64/79

SUPREME COURT OF VICTORIA

KANE v RICHARDSON

Anderson J

12 October 1979

MOTOR TRAFFIC – DRINK/DRIVING AND OTHER DRIVING OFFENCES – DEFENDANT DRIVING A BEACH BUGGY ON A TRACK – MEANING OF "HIGHWAY" AND "MOTOR CAR" – FINDING BY JUSTICES THAT THE BEACH BUGGY WAS NOT A MOTOR CAR – INFORMATIONS DISMISSED – WHETHER COURT IN ERROR: *MOTOR CAR ACT* 1958, S3.

HELD: Orders nisi discharged.

1. The determination of each of these Orders nisi turned on the definitions of the words "highway" and "motor car" which occur in s3 of the *Motor Car Act* ('Act'). "Highway" is defined as meaning "any street road lane bridge thoroughfare or place open to or used by the public for passage with vehicles". "Motor car" is defined as meaning, so far as relevant to these cases, "any vehicle propelled by internal combustion steam gas oil electricity or any other power and used or intended for use on any highway".

2. In relation to the vehicle driven by the defendant, its engine was started by pulling a cord as one starts a lawn mower; it had no headlights, no hand brake, no horn, no windscreen, no indicators; It could not sensibly be driven on a conventional road; the recommended pressure for the tyres was said to be two pounds, and its tyres would be destroyed if driven any appreciable distance on the road. The justices were entitled not to be satisfied that this was a vehicle "intended for use on any highway" as required by the definition of "motor car", and the question then arose whether the vehicle was in fact "used" on any highway, that being the alternative aspect of its use within the definition of "motor car".

3. Whether the track was a highway was a question of fact for the justices. The track was on private land; it may have been a very much unmade street on a plan of subdivision, but there was nothing to show that it was, and it did not appear whether it served the front or the back of the houses to which it gave access. There were no street signs and no provision for street lighting. It was only used by the residents of the two houses and the staff and visitors to an office at the corner of the track and Wasley Street. It may be inferred that persons desiring to visit the two houses might use the track, but that would not constitute any real use by the public, nor could they and the occupants of the houses be said necessarily to be the public *qua* public; rather they were a special group which made only casual and occasional use of the facility.

***Schubert v Lee* [1946] HCA 28; (1946) 71 CLR 589, applied.**
***Ireland v Haesler* [1959] VicRp 2; (1959) VR 4; [1959] ALR 202; and**
***Matthews v Earles* [1965] VicRp 31; (1965) VR 213, referred to.**

4. The onus was on the prosecution to prove every element of each of the alleged offences, and it was open to the justices not to be satisfied beyond reasonable doubt that the track on which the vehicle was driven was a highway within the definition of s3 of the Act. If they were not so satisfied, then since it was likewise open to them on the evidence not to be satisfied that the vehicle was intended for use on a highway and also not to be satisfied that the defendant had driven on Wasley Street, there was no basis for upsetting their orders in these cases.

ANDERSON J: I have before me three orders nisi to review three orders of the Magistrates' Court at Sunshine, comprising two justices of the peace, which on 5th February 1979 dismissed three informations charging the defendant, Joseph Peter Kane, with three breaches of the *Motor Car Act* 1958 allegedly committed on 22nd December 1978. The three alleged offences may be shortly described as:

(a) driving a motor car with a blood alcohol reading of more than 0.05 per cent, contrary to s81A of the Act;
(b) driving a motor car which was unregistered on a highway, contrary to s17; and
(c) driving a motor car during a period during which his licence was cancelled, contrary to s28.

The determination of each of these Orders nisi turns, in my opinion, on the definitions

of the words "highway" and "motor car", which occur in s3 of the Act. "Highway" is defined as meaning "any street road lane bridge thoroughfare or place open to or used by the public for passage with vehicles". "Motor car" is defined as meaning, so far as relevant to these cases, "any vehicle propelled by internal combustion steam gas oil electricity or any other power and used or intended for use on any highway".

At the hearing of the informations, witnesses for both the informant and the defendant gave evidence. The relevant facts which were open to the justices to find may be briefly stated. There was evidence before the Court that on the afternoon of 22nd December 1978 the defendant drove a vehicle commonly known as a beach buggy. Its engine was started by pulling a cord as one starts a lawn mower; it had no headlights, no hand brake, no horn, no windscreen, no indicators; It could not sensibly be driven on a conventional road; the recommended pressure for the tyres was said to be two pounds, and its tyres would be destroyed if driven any appreciable distance on the road. The justices were entitled not to be satisfied that this was a vehicle "intended for use on any highway" as required by the definition of "motor car", and the question then arose whether the vehicle was in fact “used” on any highway, that being the alternative aspect of its use within the definition of "motor car".

The police evidence was that the defendant had driven the vehicle on a street called Wasley Street, Albion, and also on a track which ran off Wasley Street. The defendant gave evidence denying that he had driven the vehicle on Wasley Street, but admitting that he had driven it on the track. Implicit in the justices' decision is that they were not satisfied that he had driven the vehicle in Wasley Street, and the only real question in these cases is whether the track was a "highway" within the definition above set out. The nature of the track is therefore of prime importance. Out Albion way where the track is located, Ballarat Road runs east and west. It is a busy arterial road. Off Ballarat Road to the south runs Wasley Street. A short distance south of where Wasley Street joins Ballarat Road the track runs off Wasley Street to the west.

An answering affidavit, filed on behalf of the defendant, set out evidence given by a witness for the defendant which was not set out in the informant's affidavits. The answering affidavit is supplementary to the material contained in the informant's affidavit rather than contradictory, and was accepted in accordance with the usual practice. The additional evidence was that of one Heaviside, who was the owner of the vehicle and lived in Wasley Street and was the proprietor of an office which was apparently on the corner of Wasley Street and the track. His evidence described the track in these terms, "The track is unsealed, we constructed the track ourselves from old bricks. We put some gravel over the top of the bricks. The Country Roads Board were asked to repair it but they did nothing about it. Eventually the Council dropped some gravel on top of the surface.

The surface of the track is about three feet below the level of Ballarat Road. There is no access to Ballarat Road from the track except from Wasley Street. There is a fence and trees separating the track from Ballarat Road. The only use that I know is made of the road is by the owners of the two houses on the track and the staff and visitors to our office. The track runs out when it reaches the creek." The answering affidavit also stated that one of the witnesses in cross-examination said that there were not any street signs at the intersection of the track with Wasley Street and there was no provision for street lighting for the track, and that there was no traffic in the vicinity of the defendant when he was intercepted on the track.

The defendant himself gave evidence that the track was "just an access track for the office and the two houses". Photographs of the track were tendered before the justices, but were not reproduced at the hearing of the orders nisi; it was stated that they were not now available. In announcing the Court's decision, the Chairman said, "We cannot agree, Sergeant, with the submission put by you. We are of the view that the beach buggy was not a motor car within the meaning of s3(1) of the *Motor Car Act*. The informations are dismissed."

Considerable argument ensued before me on the question of whether the track was a highway. The case is not without difficulty, for the justices did not in terms indicate whether they had in fact considered whether the track was a highway within the meaning of the definition in s3. They were, however, addressed in argument on the question, and their finding that the vehicle was not a motor car implies to my mind that they were not satisfied on the evidence that the track

fell within the definition of "highway" for, had they been so satisfied, the vehicle would have been used on a highway, and so would have been a motor car. Whether the track was a highway was really a question of fact for the justices (see, e.g., *Dobell v Petrac* [1961] VicRp 13; (1961) VR 70 at p74; *Mills v Selby* [1971] VicRp 102; (1971) VR 836 at pp841-2). Had they found that this was a highway, it would, I think, have been difficult to fault their finding. On the other hand, they had to have the necessary degree of satisfaction that it was a highway before they could convict, and there were a number of aspects which might reasonably have created the appropriate amount of reasonable doubt. The evidence suggests that the track ran roughly parallel to Ballarat Road. Ballarat Road seemingly came under the jurisdiction of the Country Roads Board. Whether it did or not, the Board when asked to do something about the track did nothing. The evidence shows. that a fence and trees separated the track from Ballarat Road, from which it could be inferred that the track was not within the curtilage of the boundaries of Ballarat Road, and was not within the jurisdiction of the Board anyway.

On the contrary, it suggests that the track was on private land; it may have been a very much unmade street on a plan of subdivision, but there was nothing to show that it was, and it did not appear whether it served the front or the back of the houses to which it gave access. The evidence of Heaviside was that he and some other person or persons had made the track to serve the two houses and his office. One gets the impression that the track might pass over the land of each of the houses providing in effect a common driveway, used by each householder with the licence of the other. The track ended up a short distance beyond the second house, leading nowhere except to a creek. There were no street signs and no provision for street lighting. Such evidence as there was of the use made of the track was that it was only used by the residents of the two houses and the staff and visitors to Heaviside's office at the corner of the track and Wasley Street. It may be inferred that persons desiring to visit the two houses might use the track, but that would not, in my opinion, constitute any real use by the public, nor could they and the occupants of the houses be said necessarily to be the public *qua* public; rather they were a special group which made only casual and occasional use of the facility.

The justices had seen photographs of the track and these may have assisted to create doubts. Some of these aspects may be conjectural, but several at least are relevant, and it is to be borne in mind that the onus of satisfying the justices that the track was a highway was on the informant. (see *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; (1956) VLR 38; [1956] ALR 301, to which I later refer in detail).

In this context the words in the definition of "highway", namely, "open to or used by the public for passage with vehicles", are material. In *Schubert v Lee* [1946] HCA 28; (1946) 71 CLR 589, the High Court of Australia discussed the meaning of the expression "street road ...place open to or used by the public" which appeared in the *Road Traffic Act* 1919-1941 (WA). In the Judgment of the Court at p592, it is said:

> "The words 'open to or used by the public' are apt to describe a factual condition consisting in any real sense of the use by the public as the public – as distinct from use by licence or a particular person or only casual or occasional use. It may be necessary to distinguish places left open by the owner but obviously intended for the use of a particular description of person ... for example, visitors to his shop or other premises."

The aspect of occasional or casual use and of whether such use is by the public as the public is illustrated in various cases, including *Ireland v Haesler* [1959] VicRp 2; (1959) VR 4; [1959] ALR 202 and *Matthews v Earles* [1965] VicRp 31; (1965) VR 213. These and other cases emphasise that whether or not a way – to use a neutral term – fits within the definition of "highway" is to be determined as a matter of fact by the Court of first instance.

On behalf of the informant, and in support of the grounds of the order nisi which raised the question as to whether the vehicle was a motor car and the track was a highway, it was submitted that the decision of the justices in the present case could not stand because it was unreasonable. It was argued that all that the justices had decided was that the vehicle was a beach buggy, not a motor car, but that they had made no finding as to whether the track was or was not a highway, and on the evidence the only reasonable finding was that it was a highway. As I have said, in my opinion there was evidence which would justify the justices in not being satisfied that the track came within the definition of "highway". Whether I might have found that the track was a highway

had I been sitting as the court of first instance is not the question. In *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301, Herring CJ stated the principle in these terms:

> "The principle that has to be applied is that appropriate to the verdict of a jury: *Wilson v Jones* [1915] VicLawRp 94; (1915) VLR 635, at p638, per Hood J. And so one has to consider in what cases the verdict of a jury against a party on an issue, the burden of proof of which lies upon him, can properly be set aside and the contrary verdict substituted. Here the burden lay upon the defendant of satisfying the Court that it did not know and could not with reasonable diligence have ascertained the name and address of the person who was in charge of the vehicle at the relevant time. The Court having heard the evidence was not satisfied. What I am asked to do is to say that the Court should have been satisfied and to deal with the matter on this basis. This I can only do if it appears that there is no reasonable view on the evidence that is consistent with the Court's decision. If on any reasonable view of the evidence that decision can be supported, then the party who complains of that decision cannot have it set aside and the contrary decision that he desires substituted for it. It is a question of what he is entitled to as a matter of law, and he is only entitled to a contrary decision when that decision is the only possible decision that the evidence on any reasonable view can support."

This principle has been repeatedly stressed in many cases; the most commonly referred to case is probably the decision of the Full Court in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; (1962) VR 346; (1961) 19 LGRA 232, where *Young v Paddle Bros Pty Ltd* is quoted with approval. In the present case, the onus was on the prosecution to prove every element of each of the alleged offences, and in my opinion it was open to the justices not to be satisfied beyond reasonable doubt that the track on which the vehicle was driven was a highway within the definition of s3. If they were not so satisfied, then since it was likewise open to them on the evidence not to be satisfied that the vehicle was intended for use on a highway and also not to be satisfied that the defendant had driven on Wasley Street, there is no basis for upsetting their orders in these cases.

The three orders nisi are accordingly discharged. On the question of costs, there are three orders nisi here, and the maximum, I think is still $200, the costs that are available on an order nisi. This is really one case, though there has been additional paper work in each problem.

APPEARANCES: For the applicant/informant Richardson: Mrs Lieber instructed by the Crown Solicitor. For the respondent defendant: Mr J Riordan of counsel instructed by Messrs Landers and Rogers.
