08/69

SUPREME COURT OF VICTORIA

ROWSE v McKENZIE

Starke J

22 September 1969

MOTOR TRAFFIC – SPEEDING – DEFENDANT CHARGED WITH SPEED DANGEROUS AND EXCEEDING 50M/PH – DEFENDANT GAVE EVIDENCE THAT HIS SPEED DID NOT EXCEED 60M/PH – INFORMANT SAID THE DEFENDANT'S SPEED WAS 70M/PH AND AT ONE STAGE THE DEFENDANT DROVE ONTO THE INCORRECT SIDE OF THE ROAD – DANGEROUS SPEED CHARGE DISMISSED – DEFENDANT FOUND GUILTY OF THE SPEEDING CHARGE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80A; *ROAD TRAFFIC REGULATIONS* 1962, R1001(1)(c).

HELD: Order nisi discharged.
1. Sub-regulation 1001(2) of *Road Traffic Regulations* 1962 in effect changed the burden of proof in certain circumstances. The Magistrate must first be satisfied that the applicant was exceeding 50 miles an hour, and the burden was on the informant to prove this fact beyond reasonable doubt. It must be assumed in this case that the Magistrate was so satisfied, not only because he convicted the defendant of the offence, but also because in his evidence the defendant conceded that he was exceeding at some time 50m/ph.

2. However, in convicting as he did, one must assume, unless the contrary was shown, that the Magistrate was satisfied beyond reasonable doubt that the defendant was travelling more than 50m/ph but was not satisfied on the balance of the probabilities that the speed at which the defendant drove the vehicle was not dangerous having regard to all the circumstances.

3. On the evidence the magistrate was in fact not bound to find that the speed of the defendant's vehicle was dangerous in all the circumstances.

4. In these circumstances there was nothing inconsistent between his dismissing the information under the *Motor Car Act* and recording a conviction under the *Road Traffic Regulations*.

STARKE J: This is the return of an order nisi seeking to set aside a conviction recorded against the applicant, who was the defendant below, made on 24 February 1969. The applicant was charged on the same information with two offences: one contrary to s80A of the *Motor Car Act*.

> "that the defendant did on 8 December 1968 at Neerim South drive a motor car on a public highway, namely Main Road, at a speed 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 the amount of traffic which actually was at the time or which might reasonably have been expected to be on such highway."

He was also charged on information contrary to regulation 1001 of the regulations under the *Motor Car Act*,

> "that he did on the same day drive a vehicle on a highway, namely Main Road, at a speed exceeding 50 miles an hour".

The two informations related to the same conduct or alleged conduct on the part of the defendant.

On the day of 6 May 1969 Master Brett made an order nisi in these terms:—

> "Upon application made on 18 April 1969 and this day upon hearing, Mr Chernov of counsel for the applicant, and upon reading the affidavit of Barrie Murdoch Armitage sworn the 18 April 1969 and filed herein and the exhibits therein referred to, I do order that upon service upon him of a copy of this order and a copy of the said affidavit of Barrie Murdoch Armitage, and a copy of each of the

said exhibits, Herbert William McKenzie the above-named respondent show cause before the judge hearing the list of miscellaneous causes on a day to be fixed that the calling over of that list in the month of May 1969. By the order made by the Court of Petty Sessions at Warragul constituted by Mr EM Ross Stipendiary Magistrate on the 21 March 1969, whereby the applicant was convicted on an information charging that he in contravention of *Road Traffic Regulation* 1001(1)(c) did on the 8 December 1968, at Neerim South in the said State drive a vehicle on a highway to wit Main Road at a speed exceeding 50 m.p.h., should not be reviewed on the following grounds:

(i) that having on the same evidence found the applicant not guilty of a charge of driving at a speed dangerous to the public having regard to all the circumstances of the case on the 8 December 1968 the Magistrate ought not to have held that the applicant was guilty.

(ii) that the Magistrate ought to have held in the circumstances that the applicant had discharged the onus of establishing that the speed at which he drove was not dangerous having regard to all the circumstances within the meaning of Regulation 1001(1)(c).

(iii) That the changes laid under s318(i) of the *Crimes Act* 1958 and under *Road Traffic Regulations* 1962, R1001(1)(c) having been heard together the Magistrate was in error in failing to give reasons for convicting the applicant.

And I do further order that within 21 days of this day the applicant serve a copy of this order and a copy of the aforesaid affidavit and a copy of each of the exhibits thereto on the respondent and leave a copy of each of the said documents with the Clerk at Petty Sessions at Warragul to the said Magistrate and I do further order that further execution be stayed until the determination of the order nisi and I certify that this was a matter proper for the attendance of counsel."

Evidence was given by a police constable who swore that the plaintiff at times reached a speed of 70 miles an hour and at one period drove on the incorrect side of the road. The applicant gave sworn evidence, and he swore that his speed did exceed 50 miles an hour but did not exceed 60 miles an hour.

At the conclusion of the evidence the solicitor for the applicant submitted that both of the informations should be dismissed. As to the offence alleged under the *Motor Car Act*, the Magistrate said:

"I am not satisfied that the speed was dangerous, having regard to all the circumstances",

and he then dismissed the information under the *Motor Car Act*. He went on to indicate that he found the other information proved and immediately proceeded to record a conviction against the applicant.

Section 80A of the *Motor Car Act* provides insofar as is relevant:

"Every person who drives a motor car on a highway in a manner which is dangerous to the public having regard to all the circumstances of the case including the nature condition and use of the highway and amount of traffic which actually is at the time or which might reasonably be expected to be on the highway."

The relevant portion of regulation 1001 provides as follows:

"Speed limits.
(1) No person shall drive a vehicle
(c) on any other length of highway at a speed exceeding 50 miles an hour."

Sub-regulation 2 provides;

"A driver shall not be guilty of a contravention of paragraph (c) of sub-regulation (1) of this regulation if he proves to the satisfaction of the Court that the speed at which he drove the car was not dangerous having regard to all the circumstances".

Now it is to be observed in dismissing the offence against the *Motor Car Act* the Magistrate said, "I am not satisfied that the speed was dangerous having regard to all the circumstances". I think I must read this statement to mean "I am not satisfied beyond reasonable doubt that the speed was dangerous having regard to all the circumstances", because it must be assumed that the Magistrate understood what the criminal onus of proof was and was applying it. It is to be

noticed that sub-regulation (2) of regulation 1001 in effect changes the burden of proof in certain circumstances. The Magistrate must first be satisfied that the applicant was exceeding 50 miles an hour, and the burden is on the informant to prove this fact beyond reasonable doubt. It must be assumed in this case that he was so satisfied, not only because he convicted the applicant of the offence, but also because in his evidence the applicant conceded that be was exceeding at some time 50 miles an hour.

Now it was said by Mr Roberts that the finding of the Magistrate that he was not satisfied that the speed was dangerous having regard to all the circumstances, was inconsistent with a conviction of the applicant under the regulations. In my view this argument is not sustainable.

The Magistrate having said "I am not satisfied (and I interpolate 'beyond reasonable doubt') that the speed was dangerous having regard to all the circumstances" may have been in two states of mind when considering the other offence. He may have been satisfied on the balance of the probabilities, although not beyond reasonable doubt, that the speed was dangerous having regard to all the circumstances. He might on the other hand have had a perfectly neutral attitude, and in either of those circumstances the burden which is placed on the applicant under sub-regulation (2) of regulation 1001 would not be satisfied.

The affidavit supporting the order nisi merely says that the Magistrate indicated that he found the other information proved and immediately proceeded to convict the defendant and impose a penalty. It has been said in many cases that a magistrate or any other judicial officer should give his reasons for making or not making any order. The reason that this is the well known role relating to such matters is that a statement of reasons may assist a Court of Appeal and that is the capacity in which I now sit. The ground relating to failure to give reasons has been abandoned and I say no more than re-iterating what has been said many times before, that the learned Magistrate should have given reasons for convicting.

However, in convicting as he did, one must assume, unless the contrary is shown, that the Magistrate was satisfied beyond reasonable doubt that the applicant was travelling more than 50 miles an hour and was not satisfied on the balance of the probabilities that the speed at which the applicant drove the vehicle was not dangerous having regard to all the circumstances.

I might say it was not contended before me and in my view could not have been so contended that on the evidence that the magistrate was in fact bound to find that the speed of the applicant's vehicle was not dangerous in all the circumstances.

In these circumstances I can find nothing inconsistent between his dismissing the information under the *Motor Car Act* and recording a conviction under the *Road Traffic Regulations*, and for those reasons the order nisi will be discharged and the applicant to pay the respondent's costs which I fix at $120.

APPEARANCES: For the applicant Rowse: Mr N Roberts, counsel. Dunn, Strachan & Armitage, solicitors. For the respondent McKenzie: Mr D Graham, counsel. Thomas F Mornane, State Crown Solicitor.
