60/94

SUPREME COURT OF VICTORIA

PLIASKIN v RYAN

Smith J

20, 25 July 1995 — (1995) 22 MVR 261

MOTOR TRAFFIC – USING CANNABIS IN PARKED CAR – NO EVIDENCE WHY OFFENDER DROVE VEHICLE – "IN CONNECTION WITH THE DRIVING OF THE MOTOR VEHICLE" – MEANING OF – WHETHER OFFENCE IN CONNECTION WITH DRIVING – WHETHER OPEN TO MAGISTRATE TO SUSPEND OFFENDER'S DRIVER LICENCE: *ROAD SAFETY ACT* 1986, S28.

When police approached and questioned P. who was seated in his car in a car park, P. admitted that just prior to police arrival he had used cannabis whilst in his car. A charge of using a drug of dependence was laid and at the hearing, P. pleaded guilty and said in answer to a question from the magistrate that he had driven the car to the location where he was checked by the police. The magistrate released P. on an undertaking and suspended his driver licence for one month. On appeal against the licence suspension—

HELD: Appeal allowed. Licence suspension order quashed.
1. Section 28 of the *Road Safety Act* 1986 ('Act') gives power to a court to suspend a person's driver licence if satisfied that the person has committed an offence "in connection with the driving" of a motor vehicle. If the purpose or reason for driving the vehicle was to commit an offence, then the vehicle was being driven "in connection with" that offence.

2. In the present case, there was no direct evidence as to the purpose for which P. drove the vehicle to the car park. Suspicion is not enough. In the circumstances, the necessary factual basis did not exist for the magistrate to find that P.'s purpose in driving was to use cannabis. Accordingly, the magistrate had no power to make an order under s28 of the Act.

SMITH J: **[1]** At the Magistrates' Court at Broadmeadows on 3 April 1995 the appellant, Peter Pliaskin, was found guilty of the charge of use of a drug of dependence. The magistrate released the appellant without conviction on an undertaking to be of good behaviour for twelve months. The magistrate also suspended the appellant's driving licence for a period of one month. The appellant challenges the suspension of the driving licence. The issue of law that he seeks to raise is, as formulated in the question that I substituted by direction, as follows:

> "Was it open to the magistrate to suspend the defendant's driving licence pursuant to s28 of the *Road Safety Act* 1986 or at all?"

The appellant abandoned the other issue raised in the appeal – whether the magistrate erred in refusing the appellant's application for permission to drive pending appeal.

The relevant facts that were before the magistrate are of short compass. I quote from the affidavit of the appellant which is accepted by the respondent:

> "When the summons was called on for hearing I pleaded guilty. I was not represented by counsel. The police prosecutor read out a summary of the events. The summary stated that at 10.05 p.m. on 29 January 1995 the police approached the parked sedan in a car park in East Keilor. I was seated in the car. Upon being questioned by police I admitted that just prior to the police arriving I had used the drug cannabis by smoking it through a device called a bong. The learned magistrate asked me if I agreed with the contents of the summary. I said that I did agree. The magistrate then asked me if there was anything I wished to say to the Court. I said that I was a student at the Sunshine College of Technical and Further Education starting an Information Technology course. I said that I received Austudy of $80 per week. I recall His **[2]** Worship commenting that driving under the influence of a drug is a very serious matter. The learned Magistrate then asked me if I had driven the car to the location where I was checked by the police. I said that I had driven the car there. The Magistrate then released me without conviction on an undertaking to be of good behaviour for twelve months I entered into the Undertaking. The Magistrate also suspended my Driver's Licence for a period of one month."

It should be noted that the magistrate did not express any reasons for his decision to suspend the appellant's licence. It is submitted for the appellant that the magistrate did not have power under s28 of the *Road Safety Act* 1986 to suspend the licence. So far as relevant, that section provides:

> "(1) If a court ... is satisfied that a person is guilty of an offence against this Act or of any other offence in connection with the driving of the motor vehicle, the court—
> (a) ...
> (b) in any case but subject to paragraph (a), may suspend for such time as it thinks fit ... all driver licences and permits held by that person ... "

Counsel for the appellant referred to four decisions on the section. Those decisions are *Murdoch v Simmonds* [1971] VicRp 108; [1971] VR 887, *Rochow v Pupavac* [1989] VicRp 8; [1989] VR 73; (1988) 9 MVR 93, *Buckley v DPP* (Ashley J unreported, 4 August 1994) and *Crammer v McDougall* (Batt J (1995) 21 MVR 363, 30 January 1995). Counsel submitted that on the basis of these authorities it must be shown that there was a substantial connection between the driving of the motor vehicle and the commission of the offence. It was further submitted that on the evidence that connection could not be demonstrated. On the evidence, the driving had been completed before the offence. The driving was not inextricably connected (*Rochow*, above) with the **[3]** commission of the principal offence, namely, using a drug of dependence. It was put that while the car was being used as the location for using the drug, the connection with the driving of the car was "essentially irrelevant" and at most "peripheral" (*Buckley v DPP*, above).

The above authorities reveal some possible divergence of view between the judgment of Nathan J in *Rochow* and the view of Adam J in *Murdoch* and Ashley J in *Buckley*, and Batt J in *Crammer*. In particular, in *Rochow*, Nathan J (at p77), commented, *inter alia*, that:

> "No firm rules could or should be expressed other than to say that a connection must be not so remote and fanciful as to offend a reasonable man's concept of relationship of one event with another."

It is not necessary to consider or comment upon the question of whether there is or there is not a divergence of view. For the purpose of this appeal, the informant respondent took up another aspect of the analysis of Nathan J which was expressed in the following terms:

> "The test is purposive. If the purpose or reason for driving the vehicle is to commit an offence, even if other means are available to do so, the vehicle is being 'driven in connection with' that offence."

The respondent seeks to justify the decision applying a purposive test relying upon this passage and arguing that it was reasonably open to the magistrate to find that the appellant drove the car for the purpose of committing the offence. I think that it would be consistent with the reasons of Adam, Ashley and Batt JJ to say that if the purpose or reason for driving the vehicle was to commit an offence, then the vehicle was being "driven in connection **[4]** with" that offence. The respondent does not seek to justify the magistrate's decision on any other basis. Accepting that, on the facts of the case, this is the only proper basis upon which the decision can be supported, it is necessary for the appellant to show that it was not open to the magistrate to find that a purpose of driving the car was to commit the offence of using the drug. It is necessary therefore to examine the evidence more closely.

As noted above, the facts before the learned magistrate were that

(a) the appellant was seated in a parked sedan in a car park in East Keilor;

(b) he admitted that, just prior to the police arriving at the car, he had used the drug cannabis by smoking it through a device called a bong;

(c) in answer to a question from the magistrate, he said that he had driven the car to the location where it was checked by the police.

There was no direct evidence, therefore, as to the purpose for which he drove the vehicle to the car park. The question is, therefore, whether it was reasonably open to the magistrate to infer that a purpose for driving the car to the car park was to use cannabis while at the car park. The purpose of the driving was a fact critical to the decision to suspend the licence. It was

therefore necessary to apply the approach to the finding of the critical facts in sentencing stated in *Chamberlain v R* [1983] VicRp 110; [1983] 2 VR 511; (1982) 14 A Crim R 67: **[5]**

> "The degree of persuasion required will vary with the nature and consequence of the fact or facts in question." (VR 514-515).

(See also *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; 12 ALJR 100).

In my view, applying this approach, it was not open to the magistrate to find that a purpose of the appellant driving to the car park was to use cannabis. There was sufficient evidence to raise a suspicion but that is not enough. In the absence of other evidence, one can only conjecture as to the reason for which the appellant drove to the car park. He may, for example, have had the cannabis in the bong in the car coincidentally and driven to the car park because he was visiting a supermarket or a sports ground adjacent to the car park. He may have been going there simply to meet someone. He may, of course, have gone to the car park to collect the cannabis. All this, however, is conjecture and in the absence of further evidence no finding could be made as to the purpose or purposes for which he drove the vehicle to the car park. In those circumstances the necessary factual basis could not be found to support the magistrate's exercise of the power under s28 *Road Safety* Act 1986. The appeal should therefore be allowed.

Before leaving the matter, however, I feel I should voice some concern about the procedure that was followed below. The informant had not sought to lead any evidence which might have raised s28 of the *Road Safety Act* for consideration. That only arose for consideration as a result of the magistrate asking the appellant if he had driven the car to the location where he was checked by the police. On the material placed before me, the magistrate does not appear **[7]** to have alerted the appellant to the relevance of the question or to have invited comment from him before suspending the licence. Moreover, in asking that question, a question that exposed the appellant to the risk of incriminating answers, the magistrate did not caution the appellant that he need not answer. It is true that there is no rule of law requiring that that be done but it may be said to be good practice (see *Cross on Evidence* Australian Edition, para.25105). It may have been that the magistrate raised the issue so that he could impose the penalties that he did – that is, releasing the appellant without conviction on a good behaviour bond of twelve months, the magistrate being able also to suspend the appellant's driver's licence for one month as punishment. There were, however, other ways for the magistrate to make the point he sought to make without registering a conviction.

Subject to giving the parties an opportunity to make submissions as to the form of order, I propose to make orders in accordance with the following minutes:

1. Appeal allowed.

2. So much of the order of the Magistrates' Court of Victoria at Broadmeadows made on 3 April 1995 as ordered that the driver licence of the defendant (appellant) be suspended for a period of one month be quashed.

3. The respondent pay the appellant's taxed costs of this proceeding, including any reserved costs.

4. A certificate be granted to the respondent under s13(1) of the *Appeal Costs Act* 1964.

APPEARANCES: For the appellant Pliaskin: Mr J Lavery, counsel. Legal Aid Commission of Victoria. For the respondent Ryan: Mr D Just, counsel. Mr P Wood, Solicitor for DPP.
