20/71

SUPREME COURT OF VICTORIA

VERMAY v BRITTON & ANOR

Adam J

6 October 1971

MOTOR TRAFFIC – UNLICENSED DRIVING – PERMITTING AN UNLICENSED DRIVER TO DRIVE – SON WAS UNLICENSED AND WAS DRIVING A MOTOR CAR – LICENSED FATHER SAT IN THE PASSENGER'S SEAT – ANOTHER PERSON AGED 15 YEARS AND UNLICENSED SAT BETWEEN THE SON AND THE FATHER – MEANING OF "SITTING BESIDE HIM" – WHETHER FATHER WAS SITTING BESIDE SON THE DRIVER – FINDING BY MAGISTRATE THAT FATHER WAS SITTING BESIDE THE DRIVER – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS22C(1)(a), (f), 23(1.

HELD: Order nisi absolute. Dismissals set aside. Remitted to the Magistrate to be dealt with in accordance with law.

1. "Sitting beside" properly and strictly means "sitting next to"; that some secondary or wider meaning which it sometimes has, sitting or being in the vicinity or neighbourhood of. It means something very like physical propinquity, "next to".

2. The father, the licensed driver, was not sitting beside the driver – that is the son – who was unlicensed. The person who was sitting beside the driver was the boy of 15 years, who sat between the driver and the father. They were not both sitting beside the driver: the one "sitting beside" was the boy of 15 years who in fact was sitting next to the driver.

3. There was at least four feet between the licensed driver and the unlicensed driver, there being another person between, and that would have minimised greatly the control necessary in emergency, which the section contemplated could be exercised.

4. Accordingly, the Magistrate was wrong in law in dismissing the charges.

ADAM J: This is the return of two orders nisi to review decisions of the Magistrates' Court given by Mr D Stanistreet, Stipendiary Magistrate, on the 9 February 1971. In the one information the defendant was Reginald Terry Britton, and that information charged him with driving a motor car on the Princes Highway, without being the holder of a licence to drive a motor car. That is an offence under s22C(1)(a) of the *Motor Car Act*, and exposes the offender to penalties as there provided.

The other information was against Reginald Alfred Britton, the father of the other defendant, and charged that he permitted Reginald Terry Britton to drive a motor car on the Princes Highway, Reginald Terry Britton not being the holder of a licence to drive a motor car. That is an offence under s22C(1)(f) of the *Motor Car Act*, which provides that "any person who employs, permits or suffers a person to drive any motor car upon any highway, unless he is the holder of a licence to drive a motor car appropriately endorsed for that motor car, shall be guilty of an offence against this part" and liable also to the penalties there provided.

The facts are not in dispute. Both informations were heard together, because they involved the same points. It appears that Reginald Terry Britton, on 23 August 1970, was in the driving seat of a motor car, which, in fact, was towing a trailer, although that does not matter in this case. But he was a young man, not licensed to drive a motor car. *Prima facie* the offence against him was established by proof of these undisputed facts.

The other defendant was also in the motor car, he was in the front seat. He was a licensed driver and owner of the car and it was not disputed that he was, in fact, permitting his son, who was an unlicensed driver, to drive the car. *Prima facie* he was guilty of the offence under s22C(1)(f).

The point arose in both cases as to whether the *prima facie* offences were not avoided by s23(1) of the *Motor Car Act*, which is a section appearing in the same part as s22C. That provides "nothing in this part shall prevent an unlicensed person, who is over the age of 17 years and *bona fide* learning to drive a motor car, from driving such a motor car upon any highway, if such unlicensed person has a licensed driver sitting beside him." If the son, Reginald Terry Britton, had a licensed driver sitting beside him, it is not in issue, at least in this case, that he would not be guilty of the offence of driving a motor car without a licence, nor would his father as a person sitting beside him be guilty of permitting an unlicensed driver to drive a motor car.

The question whether the son who admittedly was over the age of 17, was *bona fide* learning to drive the motor car may have given rise to some issues of fact, but that for present purposes, is not material. The only point raised was whether the condition which would excuse both the defendants – that there was a licensed driver sitting beside the unlicensed driver – was complied with.

It appears, on the undisputed evidence that the son, the unlicensed driver, was sitting in the driving seat and, in fact, driving the motor vehicle and that the father, the other defendant was also in the front seat, although he was on the extreme left side and some four feet or so away from the son, who was driving. That intervening space was occupied by another person, being a boy of about 15 years of age.

As the one physically adjacent to the driver was a boy of 15 and an unlicensed driver, the question is whether the father who was sitting was on the left of the intermediate person, "was sitting beside", the driver. If he was, the Magistrate who had dismissed both informations had reached a correct conclusion; if not, there was no answer to these charges. The Magistrate in his reasons for his decision, took the view on these facts that the licensed driver, the father, was sitting beside the unlicensed driver, the son. He said in the course of giving his decision:

> "It may be that I am wrong, but strictly looking at things, the word 'beside' does not mean in my opinion, physically adjacent. I therefore dismiss both of these informations."

The Prosecutor then said:

> "Could Your Worship please repeat your reason for dismissing these matters?"

And the Stipendiary Magistrate then said:

> "I have dismissed the information because, in my opinion, the word 'beside' does not mean physically adjacent. There seems to be no authority and it may well be that the Crown may want my decisions tested by a higher Court; at least it would clear the air once and for all".

So, I am invited to "clear the air" – whether I think the air is sufficiently clear at the moment or not.

I have not the slightest doubt that the father, the licensed driver, was not sitting beside the driver – that is the son, who was unlicensed. The person who was sitting beside the driver was the boy of 15, who sat between the driver and the father. They were not both sitting beside the driver, the one "sitting beside" was the boy of 15 years who in fact was sitting next to the driver.

I do not need, for the purpose of this case, to deal with any situation other than the one where there is a person unlicensed immediately beside the driver, and on the other side of that one a licensed driver. So, I do not need to deal with what might be an interesting point, as to whether where there was some object between the driver and the person who was next to the driver nevertheless that person who was "sitting beside" the driver. I prefer to leave that to another time. It may be a question of degree, but in the situation that here arises, it seems to be clear beyond any doubt that the father was not sitting beside the son, for the purposes of s23 of the *Motor Car Act*.

First of all "sitting beside" properly and strictly means "sitting next to"; that some secondary or wider meaning which it sometimes has, sitting or being in the vicinity or neighbourhood of. It means something very like physical propinquity, "next to". That is the meaning obviously put on

the words "sitting beside" in the Western Australian case to which I was referred; that was the case of *Bretag v Ames* (1935) 37 WALR 84, where Dwyer J at p85 speaking of the section, which for relevant purposes uses the words 'sitting beside':

> "In my opinion the proviso has a wider meaning. Moreover the requirement that the licensed person must sit next to the person learning to drive suggests it is intended that he should be in a position of control".

Without question that learned judge has said "sitting beside" means "sitting next to", and I would think that was the normal and natural meaning, apart from any context forcing one to that conclusion.

In addition to that, when one looks at the purpose of this provision, which excuses the driving of a motor car without a licence if there is a licensed driver sitting beside the unlicensed driver, obviously it is to make up for the deficiencies which an unlicensed driver presumably has, by requiring someone, who is a licensed driver, to be in the position to control the driving, and that gives added reason for treating "sitting beside" as sitting next to not somewhere in the vicinity as was the position in this case.

In fact, as I mentioned earlier there was at least four feet between the licensed driver and the unlicensed driver, there being another person between, and of course that would minimise greatly the control necessary in emergency, which the section contemplates could be exercised. Mr Dowling referred me to some other cases indicating what I would have thought was obvious, the reason tor requiring the licensed driver to be sitting next to the unlicensed driver. I refer to *Rubie v Faulkner* [1940] 1 KB 571; [1940] 1 All ER 285 1940, and *Evans v Walkden* [1956] 3 All ER 64; [1956] 1 WLR 1019, 1024. They are not directly applicable but they indicate the purpose of such a provision as we find in s23A.

There is not much more I can say, except that I would have thought that my interpretation was beyond any doubt; and as applied to this case, it meant that the unlicensed driver did not have a licensed driver sitting beside him. The result then of course is that the order nisi must be made absolute in each case, because the same point has arisen in each case, and I think the matter must be remitted to the Magistrate to proceed in accordance with my view of the law.

As far as the grounds on which the order nisi was granted in the case of the son Reginald Terry Britton, the first ground was that "the learned Magistrate was wrong in law in dismissing the above mentioned information". I uphold that ground. The second ground that "in the circumstances the learned Magistrate should have convicted the defendant as charged". Well I uphold that ground too. The third ground "That the learned Magistrate should have held that at the relevant time the defendant did not have a licensed driver sitting beside him". I uphold that ground. And fourthly. "the learned Magistrate should not have held that at the relevant time the defendant had a licensed driver sitting beside him, when a person other than a licensed driver was sitting between the defendant and a licensed driver". I uphold that.

So, I think, in sending it back to the Magistrate, I should direct that he convict the defendant and impose an appropriate penalty or take such other course as in the circumstances he thinks fit.

On the other order nisi directed to the father for permitting his son to drive, the grounds are shorter: the first was that "the learned Magistrate was wrong in law in dismissing the information". I uphold that ground, that in the circumstances the learned Magistrate should have convicted the defendant as charged. [After further discussion] The formal order is that the order nisi is made absolute. The decision below is set aside and both informations are remitted to the magistrate to be dealt with in accordance with the view expressed in these reasons for judgment.

APPEARANCES: For the applicant Vermay: Mr M Dowling, counsel. State Crown Solicitor. No appearance of or by the respondents Reginald Alfred Britton and Reginald Terry Britton.
