06/74

SUPREME COURT OF VICTORIA

CHANDLER v BUCKLAND

Murphy J

9 November 1973

CRIMINAL LAW – ILLEGAL USE OF MOTOR VEHICLE – OFFENDER A PASSENGER IN MOTOR VEHICLE – MEANING OF "USE" – WHETHER OFFENDER USED MOTOR VEHICLE ILLEGALLY – MAGISTRATE FOUND CHARGE PROVED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S81(2).

The defendant was charged with the offence of illegally using a motor car pursuant to s81(2) of the *Crimes Act* 1958. The ground on which the order nisi was argued was that there was no or no sufficient evidence upon which the Magistrate could find the defendant had used the motor car within s81(2) — the defendant having been shown merely to be a passenger in the car and not having been shown to exercise any control over management or operation of the motor car.

[Ed note: This section has been substituted by the *Crimes (Amendment) Act* 1972 which creates an evidentiary section obviating the necessity in the charge of larceny of a motor car of proving an intention to permanently deprive the owner of the car (Act No 8280/10). This amending section continues however, to include as an alternative to taking, the ingredient of any manner using. Similarly the *Crimes Theft Act* 1973 to come into operation on 1 October 1974 and amending the relevant section, has by s71(14) retained the same phraseology, i.e. "or in any manner used", in respect of motor cars and aircraft. The judgment is pertinent to the meaning the word "use" in this context. See also *Inglis v Davies* [1974] VicRp 51; [1974] VR 438.]

HELD: Order absolute. Conviction set aside.
1. The word 'uses' in the context in which it appears in s81(2) of the *Crimes Act* 1958 requires an element of control or dominion or the share of control or dominion over the driving, management or operation of the motor vehicle as such. It would not, for example, extend to cover the case of someone who without permission sat on the bonnet of a motor car and so used the vehicle in order to tie his shoelaces or to view a procession.

2. One can envisage many cases where a person who was a passenger would nonetheless be using the motor car in the relevant sense, but such cases would require evidence either of some acting in concert with or authority over the driver.

3. Whilst it was open on the evidence for the Magistrate to conclude the driver did not have lawful possession and that he did not have the consent of the owner to take or use the vehicle, but in a case such as the instant one where the defendant was a mere passenger, there would have also to be evidence led which was capable of giving rise to an inference beyond all reasonable doubt that the defendant knew that at the time of the use the driver did not have lawful possession. There was no such evidence in this case.

MURPHY J: ... I have no doubt that Mr Heliotis is correct when he submits that the mischief which existed and which the legislature sought to correct was the absence at common law of any means of charging persons engaged in 'joyriding' with an appropriate criminal offence.

It is proper to take that into account when construing the meaning to be attached to the word 'uses' in the Act. See *Heydens Case* [1584] EngR 9; (1584) 3 Co Rep 7; 76 ELR 637; 76 ER 637; *Blackstone's Commentaries* (Hargrave Ed) p87 note 38; *Young & Co v Mayor of Leamington* (1883) 8 AC 577, 526; *Avery v The London and Eastern Railway Co* (1938) AC 606, 612 and 617; [1938] 2 All ER 592; and *London Brick Co Ltd v Robinson* (1943) AC 341, 344 *et seq*; (1943) 1 All ER 23.

In *Brown v Roberts* (1963) 2 All ER 263, His Lordship Justice Megaw had to consider the meaning of the words 'it shall not be lawful for any person to use ... a motor vehicle on the road' where those words appear in the context of s35(1) of the *Road Traffic Act* 1930 (UK). His Lordship held that the verb 'use' in this context required that 'there be present, in the person alleged to be

the user, an element of controlling managing or operating the vehicle at the relevant time', and went on to find that a mere passenger was not using the motor vehicle in my relevant sense.

Similarly, argued Mr Heliotis, a person who is shown merely to be a passenger in a motor car cannot by that fact alone be said to be using the motor car within the meaning of s81(2) of the *Crimes Act*.

If it can be demonstrated or reasonably inferred that the driving of the motor car at the time in question or the use of it whatever be the manner, is something done with his concurrence, or approval or authority, then a relevant user may be said to be made of the motor car, but simply to prove that he is a passenger, and no more, is insufficient. In other words, if the defendant is a passenger, some evidence of concert with the driver or taker is required.

Mr Gillard of Counsel appeared for the Informant to show cause. On this point as to the meaning of the word 'uses' Mr Gillard relied upon the fact that the Act stipulates 'Any person who ... in any manner uses'.

He referred to two decisions, one of the Supreme Court of South Australia, the other of the Supreme Court of Tasmania. In *Bollmeyer v Daly* (1933) SASR 295, Richards J had to construe s21 of the *Motor Vehicles Act* 1921 (SA) which provides 'any person who drives or uses any motor vehicle without first obtaining the consent of the owner' shall be guilty of an offence.

His Honour held that 'uses' there meant, in its context as an alternative to the word 'drives', 'every degree of use', and that the word should be interpreted 'in the literal sense', which was that 'every person who is consciously and voluntarily in a car is using it for some purpose'.

I do not know that I follow His Honour's reasoning precisely, either on this matter or on some of the factual aspects of that case as found by him.

In *Welsh v R* (1962) TasSR 213, Sir Stanley Burbury construed s37(1) of the *Traffic Act* 1925 (Tasmania) which read 'No person shall drive or use any motor vehicle without the consent etc.' In that case the defendant had pushed a motor car into a position where it could shine its lights on to a heap of rubbish. He then sat in the car to rest after his exercise. After considering what he regarded as several relevant passages in *Fawcett v BHP By-Products Pty Ltd* [1960] HCA 59; (1960) 104 CLR 80; [1961] ALR 180 Sir Stanley Burbury said as to s37:

> "Its general purpose no doubt was to create the special offence of unlawful user of a motor vehicle because of the difficulty of establishing that a person taking a car without the owner's consent intends to deprive him of it permanently. It no doubt is primarily concerned with the unlawful driving and use of motor vehicles as units in road traffic. Windeyer J's opinion in *Fawcett v BHP By-Products Pty Ltd* that 'The Act, I think, does contemplate the use of the motor car as involving driving it or doing something to it or with it that is incidental to its normal use as a motor car' is, I think, applicable to the provisions of the *Traffic Act* 1925 and I adopt it as a proper restrictive interpretation of the expression 'use a motor car' in s37(1)."

It seems to me that the decision of Burbury CJ recognises impliedly that the person who uses the motor car must do so in a way which involves an assumption or sharing of dominion or control of the vehicle as a unit in road traffic. He held that the defendant in the case in question, who in fact pushed the car some distance and then sat in it, was not by those acts using the car in any relevant sense, namely, as exercising dominion over it as a unit in road traffic.

It has been held in an altogether unrelated context dealing with tolls and charges that an ordinary traveller along a railway in a carriage belonging to the railway company does not 'use' the railway within s95 of the *Railway Clauses Consolidation Act* of 1945. (see *Brown v The Great Western Railway* 9 QBD 744; 1 TLR 614),

There are also numerous decisions relating to places 'used for betting', but these again appear to turn not simply on the presence of a bookmaker in the place and his use of the place for betting but rather on the knowledge of the occupier of the place that a bookmaker was in fact using the place for betting. In other words, the verb 'use' in the context of gaming has also acquired a special or technical meaning according to the mischief which the statute employing

the word intended to suppress. (See, for example, *R v Davies* (1897) 2 QB 199 per Russell CJ. Again in the patent law the verb 'use' as applied to inventions or trade description also has its own special significance. Similarly, the verb 'to use' has acquired or been interpreted as having a technical meaning in many varied statutory contexts. It is not a word which has any one specific legal meaning (See Stroud's *Judicial Dictionary*).

I think that the word 'uses' in the context in which it appears in s81(2) of the *Motor Car Act* 1958 requires an element of control or dominion or the share of control or dominion over the driving, management or operation of the motor vehicle as such. It would not, for example, extend to cover the case of someone who (as counsel put it) without permission sat on the bonnet of a motor car and so used the vehicle in order to tie his shoelaces or to view a procession.

I can envisage many cases where a person who was a passenger would nonetheless be using the motor car in the relevant sense, but, in my view, such cases would require evidence either of some acting in concert with or authority over the driver.

The driver of the motor vehicle is clearly using it in the relevant sense (see *Gifford v Whittaker* (1942) 1 KB 501) and others in the vehicle may be appropriate evidence be shown to be using it also. However in my opinion, the mere fact that a person is a passenger in a motor vehicle is not, without more sufficient to indicate a relevant user within the meaning of s81(2) of the *Motor Car Act* 1958.

I would agree with the remarks of Davidson J in *Ross v Rivenall* (1959) 2 All ER 376 at 377 that such a proposition would be 'unacceptable'. There may be facts in any given case which would be sufficient to enable an inference to be drawn beyond reasonable doubt that a passenger is using the motor car in the relevant sense but I see no such facts here.

It is apparent also that every user is not made an offence by the section and that it is only a user with a guilty mind at which the section is aimed. In *R v Murphy* [1957] VicRp 75; [1957] VR 545; [1957] ALR 593 the Full Court of Victoria clearly laid down that it is a necessary element of the offence created by the section that the defendant must be shown to have had a guilty mind. The onus lies on the prosecution to prove that at the time when the defendant used the motor vehicle he knew that he was doing so without the consent of the owner or person in lawful possession thereof.

This guilty mind may again be inferred in any given case from surrounding facts and circumstances or it may be proven by admissions. In the instant case the defendant gave evidence on oath that he and the driver of the motor vehicle had taken the motor car from a party and driven to Moama and that at all times he thought that the driver had the owner's permission to use the vehicle. He supported the reasonableness of this belief by swearing that he had seen the driver use the vehicle on previous occasions on the owner's farm and with the owner's permission. In cross-examination he agreed that he had only seen the vehicle driven by the driver when on private property and that he had not seen the vehicle driven by the driver on the highway, and that knew the driver was 17 years of age and did not have a licence.

It seems to have been implicit in the cross-examination that the driver had previously driven the car with the owner's permission and that the defendant had seen him do so, if only on a farm. If this was so, then what is there in these facts which makes it appear improbable that the defendant believed as he said he did: (cf *Llewellyn v Reynolds* [1952] VicLawRp 24; [1952] VLR 171 at 176; [1952] ALR 358).

The owner himself gave evidence that he had given no one permission to use the vehicle on this occasion when he had driven the vehicle to a party (presumably the same one attended by the defendant) that he was attending at the material time. The actual driver of the vehicle was not called to give evidence.

An unsigned record of interview tendered by the police contains a number of non-committal answers in which the defendant said that he was in the vehicle when it was involved in an accident, but (his solicitor being present at the time of the interview) he said that he did not wish to answer the question as to who was the driver or who was the owner or whether he had permission to be

in the vehicle. He gave a similar answer to several other questions.

As a matter of reasoning, it is not clear from the answers given by the defendant in this record of interview whether he was attempting to protect the actual driver of the vehicle who (as appears from the evidence given at the hearing) was unlicensed and 17 years of age. There is certainly nothing, as I see it, in his answers (which were in effect a constant repetition of 'I do not wish to answer', 'I do not wish to answer this', and 'I do not wish to answer it' and 'I do not wish to say anything') to point to a consciousness of guilt such as was held open to be inferred from the answers given in *Woon v R* [1964] HCA 23; (1964) 109 CLR 529; [1964] ALR 868; 38 ALJR 32.

The defendant answered several questions, the first one which he said he did not wish to answer was the question, 'Who was the driver of this vehicle?' Thereafter he did not wish to answer and said so repeatedly, and I am of the opinion that to draw an inference against the defendant from his refusals to answer, as urged should be drawn by counsel for the informant, would be to do the defendant a serious injustice. (See *Leckey v R* [1944] KB 80 at 86; (1944) 29 Cr App R 128 and *R v Twist* [1954] VicLawRp 20; [1954] VLR 121; [1954] ALR 134)

I cannot but feel that this must have been what the Magistrate in fact did, for I can see no facts in the case which could lead to any inference being drawn beyond all reasonable doubt that the defendant had the necessary *mens rea* or intend at the relevant time to use the vehicle without the permission of the owner or person in lawful possession thereof. If the driver was in fact in lawful possession, then, even assuming that I am wrong on the first point and that there was evidence that the defendant had used the vehicle in a relevant sense, it could not have been argued that the defendant used the vehicle without his consent, that is to say, of the person in lawful possession.

It was open on the evidence for the Magistrate to conclude the driver did not have lawful possession and that he did not have the consent of the owner to take or use the vehicle, but it is my opinion in a case such as the instant one where the defendant was a mere passenger, there would have also to be evidence led which was capable of giving rise to an inference beyond all reasonable doubt that the defendant knew that at the time of the use the driver did not have lawful possession. I see no such evidence in this case.

Accordingly, I rule the order nisi to be made absolute, the order of the Magistrates' Court convicting the defendant be set aside. I order that the informant pay the applicant's costs fixed at $200. I will grant the informant an indemnity certificate under s13 of the *Appeals Costs Fund Act.*
