground that there was no case to answer.

The facts were that the motor car in which the defendant was seated was being towed by another vehicle, a Fiat car, by means of an A frame, which is not described in the material before me. However, there is evidence that the A frame would cause the towed car to follow the manoeuvres of the towing car without any intervention by any person in the towed car. The defendant was in fact seated behind the wheel of the towed car and there was a key in the ignition switch. In view of the contradiction in the affidavits that are before me, there is no evidence as to what the defendant was doing behind the wheel.

At the end of the Crown case, Mr Belson, of Her Majesty's Counsel, submitted to the

Magistrate that the defendant was not using the car within the meaning of s40(2). This submission, as I have said, was upheld. The Magistrate said that in his opinion he was satisfied that the vehicles involved were situated on the road as one unit, with one vehicle the power unit. He stated that in his opinion the nature of the tow took the actual control completely out of the hands of the towed vehicle and therefore he was satisfied that the towed vehicle was not being used for its normal vehicular purpose. He stated that in his opinion the general approach of the High Court was that the vehicle should be used in its own state. He also stated that he agreed with Mr Belson's submission as to the liability of the drivers of the vehicles in the event of death or bodily injury. He also expressed the opinion that the legislature did not intend to apply s40 of the *Motor Car Act* to cases of a similar nature to the present one.

On 23 May of this year Master Collie granted the informant an order nisi on these grounds:

1. That the Stipendiary Magistrate was in error in holding that the defendant was not using the motor car within the meaning of that expression in s40(2) of the *Motor Car Act* 1958 as alleged in the said information.

2. That the Stipendiary Magistrate was in error in not holding that the informant had established a *prima facie* case that the motor car, the subject of the said information, was a motor car in relation to which there was not in force a contract of insurance under Division 1 of Part V of the *Motor Car Act* 1958.

3. That the Stipendiary Magistrate was in error in holding that s40 of the *Motor Car Act* did not apply so as to require the owner of a motor car to insure against liability which might be incurred by him or any person who drove such motor car in respect of the death of or bodily injury of any person caused by or arising out of the towing of such motor car, and

4. That the Stipendiary Magistrate should have held accordingly that the defendant had a case to answer.

The short point raised in this order to review relates to the meaning of the word "uses" in s40(2). It is at the outset not unimportant to observe that s40(1) sub-para.(a) provides that the owner shall insure against any liability which may be incurred by him or any person who drives such motor car in respect of the death of or bodily injury to any person caused by or arising out of such use of such motor car. The word "uses" therefore in sub-section (2) of the same section is used in sharp contra-distinction to the word "drives" in sub-section(1) of the same section. There are authorities which perhaps give some assistance to the problem which confronts me: cf. *Government Insurance Office of New South Wales v King* [1960] HCA 60; (1960) 104 CLR 93; [1960] ALR 629; 34 ALJR 208, and *Fawcett v BHP By-Products Pty Ltd* [1960] HCA 59; (1960) 104 CLR 80; [1961] ALR 180.

In effect, the High Court has held in these and other cases, that in each case where the question of using a motor car has to be determined, it is a question of fact and degree. Of course it is clear that 'use' does not cover any use which is utterly foreign to the vehicle's character as a motor car, and examples will be found in the case of when the apparent use of a motor car is not a use within the meaning of this section. But in this case it seems to me that the defendant in sitting in the motor car was using it in its character as a motor car, and I would arrive at this conclusion even if he had not been sitting behind the wheel. It is clear enough, that the motor car was proceeding along the highway in the manner in which it was designed to proceed, and the fact that the defendant was not steering it (although for all I know he could have), and was not applying the brakes (again although for all I know be may have been able to apply the brakes), does not mean that he was not using it. If one takes by way of analogy the provisions in the *Police Offences Act* of illegally using a motor car where the use by the defendant may be a use as a passenger, one is fortified in the view that in this case the defendant was using the motor car within the meaning of the Act.

It is easy enough to conceive of circumstances where the negligence of the owner of the towed vehicle might be sheeted home to him rather than the driver of the towing vehicle, and in these circumstances it seems to me to be within the policy of the Act that such a situation should be covered by insurance.

Mr Monester also submitted that there was no evidence that the towed vehicle was not

insured. Having regard to the provisions of the Act relating to registration, in my view at that stage of the case it was open to the Magistrate to infer that there was no insurance policy attaching to the vehicle. However, as I propose to remit the matter to the Magistrate of the Court of Petty Sessions at Preston I say no more than that it will be open to him when all the evidence is in to determine whether there is or is not evidence that the towed vehicle was not insured.

In the circumstances the order nisi will be made absolute and that the order of the Court of Petty Sessions made at Preston on 23 April 1969 be set aside, and I order the respondent to pay the applicant's taxed costs, not exceeding $120.

APPEARANCES: For the applicant/informant Jarvie: Mr R Brooking, counsel. Thomas F Mornane, Crown Solicitor. For the respondent/defendant Halden: Mr A Monester, counsel. Sackville, Wilks & Co, solicitors.
