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SUPREME COURT OF VICTORIA

INGLIS v DAVIES

Anderson J

12, 13 February 1974 — [1974] VicRp 51; [1974] VR 438

MOTOR TRAFFIC – CONTRACT OF INSURANCE EXPIRED – VEHICLE LAST DRIVEN A WEEK BEFORE REGISTRATION EXPIRED – UNREGISTERED VEHICLE LEFT IN STREET – OWNER CHARGED WITH USING SUCH VEHICLE WITHOUT INSURANCE – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S40(2).

HELD: Order nisi discharged.
1. There were no facts justifying a finding that the defendant in any way used or had the use of the car on the date of the alleged offence, and the inadequacy of the evidence should not be remedied by speculation or the straining of the meaning of the word "use".

2. One was not entitled to read into s40(2) of the *Motor Car Act* 1958 any implied qualification such as "on a roadway" or some other expression which was apt to describe circumstances in which third parties may be exposed to injuries, and in which it may be thought to be desirable to have insurance cover.

3. As a matter of statutory interpretation the case of *Elliott v Grey* gave a meaning to the phrase, "use on a road", rather than to the word "use" *simpliciter*. In that case it was said that the word "use" was really equivalent to "have the use of a motor vehicle on the road". This fortified the view that the extremely wide meaning of the word "use" in s40(2) was untenable.
***Elliott v Grey* [1960] 1 QB 367; [1959] 3 All ER 733, distinguished.**

4. Assuming that "use" had the broader meaning as contended, there was no evidence before the magistrate that the defendant had any association with the motor car on the day in question, other than that she was the owner. There was no evidence as to who it was who left the car in Gipps Street, or when it was left there; the last association of the defendant with the vehicle – so far as the evidence went – was almost two months before, and s40(2) contemplated that someone other than the owner may use the vehicle.

5. Accordingly, there was no basis on which it could be said that the magistrate was in error in dismissing the information, and the order nisi was discharged.

ANDERSON J: This is the return of an order nisi to review an order of the Magistrates' Court at Richmond made on 18 July 1973 dismissing an information charging the defendant that on 14 July 1972 at Richmond she did "being the owner of a motor car use such motor car there being not in force in relation to such motor car a contract of insurance under Division 1, Pt V of the *Motor Car Act* 1958". The charge is purported to be laid under s40(2) of that Act.

Section 40 which contains three sub-sections, so far as is relevant to these proceedings reads: -

> "(1) Every owner of a motor car shall subject to and in accordance with this Division—
>
> (a) 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 the use of such motor car; and
>
> (b) for that purpose enter into a contract of insurance under this Division.
>
> "(2) 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 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 defendant did not appear before the magistrate and the proceedings were brief. The only evidence was given by the informant and consisted in essence of a conversation he had with the defendant. From that conversation it appeared that the defendant was the owner of the car in question when it was "left" in Gipps Street, East Melbourne, on 14 July 1972 and likewise when it was "left standing" in the same street on 21 July 1972, that the registration of the vehicle expired on 26 May 1972 and that the defendant last drove the vehicle about a week before the registration ran out, and that on 14 July 1972 there was no third-party insurance cover on the vehicle which she had let expire with the registration. There was no evidence that the defendant had herself left the car in Gipps Street, or when it had first been left there. The prosecutor in the court below submitted that though the car was parked before the registration expired, the vehicle was deemed to be using the highway on 14 July 1972. The magistrate dismissed the information stating that he was aware of an English case where an unregistered car had been left parked in the street, but was of opinion that the case did not relate to third-party insurance in respect of "using" the highway. The order nisi was obtained on the ground that the magistrate should have held that the defendant was using the motor car on 14 July 1972.

On the return of the order nisi before me, Mr Porter, for the informant, submitted that since the evidence showed that on 14 July 1972 the defendant was the owner of the motor car and that it was in Gipps Street, she had, on that occasion, "used" the motor car in contravention of s40(2). These two circumstances, he submitted, were sufficient to constitute the offence, and he conceded that no further relevant facts emerged from the evidence. He relied primarily on a decision of the Queen's Bench Division in *Elliott v Grey* [1960] 1 QB 367; [1959] 3 All ER 733, which seems to be the case to which the magistrate referred, but of which he had apparently an imperfect recollection.

In that case the defendant was charged under a section of the English Act which provided that "... it shall not be lawful for any person to use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force" the prescribed insurance cover. Some days before the date of the alleged offence, the defendant had placed his car on the road outside his house. He did certain repairs to it. Though the car could not be mechanically propelled because the engine would not work, it was, it seems, assumed that it was capable of being moved. Lord Parker CJ speaking for the Court, pointed out that the purpose of the insurance was to insure in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road. His Lordship then said (at All ER p736):

> "It is something for the protection of third parties. Approached in that way, it seems to me that the word 'use' there is, as counsel for the respondent suggests, really equivalent to 'have the use of a motor vehicle on a road'. Indeed, the definition which counsel for the appellant suggested, and which, I think, was that 'use' means to have the advantage of a vehicle as a means of transport including for any period or time between journeys, itself suggests availability. In other words, it is really equivalent to what counsel for the respondent suggests by the expression 'have the use of'."

If a similarly extended meaning were to be given to the word "use" in s40(2) of the *Motor Car Act* 1958, some astonishing consequences would follow, for in s40(2) there is no qualification of where the "use" takes place, and if parking a car in the street, as was the position in *Elliott's Case*, constitutes a use of the car after it is parked, then under the Victorian Act, if *Elliott's Case* applies, the very fact that an owner had a car which was uninsured would render him liable to a penalty, wherever he parked it, whether in his own driveway or in his own garage, or wherever it happened to be. This, I think, is not the meaning of Victorian section, and I do not think that one is entitled to read into s40(2) any implied qualification such as "on a roadway" or some other expression which is apt to describe circumstances in which third parties may be exposed to injuries, and in which it may be thought to be desirable to have insurance cover.

It may perhaps be suggested that on private land a person may be exposed to injury because of the use of a motor vehicle. That may be so. I am not saying that a motor vehicle used only on private land is not required to have third-party insurance cover. If it is "used" on private land contrary to s40(2), then the owner may be liable under s40(2). What I am seeking to point out is that I do not consider that the owner of a motor car which is uninsured, can be said to use the vehicle within the meaning of s40(2) irrespective of where it is, simply because, wherever it is he "has the use of it" in the sense that it is there for him or her, if he or she wants it. On the facts, as I shall shortly indicate, there was evidence in *Elliott's Case* of the defendant working upon his

car in the roadway on the date of the offence, whereas in the case before me there is no evidence of any association between the defendant and her car later than about 19 May 1972.

Mr Porter referred me to a number of decisions of the High Court of Australia in which it has been held that the word "use" as used in third-party motor car insurance legislation has been held to cover more than the actual driving of a motor car, e.g., *Fawcett v BHP By-Products Pty Ltd* [1960] HCA 59; (1960) 104 CLR 80; [1961] ALR 180, and *Government Insurance Office of New* South *Wales v RJ Green and Lloyd Pty Ltd* [1966] HCA 6; (1966) 114 CLR 437; [1967] ALR 106. It is unnecessary to discuss these cases in detail, but the general purport of them is that some use was being made of the vehicle *qua* vehicle at the time.

Mr Porter likewise referred to other decisions which illustrated the limitation on the extended meaning of the word "use" in the same context: *Government Insurance Office of New South Wales v King* [1960] HCA 60; (1961) 104 CLR 93; [1960] ALR 629; *Harvey Trinder (NSW) Pty Ltd v Government Insurance Office of New South Wales* [1966] HCA 25; (1966) 114 CLR 449; [1966] ALR 979, wherein, broadly speaking, the use being made of the vehicle was not *qua* vehicle. These cases are not of real assistance in resolving the meaning of "use" in s40(2). They do illustrate that the word "use" in legislation relating to third-party insurance has a wider meaning than "drive", but that does not resolve the problem in this case, except perhaps to the extent that the observation of Menzies J in *Government Insurance Office of New South Wales v King* at (CLR) p100; (ALR) p633 that "To make a car ready for use is not to use it", and similar observations by him would tend to militate against the view that the work upon the car which the defendant was doing in *Elliott's Case* was a "using" of the car in the third-party insurance context.

I think, returning to *Elliott v Grey*, that it is distinguishable from the present case for two distinct reasons, each in itself adequate. As a matter of statutory interpretation I think that *Elliott v Grey* gives a meaning to the phrase, "use on a road", rather than to the word "use" *simpliciter*. This, I think, is emphasized by Lord Parker CJ, when he said that the word "use" was really equivalent to "have the use of a motor vehicle on the road". This fortifies the view I have already expressed that the extremely wide meaning contended for by Mr Porter of the word "use" in s40(2) is untenable. The second reason is that the facts are different. Assuming that "use" has the broader meaning for which Mr Porter contends, there was no evidence before the magistrate that the defendant had any association with the motor car on the day in question, other than that she was the owner. There was no evidence as to who it was who left the car in Gipps Street, or when it was left there; the last association of the defendant with the vehicle – so far as the evidence went – was almost two months before, and s40(2) contemplates that someone other than the owner may use the vehicle. On the other hand, in *Elliott's Case*, the defendant, on the date of the alleged offence had cleaned the car, oiled its locks, sent the battery to be recharged and replaced the old carburettor with a new one; he found that the self-starter solenoid needed renewing, and he had unjacked the car so that instead of the wheels being off the ground, they were at the date of the alleged offence now upon the roadway. In such circumstances, the Queen's Bench Division was of the opinion that on that day the defendant used the motor car on the road.

There was no dispute in *Elliott's Case* that it was the defendant who put the car on the road, whereas in the present case there is no evidence how the car got into Gipps Street. Section 40(2) acknowledges that some person other than the owner may use the car. It refers to the owner himself using the car or some other person being permitted to use the car. The fact of ownership does not carry the implication either that the owner put the car in any position or used it when it was in such a position. *Elliott's Case* does not suggest that, for the section there in question does not deal with the owner as such. The English section makes liable "any person" who uses a motor vehicle which is uninsured: the Victorian Act makes liable the owner, who, in my opinion, is not liable without there being some nexus between the owner and the use of the vehicle. Mere ownership, in my view, does not provide that nexus.

In *Elliott's Case* the Court gave an extended meaning to the word "use" or, as I have indicated interpreted the phrase "use ... a motor vehicle on a road" as meaning "have the use of a motor vehicle on the road", and it had facts which it found amounted to use of the car by the defendant. In the present case, I do not think the meaning of the word "use" can be extended to remedy any inadequacy in the legislation. In any event, there are no facts justifying a finding that the defendant in any way used or had the use of the car on the date of the alleged offence,

and I do not think that the inadequacy of the evidence should be remedied by speculation or the straining of the meaning of the word "use".

One further matter has exercised my mind. The offence created by s40(2) is using a motor car in contravention of Division 1 of Pt V of the Act. Section 40(2) provides that a person using a motor car in contravention of that Division is guilty of an offence unless exculpated by the fact that there is third-party cover for the car. What provision of Division 1 is it alleged that the defendant contravened? Mr Porter submitted that she had contravened s40(1), which requires every owner of a motor car to 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 the use of such motor car; and for that purpose enter into a contract of insurance under Division 1.

But this, presumably, had been done when the policy which expired on 26 May 1972 had been taken out 12 months earlier. Section 40(1) says nothing about renewing the insurance or keeping the vehicle insured, and at the time when the defendant last drove it about a week before 26 May 1972, the car was still insured. The expression "in contravention of this Division" cannot be said to be meaningless, and so the question remains: in contravention of what provision of Division 1 is it alleged that the defendant used the motor car, even assuming that *Elliott v Grey* applied and that there was some vicarious basis on which ownership of the motor car fixed the defendant with the quality of using the car on 14 July 1972 because it happened then to be in Gipps Street?

It involves, in my opinion, impermissible circuity to argue that the contravention is expressed in the words which commence with "unless" in s40(2), for then the sub-section would provide that every owner who used a motor car which was uninsured was guilty of an offence unless the motor car was insured. I have said that I am concerned about the ambiguity contained in s40(2), but it is unnecessary for me to resolve the question which is raised by that ambiguity because I have indicated other adequate reasons, each ample in itself for the view which I have. In this case there is no basis on which I can say that the magistrate was in error in dismissing the information, and on that account I discharge the order nisi. The order will be that the informant pay the defendant's taxed costs of the application occasioned by this order nisi. Order nisi discharged.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: TD Armstrong and Gillman.
