34/90

SUPREME COURT OF VICTORIA

HUMPHREY v EDWARDS

Southwell J

25 October 1988

MOTOR TRAFFIC – DRINK/DRIVING – PERSON FOUND DRIVING – WHEN QUESTIONED ADMITTED TO EARLIER DRIVING – ONE CHARGE LAID – WHETHER BAD FOR DUPLICITY: *MOTOR CAR ACT* 1958, S81A.

H., a police officer saw E. drive a motor car forwards for a short distance then stop. When E. was later questioned he admitted that just prior to his apprehension by H. he had driven the motor car some 200 metres to where he was found by H. On a hearing of a charge laid against E. for driving a motor car whilst in excess of .05% blood/alcohol, the magistrate upheld a 'no case' submission and dismissed the charge on the ground that it was bad for duplicity given the evidence as to the two episodes of driving. Upon order nisi to review—

HELD: Order absolute. Remitted for further hearing.
The evidence as to the two episodes of driving did not involve a finding that the prosecution was alleging two separate offences. There would have been little doubt that the case the defendant was required to meet concerned the episode of driving seen by the police officer rather than the admission as to the earlier driving. However, in order to put the matter beyond doubt, it would have been desirable for the prosecutor to elect as to what it was the defendant had to answer.

SOUTHWELL J: [1] This is the return of an Order Nisi to review a decision of the Magistrates Court at Lilydale of 6 June 1988, dismissing an information charging that the respondent/defendant, who I shall call the defendant did, on 6 December 1986 at Wandin North, drive a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than 0.5 percentum, an offence against the *Motor Car Act* s81A(1), now the *Road Safety Act* 1986. Evidence was given in support of the information by the applicant/informant (who I shall call 'the informant') who said in substance that he attended the intersection of Warburton Highway and Wellington Road, Wandin North at about 2.15 a.m. on 6 December; he saw there a blue Toyota Celica car near a motor cycle, and he saw the defendant standing in the driver's doorway of the car. The defendant then got into the driver's seat and closed the door. He then started the engine, drove forward one or two metres and stopped. He was approached by the police, gave his name and address, and admitted that he just driven the vehicle to that point. The informant noticed the smell of alcohol on the defendant, and observed that his eyes were bloodshot, and his speech was slurred. He then required the defendant to undergo a preliminary breath test, presumably because he had found the defendant driving the vehicle. Whether or not the car moved forward, the defendant would still **[2]** have been in charge of the vehicle as having been in the driving seat of it, and having started the engine of it, and it would not, in those circumstances, be necessary to decide whether the vehicle in fact moved.

The preliminary breath test was positive, and in due course the defendant was required to undergo a breathalyser test which showed a blood alcohol content of .230 per cent. The informant, after conducting that test, further questioned the defendant who is said to have admitted that he had been drinking for some hours that night, and had, just before his apprehension, driven the car some 200 metres to the spot where he was found. The Schedule 7 certificate was tendered, and no doubt at that stage the prosecutor thought that he had mounted an unanswerable case. However, counsel for the defendant then submitted that the charge should be dismissed because it was bad for duplicity. In this court, Mr Traczyk for the defendant, conceded that the information on its face was not bad for duplicity, but submitted that the evidence of the informant, of an admission that shortly prior to his apprehension the defendant had driven the car to the spot where he was apprehended, involved that the prosecution was, in effect, alleging two separate offences, (1) when he had driven the 200 metres to the scene of apprehension, and (2) when he had got back into the car, started it, and driven it one or two metres forward.

[3] Counsel was not armed with authority to argue the matter there and then, and during discussion it appears that the learned Stipendiary Magistrate suggested that the problem could be overcome if the informant nominated which period of driving he relied upon, and suggested, apparently, that perhaps a further information could be issued. It was then pointed out that that could not be done, because the event had occurred more than 12 months prior to the hearing. There was some further discussion, but at no stage does it appear that the Magistrate specifically called upon the informant, or the prosecutor, to make an election. The Magistrate upheld counsel's submission, and dismissed the information.

In my view, the course taken was misconceived. The informant had the right to require the defendant to undergo a preliminary breath test if, and only if, he found him driving or he found him in charge of the car, or he had formed the belief that the defendant had been driving whilst under the influence of intoxicating liquor. The material presently before the court does not indicate that the informant formed that belief, or if he did, he gave no evidence of it, and it would therefore be obvious that the requirement that the defendant undergo a breath test was made in relation to the finding by the informant of the defendant driving the car at the scene of the apprehension. It would follow, for example, from *Peebles v Hotchin* [1988] 8 MVR 147, that the informant would, in the absence of forming the belief to which I **[4]** have referred, have not been enabled to require the defendant to undergo a preliminary breath test, and it is to be presumed, in those circumstances, that the requirement was lawful rather than unlawful. Whether that be so or not, the fact remains that on the evidence before the Magistrate, the informant found the defendant driving.

[5] He required him to undergo a preliminary breath test, which he was lawfully enabled to do, he thereafter required him to undergo a full breath test and it returned a finding of .23 per cent. There could be little question, in those circumstances, of any doubt in the defendant's mind as to what he was charged with and to what case he had to meet. I would have thought that a defendant who got into the witness box in a case like this and said that he did not know what case he had to meet, would have some difficulty handling cross-examination about that. There can, in my view, be no injustice for him to meet the case as it was put.

The fact that the informant gave evidence of some admission of previous driving, does not involve a finding that the prosecution was alleging two separate offences. The evidence of the admission as to earlier driving is no more, in the circumstances of this case, than evidence tending to support the otherwise overwhelming case that when the informant found the defendant driving, his blood alcohol content was in excess of .05 percent.

In those circumstances, I am satisfied that the Magistrate was in error in dismissing the information. However, I should express the view that it would have been desirable for the Magistrate to have required the prosecutor to elect, in order that there could be no doubt left in anybody's mind, as to just what it was that the defendant had to meet. It follows that the order nisi must be made absolute, and the matter will be referred to the Magistrates' Court to be further dealt with according to law.

APPEARANCES: For the applicant Humphrey: Mr M Colbran, counsel. Victorian Government Solicitor. For the respondent Edwards: Mr GJ Traczyk, counsel. Devenish & Co, solicitors.
