09/69

SUPREME COURT OF VICTORIA

STAPLES v McGILL

Gowans J

22 September 1969

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT OBSERVED DRIVING A MOTOR VEHICLE WHICH WAS MAKING A LOUD NOISE AND APPEARED TO BE "KANGAROO HOPPING" – DEFENDANT INTERCEPTED AND REQUESTED TO UNDERGO A BREATH TEST WHICH HE REFUSED – DEFENDANT CHARGED WITH AN OFFENCE OF REFUSING A BREATH TEST – NO EVIDENCE GIVEN BY POLICE INFORMANT THAT HE HAD REASONABLE GROUNDS FOR BELIEVING THAT THE DEFENDANT'S ABILITY TO DRIVE WAS IMPAIRED – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S408(4), (5).

HELD: Order nisi discharged.

1. The defendant took the point that there was no evidence before the Magistrate that the police informant held any belief to the effect of the matter set out in sub-sec(4) and there was no evidence as to what the grounds of that belief were. This was correct, because the informant never gave any evidence that be held any belief to the effect of the matters set out in sub-sec(4). The only evidence in any way bearing upon that was the part of his evidence as to what he said to the defendant. It is true that he said to the defendant "I believe that you were driving a motor car," etc., but he never at any time gave any evidence to the effect that he in fact held that belief.

2. It is true also that in the course of his evidence he set out a number of matters bearing upon the defendant's condition and his conduct in relation to the car, but he never at any time said that these were the grounds upon which he based his belief. That really made it impossible to determine the reasonableness or otherwise of the grounds on which he held his belief, since neither the belief nor the grounds were stated.

3. Accordingly, the dismissal of the information was soundly based and the order nisi was discharged.

GOWANS J: This is an order nisi to review the decision of Mr Proposch SM, at the Court of Petty Sessions at Melton on 17 March 1969, when an information under s408A(4) and (5) of the *Crimes Act* was dismissed.

The actual terms of the information were

> "that the defendant whom the informant a member of the Police Force believed on reasonable grounds had been within the last two preceding hours driving a motor car and who had behaved whilst driving in a manner which indicated that his ability to drive such motor car was impaired at the time he was driving such motor car being required by the informant to furnish a sample of his breath for analysis by an approved breath analysing instrument refused to furnish a sample of his breath by exhaling directly into the instrument."

The evidence given by the informant was that on Friday 6 December 1968, about 10.20pm he was on patrol duty outside Mack's Hotel at Melton and noticed the defendant driving a car along Palmerston Street. The car was making a loud noise and appeared to be "kangaroo hopping" as it approached the Western Highway. It stalled once, and the defendant started it again and commenced to move forward. When accosted by the police he said that the car was in good condition, but the police witness gave evidence that the defendant's breath smelled strongly of intoxicating liquor, his eyes were bloodshot and he kept squinting at the constable, and, in answer to questions admitted that he had drunk about four beers over a period of about two hours.

The constable gave evidence that he said to the defendant "I believe on reasonable grounds that you were driving a motor car within the last preceding two hours in a manner which indicated that your ability to drive a motor car was impaired, and I require you to furnish a sample of your

breath for analysis by this approved breath analysing instrument". To that the defendant answered: "What do you think I am?" Then the further evidence was to the effect that when a member of the breath analysis section was brought to the police station the defendant failed to blow into the instrument.

A submission was made by Mr Mattei on behalf of the defendant at the end of the informant's case that at the time of the interception the constable did not suspect the driver but suspected the car because of the noise it was making and its unroadworthy condition, and it was not until the car had stopped that the constable considered the defendant should be tested. The Magistrate upheld that submission and in effect dismissed the information on the ground that there were no reasonable grounds for any belief by the constable to the effect of s408A(4).

The order nisi to review the dismissal of the information was based on two grounds stated as follows:

> "1. That upon the evidence the Stipendiary Magistrate was in error in holding that the informant did not have reasonable grounds for believing that the defendant whilst driving a motor car within the last preceding two hours as alleged in the information had behaved in a manner which indicated that his ability to drive such motor car was impaired at the time he was so driving.
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> 2. That upon the evidence the Stipendiary Magistrate was in error in holding that there were no reasonable grounds for requiring the defendant to furnish his breath for analysis."

Whatever might be said as to whether the Magistrate was entitled to come to the conclusion that the grounds entertained by the police constable for believing the things set out in s408A(4) were reasonable or otherwise, the respondent is entitled to uphold the dismissal of the information on any grounds that are open to him.

Mr Mattei has taken the point that there was no evidence before the Magistrate that the constable held any belief to the effect of the matter set out in sub-sec(4) and there was no evidence as to what the grounds of that belief were. This is obviously correct, because the constable never gave any evidence that be held any belief to the effect of the matters set out in sub-sec(4). The only evidence in any way bearing upon that is the part of his evidence as to what he said to the defendant. It is true that he said to the defendant "I believe that you were driving a motor car," etc., but he never at any time gave any evidence to the effect that he in fact held that belief.

It is true also that in the course of his evidence he set out a number of matters bearing upon the defendant's condition and his conduct in relation to the car, but he never at any time said that these were the grounds upon which he based his belief. That really made it impossible to determine the reasonableness or otherwise of the grounds on which he held his belief, since neither the belief nor the grounds were stated.

In these circumstances the point taken by Mr Mattei must be upheld, and indeed Mr Hart very properly conceded that there was no real answer that could be made to the point once it was taken. That being so, without adjudicating on the issue which was raised by the order nisi, it is necessary to come to the conclusion that the dismissal of the information was soundly based and the order nisi must therefore be discharged. The order nisi will be discharged with costs.

APPEARANCES: For the applicant Staples: Mr LR Hart, counsel. Thomas F Mornane, Crown Solicitor. For the respondent McGill: Mr D Mattei, counsel. PJ Cannon & Testro, solicitors.
