14/70

SUPREME COURT OF VICTORIA

HOY v SMALL

McInerney J

16 June 1970

MOTOR TRAFFIC – DANGEROUS DRIVING – UNROADWORTHY MOTOR VEHICLE – DEFENDANT PLEADED NOT GUILTY TO ALL CHARGES – EVIDENCE LED WHICH SHOWED THAT THE DEFENDANT DROVE A MOTOR VEHICLE AT A FAST SPEED IN WARRNAMBOOL – THAT THE TYRES SCREECHED WHEN ENTERING A ROUNDABOUT – THAT THE FOOTBRAKE AND CLUTCH WERE INEFFECTIVE – SUBMISSION OF 'NO CASE' MADE – WHETHER MAGISTRATE SHOULD HAVE FOUND THE DEFENDANT GUILTY OF CARELESS DRIVING IF NOT SATISFIED THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A CHARGE OF DANGEROUS DRIVING – UNROADWORTHY CHARGE SAID TO BE DUPLEX – WHETHER MAGISTRATE SHOULD HAVE CONSIDERED AMENDING THE INFORMATION – SUBMISSION UPHELD BY MAGISTRATE – ALL CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS80A, 81A(1); *MOTOR CAR REGULATIONS* 1966, R140.

HELD: Order nisi absolute. Remitted to the Magistrates' Court for hearing and determination in accordance with the law.

1. Since the Magistrate took the view that the defendant was wrongly charged with dangerous driving, he must have meant that on the circumstances no court could regard the conduct of the defendant as amounting to dangerous driving. In so ruling the Magistrate erred in law.

2. The Magistrate also erred in law, if he was not satisfied that the defendant was guilty of an offence against s80A(1) of the *Motor Car Act*, in failing to exercise his discretion as to whether the defendant should have been convicted of an offence under s81(1), namely, of driving carelessly. The provisions of sub-s3 conferred on the court a discretion as to whether, when not satisfied that a defendant was guilty of an offence under s80A(1), it should go on to convict the defendant of an offence under s81(1). The court is not bound to proceed to convict the defendant under sub-s1 of s81 but the provisions of sub-s3 mean that if the court is not satisfied that the defendant is guilty of the offence of driving recklessly or in a manner dangerous to the public or at a speed dangerous to the public under sub-s1, it ought in such circumstances to consider whether it is appropriate to exercise its power under sub-s3 of proceeding to convict the defendant of the offence of careless driving under sub-s1 of s81 of the Act.

3. In other words the Magistrate should have held that there was a *prima facie* case made out that the defendant did drive a motor on a highway in a manner which was dangerous to the public, as alleged in the information, and that the Magistrate was wrong in law in holding that, in respect of the charge of driving in a manner dangerous, the defendant had been wrongly charged.

4. In relation to the charge of unroadworthy motor car, a vehicle which is not in good mechanical order would almost always be a vehicle which is not in a safe and serviceable condition, but that it cannot be said that every vehicle which is not in a safe and serviceable condition is a vehicle which is at the same time not in good mechanical order.

5. The Magistrate was clearly right in saying that the information was bad for duplicity. But the Magistrate erred in dismissing the information on that ground. The objection that the information was bad for duplicity was an objection that the information was subject to a defect in form or substance, and, where such a defect appeared, the court had power to amend the information, and indeed, under s200 of the *Justices Act*, the court was precluded from allowing any objection to an information for any defect in substance or in form.

McINERNEY J: These are two orders to review decisions of the Magistrates' Court at Warrnambool on 3 February 1970 the court consisting of Mr Fitzpatrick, Stipendiary Magistrate and sitting to hear the three informations laid by the informant Gerald Austin Hoy against the defendant Christopher John Small arising out of the driving by the defendant of a Holden panel van in the vicinity of and in the intersection of Liebig Street, Princess Street and Howard Streets Warrnambool.

Arising out of that driving the defendant was charged, firstly with an offence against s80A of the *Motor Car Act* of having on 27 January 1970, in Warrnambool driven a motor car on a highway, to wit Princess Street, in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the highway and to the amount of traffic which actually was at that time or which might have reasonably been expected to have been in such highway.

The second information, a copy of which is not before me, charged a breach of Act 6359 in having driven at an excessive speed through the intersection. The third information charged an offence constituted by a contravention of r140 of the *Motor Car Regulations* 1966; for that the defendant on the 27 January 1970 at Warrnambool did drive a motor car on a highway, to wit Princess Street, such motor car not being in good mechanical order or in a safe and thoroughly serviceable condition in that the right-hand headlight and number plate lights were not operating, the clutch was ineffective, left-hand exterior rear vision mirror was not fitted, foot-brake and exhaust were also ineffective.

On the hearing of these informations, which were, by consent, all heard together, the defendant, who appeared by his solicitor Mr K O'Sullivan of Warrnambool, pleaded not guilty to all three informations. The prosecuting officer Sergeant Coysh called as his sole witness the informant Gerald Austin Hoy who gave evidence that at 11.50 p.m, on the night of Tuesday 27 January 1970, he was off duty, wearing plain clothes and walking north in Liebig Street, Warrnambool, when he observed the defendant driving in a white Holden panel van west of Princess Street, Warrnambool, into the multi-intersection of Liebig Street, Princess Street and Howard Street at a fast rate of speed. He said that on arriving at a point on the western side of the centre of that intersection the defendant applied his brakes suddenly and almost broadsided into a "U" turn. The defendant then kept the steering wheel on a hard right-hand lock, made five complete circular turns around the middle of the intersection while travelling at a fast speed. During this time the motor of the defendant's van was roaring loudly and making an excessive noise and the tyres of his vehicle screeched loudly.

He informed further that even before he saw the defendant's vehicle enter the intersection his attention had been attracted to it by the extremely loud noise of its motor and exhaust which sounded as though the vehicle was coming at a fast speed. The informant said further that the area where this offence occurred was in a built-up areas that there was no provision for street lighting, that the offences occurred within two hundred to three hundred yards of two private hospitals, that the intersection was a wide intersection but that the view into Princess Street in either direction was very limited. He said there were nature strips in front of the houses on the corner of Princess Street. He said, in evidence-in-chief, that traffic was light at the time but in cross-examination he said that there was no other traffic present at the time. In cross-examination, he said that the car appeared to be under control at all times. He said also he was unable to estimate the speed of the car as it entered the intersection from Princess Street but stated that it was a very fast speed.

He said that having intercepted the defendant and informed him of his observations he asked him, "What is your excuse for doing the wheelies in the middle of the intersection?", to which the defendant replied, "Just for a pose." Informant then asked, "Do you mean you were just showing off?", to which the defendant replied, "Yes, I suppose, yes," He then said to the defendant, "What is your excuse for entering the intersection at excessive speed?", to which the defendant replied, "I think I entered at a safe speed." Informant then inspected the defendant's vehicle and found that the right-hand headlight was not operating, the rear number plate light was not operating, there was no left-hand side exterior rear vision mirror, the foot brake was ineffective in that it travelled nearly to the floor before taking effect; the clutch was ineffective in that when it was depressed to the floor it would stick and not return. Informant testified when the car was checked the clutch went to the floor and had to be pulled back by hand and that the same applied to the brake pedal. Informant said that when he said to the defendant, "What is your excuse for driving this vehicle while it is in an unserviceable condition?", the defendant replied, "None at all."

No witness other than the informant was called for the prosecution and at the conclusion of the case for the, prosecution Mr O'Sullivan, on behalf of the defendant, submitted that all the charges against the defendant should be dismissed. In relation to the charge of driving in a manner

dangerous, he invited the Magistrate to use his own knowledge of the intersection and take into account the evidence of the informant that the car appeared to be under control at all times. In the course of his submission Mr O'Sullivan stated, "This man has been wrongly charged and it could well be the defendant drove carelessly but not dangerously." In relation to the charge that the vehicle was not in good mechanical order or in a safe and thoroughly serviceable condition, Mr O'Sullivan submitted that the charge was bad for duplicity and he made submissions apparently that the case of driving at an excessive speed ought also to be dismissed.

The informant likewise, in reply to these submissions, invited the Magistrate to apply his knowledge of the intersection and of the traffic which was present or likely to be present at this intersection. He pointed out to the Magistrate that Liebig Street was the main thoroughfare from the Shopping area to the Mortlake Road and could be expected to carry traffic at all times of the day or night. The prosecuting officer also submitted to the Magistrate that if the Magistrate considered that the more appropriate charge in relation to the defendant's driving would have been careless driving, then under s80A(3) of the *Motor Car Act* he was entitled to convict the defendant on that charge without the necessity of laying a further information, and he pointed out that Mr O'Sullivan for the defence had in his submissions suggested that the defendant had driven carelessly.

There followed discussion as to the submission that the information for the driving of a vehicle not in good mechanical order or not in a safe and thoroughly serviceable condition, it being submitted first that the information was not bad for duplicity. No application having been made by the prosecuting officer for leave to amend the information, and the Magistrate apparently not having invited the informant to amend the information, the Magistrate, at the end of the submissions, dismissed all three informations. His reasons for doing so appear in paragraph 14 of the affidavit of Sergeant Coysh, sworn 26 February 1970 and are as follows:

> "The defendant is the type of person who, while completely irresponsible in his driving, escaped the process of the law and should not be allowed on the road. In respect of the charge of driving in a manner dangerous the defendant has been wrongly charged; in respect of the speed through the intersection, the speed has not been proven. In respect of the charge relating to the driving of an unserviceable vehicle, it is a duplex information".

The informant obtained orders nisi from Master Collie on the 2 March 1970, to review the decision of the Magistrate in relation to the dangerous driving charge and the charge of driving a motor car which was not in good mechanical order or not a safe and thoroughly serviceable condition. No question arises with respect to the information as to the driving at an excessive speed. Each of those orders nisi directed the informant to effect service of the order nisi, affidavits and exhibits on the Magistrate, the customary direction being given that such service might be effected by leaving those documents with the Magistrates' Court at Warrnambool. Although there is an affidavit of service of the order nisi and exhibits on the defendant, there is no material on the file to indicate that service on the Magistrate was effected. Mr Winneke of Counsel for the informant, has assured me that his instructions are that service on the Magistrate, by leaving the documents with the Magistrates' Court, Warrnambool, was in fact effected and has undertaken that an affidavit verifying that service will be filed. On that undertaking I intimated I would go on to hear the orders nisi but that any order I made would be conditional upon the due filing of an affidavit of service.

The reasons for judgment of the Magistrate, as disclosed in the affidavit of Sergeant Coysh, suggest that in relation to the charge of dangerous driving the Magistrate took the view that the matters proved in the evidence of the informant could in no circumstances amount to the offence of dangerous driving. I read his statement, that in respect of the charge of driving in a manner dangerous the defendant has been wrongly charged as meaning not that the Magistrate was not satisfied beyond reasonable doubt that the defendant had been guilty of the offence of dangerous driving but that even accepting the evidence of the informant it would not be open to the court to find that the offence of dangerous driving had been committed.

This point, perhaps, is of materiality because the affidavit of the informant suggests, although it does not explicitly so state, that the defendant was making a submission of no case to answer and that the Magistrate, in dismissing the informations, was dismissing it on the basis there was no case to answer. In my view it cannot be made on the material before the Magistrate,

that the offence of dangerous driving could not in law be regarded as established. That is not to say that a Magistrate was bound to be satisfied beyond reasonable doubt. The case of *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 indicates clearly the difference between upholding a submission of no case and dismissing an information on the ground that the tribunal is not satisfied beyond reasonable doubt.

In the present case the material which was relevant in relation to the issue of driving in a manner dangerous appears to me to be the following;

- That the intersection was an intersection of three streets, one of which was the main thoroughfare from the shopping area of Warrnambool to the Mortlake Road, which could be expected to carry traffic at all hours of the day and night;
- That the intersection was in a built-up area
- That although it was a wide intersection, the view into Princess Street from Liebig Street or Howard Street was very limited;
- That there were houses on the corner of Princess Street and the intersection;
- That there were two private hospitals within two hundred or three hundred yards of the intersection;
- That the driver in driving made five complete circular turns around the middle of the intersection at a speed, which was described as a fast speed;
- That the tyres of the vehicle screeched loudly as these turns were being made, and
- That on examination the footbrake was ineffective in that it travelled nearly to the floor before taking effect and the clutch was ineffective in that when it was depressed to the floor it would stick and not return.

A further relevant fact is that, in the defendant's panel van there was no left-hand side exterior rear vision mirror. It is also relevant that although this incident occurred at 11.50pm at night it was during the month of January, when perhaps a greater volume of traffic might reasonably be expected than a corresponding time in the month of June.

Even though the evidence indicated that the vehicle was under perfect control throughout, a matter which gives rise to an inference that the defendant was a capable driver, capable of controlling his vehicle, nevertheless the defective condition of the footbrake and of the clutch indicated possible sources of danger in the manoeuvres in which the defendant was engaged, and the absence of a rear vision mirror on the left-hand side of the vehicle must have made it more difficult for the defendant to observe the possible approach of traffic from the various intersections as he turned around and around in the course of these five complete circular turns in the middle of the intersection.

I am not able to say that that is conduct which can never constitute dangerous driving, and in my view the Magistrate was wrong in taking the view, if indeed he took the view, as I think he did, that the circumstances could never amount to dangerous driving. If he took the view that in the circumstances he was not satisfied beyond reasonable doubt that the offence of dangerous driving had been made out it might have been more difficult for the informant to persuade this court to interfere, but, since the Magistrate has taken the view that the defendant was wrongly charged with dangerous driving, he must, I think, have meant by that that on the circumstances no court could regard the conduct of the defendant as amounting to dangerous driving. In so ruling I think the Magistrate erred in law.

I think the Magistrate also erred in law, if he was not satisfied that the defendant was guilty of an offence against s80A(1) of the *Motor Car Act*, in failing to exercise his discretion as to whether the defendant should be convicted of an offence under s81(1), namely, of driving carelessly. I think the provisions of sub-s3 confer on the court a discretion as to whether, when not satisfied that a defendant is guilty of an offence under s80A(1), it should go on to convict the defendant of an offence under s81(1). The court is not bound to proceed to convict the defendant under sub-s1 of s81 but I take the provisions of sub-s3 as meaning that if the court is not satisfied that the defendant is guilty of the offence of driving recklessly or in a manner dangerous to the public or at a speed dangerous to the public under sub-s1, it ought in such circumstances to consider whether it is appropriate to exercise its power under sub-s3 of proceeding to convict the defendant of the offence of careless driving under sub-s1 of s81 of the Act.

In those circumstances I am of opinion that grounds 2 and 4 of the order nisi to review the dismissal of the information for driving dangerously have been made out. In other words (under

ground 2) the Stipendiary Magistrate should have held that there was a *prima facie* case made out that the defendant did drive a motor on a highway in a manner which was dangerous to the public, as alleged in the information, and (under ground 4) that the Stipendiary Magistrate was wrong in law in holding that, in respect of the charge of driving in a manner dangerous, the defendant had been wrongly charged. As to ground 3, which asserts in the alternative that the Stipendiary Magistrate should have held that there was a *prima facie* case made out that the defendant did drive a motor car on a highway recklessly, I am not myself prepared to go further than to say that, if the Magistrate was dismissing the information of driving in a manner dangerous to the public, he ought to have applied his mind under sub-s3 of s80A, to the question whether it was proper for him in the circumstances to record a conviction of careless driving under sub-s1 of s81. To my way of thinking, the state of fact testified to by the informant is suggestive of reckless driving rather than careless driving. In making that observation, I am not, however, to be taken as saying that conduct of this sort cannot be the subject of the charge of careless driving.

In respect of the information which charged the defendant with having driven a motor car which was not in good mechanical order or in a safe and thoroughly serviceable condition, although Mr Winneke formally submitted that the information was not bad for duplicity, his contention being in this respect that Regulation 140 discloses two offences rather than three, he did not urge that submission very strongly, because he frankly conceded that it was difficult to make that submission good, having regard to the presence in the regulation of the third limb of the regulation, namely, that of not complying with the requirements of the regulations. Regulation 140 provides:

> "No person shall drive or use or cause to be driven or used on any highway any motor car if such motor car or any trailer or other vehicle attached to or drawn by such motor car is not in good mechanical order or is not in a safe and thoroughly serviceable condition or does not comply with the requirements of these Regulations."

There may be many cases of a vehicle which does not comply with the provisions of the Regulations but which is in good mechanical order and in a safe and thoroughly serviceable condition. A distinction can be drawn between a vehicle which is not in good mechanical order on the one hand and a vehicle which is not in a safe and thoroughly serviceable condition. I am disposed to think that the particulars of the information given in this case illustrate that difference. I think the circumstance that the right-hand headlight and the number plate light were not operating, and possibly also the circumstance that the exhaust was ineffective are matters which go to the question whether the vehicle is in a safe and thoroughly serviceable condition rather than to the question whether it is in good mechanical order, whereas the circumstance that the clutch was ineffective and that the foot-brake was ineffective would go to the question whether the vehicle was in good mechanical order, although they might also go to the question whether the vehicle was in a safe and thoroughly serviceable condition. In short, I would think that a vehicle which is not in good mechanical order would almost always be a vehicle which is not in a safe and serviceable condition, but that it cannot be said that every vehicle which is not in a safe and serviceable condition is a vehicle which is at the same time not in good mechanical order.

In my view, the regulation creates three different offences and this information charged the defendant with two alternative offences. As such that information infringed the provisions of s88(1) of the *Justices Act*, which provides that

> "Except where otherwise expressly enacted, every information shall be for one offence only and not for two or more offences."

It is not suggested that there is any express enactment which empowered the informant in this case to charge the defendant with these two offences in the one information. In those circumstances the Magistrate was clearly right in saying that the information was bad for duplicity. But the Magistrate in my view, erred in dismissing the information on that ground. The objection that the information is bad for duplicity is an objection that the information is subject to a defect in form or substance, and, where such a defect appears, the court has power to amend the information, and indeed, under s200 of the *Justices Act*, the court is precluded from allowing any objection to an information for any defect in substance or in form.

On the contrary, if such defect appears to the court to be such that the person charged

has been thereby deceived or misled, the court may amend such information and, if the person charged so requests, adjourn the hearing to some future date. The settled course of practice in dealing with an objection founded on duplicity is to put the informant to his election as to which offence he desires to proceed on and subject to the question of whether an adjournment should be granted to the defendant, if he contends that he is prejudiced by the amendment of the information, the court should then go on to hear the information as so amended. That practice will be found discussed in the judgment of Dixon J, as he then was, in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 at pp489-490; [1938] ALR 104. See also *Mackay v May* [1924] VicLawRp 65; [1924] VLR 413; 30 ALR 328; 46 ALT 61 in the judgment of Sir Leo Cussen, the Acting Chief Justice.

In those circumstances the Magistrate erred in law in dismissing the information. I considered whether I should myself amend the information, but having regard to the fact the defendant is not today represented and may desire to make submissions as to penalty in the event of his not desiring to call evidence in answer to the information is so amended, I think the proper course is to remit that information to the Magistrate with a direction that he should put the informant to his election as to whether he desires to proceed on the charge that the defendant drove a motor car such motor car not being in good mechanical order or whether he desires to proceed with an information charging the defendant with having driven a motor car such motor car not being in a safe order and thoroughly serviceable condition. If the informant asks for such an amendment it would appear, in the absence of anything further, that the amendment sought ought to be granted subject to granting the defendant any adjournment which may be necessary in the interests of justice.

In the result, the order nisi in case 6598 which deals with the charge of a breach of Regulation 140 is made out on ground 1 that he was wrong in law in dismissing the information and on ground 4 that the Stipendiary Magistrate should have amended or permitted the informant to amend the information. Ground 2, that the Stipendiary Magistrate should have held the information was not bad for duplicity is not made out. The Magistrate was correct in saying the information was bad for duplicity. Having regard to that fact it is unnecessary to say more than that the Magistrate should have held there was a *prima facie* case made out that the defendant did drive a vehicle on a highway such vehicle being in some respects in not good mechanical order or in other respects in not a safe and thoroughly mechanical condition. I do not consider ground 3, as expressed, is made out. The real point is, the Magistrate should have amended or permitted the informant to amend the information so as to remove the undoubted duplicity therein.

The formal orders will be that the Order Nisi is made absolute. The information is remitted to the Magistrates' Court at Warrnambool to hear and determine it according to law, with a direction that the Magistrate, having ruled that the information is bad for duplicity, should put the informant to his election as to the manner in which the information is to be amended, or in default of the informant electing to amend, that the Magistrate should himself amend the information so as to remove the objection founded on duplicity, and that in either event the Magistrate should then proceed to hear and determine the information as so amended.

As to the order nisi in 6599, the case of the information for dangerous driving, the order nisi is made absolute on grounds 2 and 4 and the information is remitted to the Magistrates' Court at Warrnambool to hear and determine according to law.

I order that in relation to Order to Review 6598 the informant's costs of and incidental to the order nisi be taxed or agreed and when so taxed or agreed be paid to an amount not exceeding $120 by the defendant. No order as to costs in relation to Order to Review 6599. That is because the informant has not asked for two costs and is not to be taken as indicating there was any reason in the nature of the information why the defendant should not have been liable to pay costs in respect of the proceedings in that case had it been brought forward on its own. These orders are made subject to a proper affidavit of service on the Magistrate being filed in each case within seven days.

APPEARANCES: For the informant/applicant Hoy: Mr J Winneke, counsel, John Downey, State Crown Solicitor. No appearance of or for the defendant Small.