

31/72

SUPREME COURT OF VICTORIA

PEARCE v BUBAT

McInerney J

22 September 1972

MOTOR TRAFFIC – DEFENDANT CHARGED WITH PERMITTING AN UNLICENSED DRIVER TO DRIVE A MOTOR CAR – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S22C.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination according to law.

1. The ground of the order nisi that the Stipendiary Magistrate was wrong in holding that s22C sub-section (1)(f) of the *Motor Car Act* 1958 only applied in cases where the person employed, permitted or suffered to drive a motor car upon the highway is required to but does not hold a licence appropriately endorsed was correct.

2. It may be conceded that the paragraph would be clearer if it were framed in some such way as the Magistrate has suggested in the affidavit filed by him in the *certiorari* proceedings. Nevertheless, it can be given sense and meaning if it is assumed that after the words 'motor car' a comma is to be understood. It is to be recalled that all these vehicles are motor cars and that basically what is required to permit or to justify or legitimise the driving of a motor car of any one or other of the types specified in s22 is the holding of a licence to drive a motor car; in some cases what will suffice is a licence to drive a motor car being a motor cycle, if the vehicle driven is a motor car being a motor cycle. If the vehicle driven is a motor car not being a motor cycle a licence authorising the holder to drive a vehicle being a motor car not being a motor cycle, suffices.

McINERNEY J: This is an order to review a decision of the Magistrates' Court at Kyneton on 26 January 1972 dismissing an information against Horst Alfred Kurt Bubat which charged that on 21 November 1971 at Kyneton he did permit one Frank Bubat to drive a motor car other than a motor cycle upon a highway to wit Jeffrey Street, Kyneton, the said Frank Bubat not being the holder of a licence to drive a motor car. According to the affidavit of Sergeant Taylor, the magistrate dismissed the charge, as it were, on the threshold. When the charge was about to be read to the accused the magistrate said to the defendant, "I won't convict you of that", and then said to Sergeant Taylor, "You realise there is no offence under this section", and after some discussion the magistrate dismissed the information after hearing evidence from the informant Peter Sinclair Pearce.

That is how the matter is referred to in the affidavit of the informant on which this order nisi was granted, but according to the material in the related *certiorari* matter, with which I have just dealt — and I think I must act on that material in relation to this order nisi, it appears that although the evidence was not given in the Magistrates' Court, the charge was dismissed in the Magistrates' Court. Perhaps this matter can be dealt with on the footing that whether or not any evidence was given or adopted in the Magistrates' Court, the dismissal of the information was on the basis that on the face of it it did not disclose an offence.

The Magistrate, in his affidavit filed in the *certiorari* proceedings, has set out the reasons why he has taken this view (which has been a view he has held for some time and applied in other cases). He has traced out the history of the Legislation, going back to the 1956 Act, whereby under s22 sub-section (1) there was imposed, or created, a series of offences all grouped together under the one sub-section;

"Subject to this Act no person shall drive a motor car other than a motor cycle, or a motor car being a motor cycle, upon any highway without being licensed under this part for the appropriate purpose, and no person shall employ or permit or allow to drive a motor car any person who is not so licensed."

Sub-section (2) then went on to empower the Chief Commissioner;

"On the application of a person over the age of 18 years, to issue a licence in the prescribed form, to drive a motor car other than a motor cycle, or to drive a motor car being a motor cycle."

There was a provision whereby;

"A Licence to drive a motor car other than a motor cycle should not entitle the holder to drive upon a highway three classes of vehicles, including an articulated motor car, unless the licence is extended by the Chief Commissioner by endorsement thereon for the appropriate purposes".

Sub-section (3) empowered the Chief Commissioner;

"On the application of any person over the age of 16 years but under the age of 18 years to issue to that person a licence to drive a motor tractor."

In the definition clause of the *Motor Car Act*, s3, there were definitions of 'articulated motor car', 'motor car' or 'car' and 'motor cycle' and 'motor tractor'; it may be said that an articulated motor car was defined as meaning a motor with certain attributes. In the definition clause motor car was defined as including an articulated motor cycle and a motor tractor and a motor cycle was defined as a motor car having only two wheels, and there was a special definition of motor tractor.

In 1963, by Act No. 7073 these provisions were amended and certain endorsements of the licence became necessary to permit the holder of the licence to drive particular kinds of vehicles. Section 22 sub-section (1) empowered a person over the age of 16 years:

"To apply to the Chief Commissioner for a licence to drive a motor tractor."

Sub-section (2) empowered a person over the age of 18 years:

"To apply to the Chief Commissioner for a licence to drive a motor car other than a motor cycle or a licence to drive a motor cycle."

Then sub-section (3) empowered any person being the holder of a licence to drive a motor car other than a motor cycle on compliance with certain qualifications and conditions;

"To apply to the Chief Commissioner for an endorsement on the licence authorising the holder to drive a heavy vehicle or articulated motor car or a large trailer combination."

Those terms, 'heavy vehicle' and 'large trailer combination' had not theretofore occurred in the Act. A 'heavy vehicle' is defined by a definition inserted in s3 by Act 7073 as meaning a motor car with certain attributes. A 'large trailer combination' means: 'a heavy vehicle which is towing a trailer weighing more than 15cwt unladen'. It is clear therefore that each of the kinds of vehicles referred to in sub-section (3) is a motor car within the meaning of the Act.

Sub-section (4) empowered the Commissioner;

"To grant the applicant a licence or to make the necessary endorsement on the licence."

The offence with which I am now concerned is dealt with under s22C. That creates a number of offences and prescribes penalties which depend on the ascertainment of facts set out in the section. In *Peck v De-Saint-Aromain* [1972] VicRp 22; (1972) VR 230 the provisions of the section were found by Mr Acting Justice Norris, with some justification, I would say, with respect, to be pregnant with difficulty.

Section 22C sub-section (1) creates a number of offences of driving a motor car on a highway unless the driver is the holder of a licence of one or other of the kinds specified. Paragraph (a) deals with the motor car other than a motor cycle. Paragraph (b) deals with a motor car being a motor cycle. Paragraph (a) deals with heavy vehicles, the condition in that case being that the driver must have a licence to drive a motor car which has been endorsed to authorise the holder to drive a heavy vehicle or large trailer combination, or an articulated motor car. Paragraph (d) deals with the driving of a large trailer combination and requires that the driver be the holder of

a licence which has been endorsed to authorise the holder to drive a large trailer combination or an articulated motor car. Paragraph (e) deals with the driving of an articulated motor car on a highway and required the driver to be the holder of a licence to drive a motor car which has been endorsed to authorise the holder to drive an articulated motor car. Paragraph (f), which is the relevant paragraph for my purposes, provides that

"Subject to this Act, 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, if the case so requires, for that motor car, shall be guilty of an offence against this part."

It is to be observed that it applies to anyone who 'employs, permits or suffers a person to drive any motor car'. Stopping there the ingredient of the offence would be established if the person had been employed or permitted or suffered to drive a motor car being a motor cycle, a motor car not being a motor cycle, a motor car being a heavy vehicle and a motor car being a large trailer combination or a motor car being an articulated motor car.

It is the view of Mr Acting Justice Norris, expressed in the case to which I referred *Peck v De-Saint-Aromain* that paragraph (f) imposes a *prima facie* liability on a person driving a motor car on a highway from that liability that person can exculpate himself if he proves that he is the holder of a licence to drive a motor car appropriately endorsed if the case so requires for that motor car.

The Magistrate dismissed the information on the basis that para (f) as applied to a person charged with permitting someone to drive a motor car on a highway, was not applicable unless the motor car was one which a licence for which required the appropriate endorsement, and that while it penalised the person who drove a motor car, the licence for which required some appropriate endorsement if that person did not have a licence so endorsed, it did not apply to the ordinary case of a person driving a motor car holding a licence which was not required to be endorsed in any way.

It has been put by the counsel for the informant moving the order absolute that the Magistrate's decision was wrong on two grounds, one that on the evidence the Magistrate ought to have convicted the said defendant.

It may be doubted whether that ground is really open having regard to the fact that the dismissal took place before any evidence was given. The second ground is that the Stipendiary Magistrate was wrong in holding that s22C sub-section (1)(f) of the *Motor Car Act* 1958 only applied in cases where the person employed, permitted or suffered to drive a motor car upon the highway is required to but does not hold a licence appropriately endorsed. That in substance, was I think, the view held by the Stipendiary Magistrate. In my view that construction of paragraph (1) of sub-section (1) of 22C is not correct.

It may be conceded that the paragraph would be clearer if it were framed in some such way as the Magistrate has suggested in the affidavit filed by him in the *certiorari* proceedings. Nevertheless I think it can be given sense and meaning if it is assumed that after the words 'motor car' a comma is to be understood. It is to be recalled that all these vehicles are motor cars and that basically what is required to permit or to justify or legitimise the driving of a motor car of any one or other of the types specified in s22 is the holding of a licence to drive a motor car; in some cases what will suffice is a licence to drive a motor car being a motor cycle, if the vehicle driven is a motor car being a motor cycle. If the vehicle driven is a motor car not being a motor cycle a licence authorising the holder to drive a vehicle being a motor car not being a motor cycle, suffices.

In all the other cases the licence which bears an endorsement of the kind referred to in sub-section (3) of s22 is in fact a licence to drive a motor car and what is required to avoid the commission of an offence under s22C is that the driver should have been the holder of a licence to drive a motor car. But that does not suffice, if the motor car is of that particular kind which requires some special endorsement, then the licence must bear the appropriate endorsement.

I think the construction contended for by Mr Graham gives full effect to the words appearing

in para (f) whereas, the construction adopted by the Magistrate gives no operation to the words: 'if the case so requires' and leaves altogether uncovered the case of a person who employs, permits or suffers a person to drive a motor car being a motor cycle or a motor car other than a motor cycle on a highway. This would, on any view of it, be a substantial omission from the Legislature. Such omissions have been known to occur, and if they have in fact occurred, of course, the Courts can merely note the fact and hope that the Legislature will remedy the omission. But in my view no such *casus omissus* occurs in the present case. The language was apt to cover the particular facts before the Magistrate.

In my view the Order Nisi must be made absolute. The decision of the Magistrates' Court made the 26 January 1972, dismissing the information, is set aside. Remit the information to the Magistrates' Court at Kyneton to hear and determine according to law.
