33/80

SUPREME COURT OF VICTORIA

HOWARD v EDWARDS

Fullagar J

20 March 1980

CRIMINAL LAW – DRIVER OF MOTOR CAR CHARGED WITH THEFT OF MOTOR CAR AND DISHONESTLY ASSISTING IN THE RETENTION OF A STOLEN MOTOR CAR – MOTOR CAR STOLEN BY PASSENGER IN MOTOR CAR – THEFT CHARGE DISMISSED BY MAGISTRATE ON GROUND THAT THERE WAS NO EVIDENCE OF APPROPRIATION BY THE DEFENDANT – SECOND CHARGE DISMISSED UPON GROUND THAT THERE WAS NO EVIDENCE THAT THE DEFENDANT HAD DISHONESTLY ASSISTED IN THE RETENTION OF GOODS AT THE TIME AND PLACE THE VEHICLE WAS STOLEN – WHETHER MAGISTRATE SHOULD HAVE AMENDED THE CHARGE – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, SS72(1), 73(14), 74, 88.

E. was intercepted driving a motor car which had been stolen earlier and was charged with two offences in relation to the motor car namely, that he did steal the car and dishonestly assist in the retention of it. The actual thief of the car was a passenger in the car. The Magistrate upheld a no case submission on the ground that E. was not the actual thief of the car and that whilst he may have been guilty of dishonestly assisting in the retention of the vehicle when he was intercepted (at Morwell) he was not guilty of the charge which alleged the offence took place at Collingwood. Upon appeal—

HELD: Appeal allowed. Order absolute. Remitted to the Magistrates' Court for further consideration.
1. By s72(1) of the *Crimes Act*, a person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. There was evidence that E. "in any manner used the motor car without the consent of the owner or person in lawful possession thereof" within the meaning of s73(14)(a) of the *Crimes Act*. The user of the car was by driving it, that is to say using its controls to procure it to carry the driver and others from place to place. This is the use of a motor car for the very purpose for which it exists and for the very purpose for which an owner acquires it. The owner did not consent to the use and no person was in lawful possession of the car. There was evidence, therefore, in support of a conclusive presumption that E. at the time of driving intended to permanently deprive the owner of the car.

2. By s73(4), any assumption by a person of the rights of an owner amounts to an appropriation. If the evidence shows that a person, knowing or believing that a car has been stolen, drives that car on a joy-ride, this provides *prima facie* evidence that the person made an assumption of the rights of the owner of the car. There was no contention that E. acted otherwise than "dishonestly": the evidence for the prosecution raised a *prima facie* case that the respondent at the time of driving had no belief that he had a legal right to go joy-riding in this stolen car without the consent of its lawful owner, and a *prima facie* case he did not have the belief set out in s73(2)b). Accordingly, there was a case to answer on all the elements required by s72(1) to constitute an offence against s74 of the Act.

3. It was open to the Magistrate at the close of the prosecution case to be satisfied that the facts disclosed were established and to be satisfied that the only inference reasonably open on those facts was that E. did his evasive driving in the knowledge that if it were successful it would enable the group to retain the car and that he intended this result, that is to say the retention, to ensue. That was a sufficient intention to assist to bring the case within s88. It is a mistake to confuse intention with either purpose or motive.

4. The Magistrate had power to amend the second information to allege that the offence took place at Morwell and on 27th April, and he should have made the amendment unless, after giving both sides the opportunity to he heard on the matter, it appeared that there was some impediment to amendment. Accordingly, the Magistrate should not have dismissed the information without calling on both sides to address him on the matter of the necessary amendments.

FULLAGAR J: This is the return of two orders nisi to review two orders of the Magistrates' Court at Morwell made by a Stipendiary Magistrate on 8 August 1978. Each order of the Magistrate dismissed an information against the respondent, Leon Warren Edwards, laid under Division 2 of Part 1 of the *Crimes Act* 1958. Each dismissal was at the end of the prosecution case on the ground, in substance, that there was no case to answer.

The prosecution case included the following facts which I state by way of introduction: A motor car, registered No JWJ 918 was stolen at Collingwood in Melbourne between 1 o'clock and 8 o'clock in the morning of 27th April 1978, and at about 11.40 a.m. on that day the car was seen, by a police patrol, being driven very erratically and dangerously on the Princes Highway at Morwell in Gippsland. The defendant, who was 22 years old, was driving the car, and amongst the passengers were the women who had stolen the car in Melbourne. When the police car drew alongside and its siren and flashing light were activated, the defendant sped away and attempted to escape after being told by one of the said two passengers to "get going"; but after a short chase he stopped and was interviewed by the police. In the car were seven or eight other people, being five adult males and one old woman and one or two children, and the defendant was subjected to a breath test, showed that his blood alcohol content was .270. The thief who had taken the car from outside its owner's premises in Collingwood, was seated beside the respondent driver. Respondent was charged:

> 1. That the respondent on 27th April 1978 at Morwell did steal one Valiant Sedan registered No. JWJ 918.
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> 2. That the respondent at Collingwood on 26th April 1978 (sic) did dishonestly assist in the retention of stolen goods, namely one Valiant Sedan No. JWJ 918, belonging to Nuri Reshitovski, knowing or believing same to be stolen.

This charge is the subject of the second order nisi, No 7583. The first information was under s74 of the *Crimes Act* and the second was under s88 of the *Crimes Act*. It is clear that the second information was made out in error as to both time and place, and that the only offences under s88 of which the respondent could possibly be guilty must have boon committed by him, if at all, on 27th April 1978, not 26th, and at Morwell, not at Collingwood.

The two informations were heard together, and at the conclusion of the prosecution case each was dismissed, the first information on the ground that there was no evidence of appropriation by the respondent. The magistrate said that the defendant fell within the category of persons referred to by Lush J in *Stein v Henshall* [1976] VicRp 62; (1976) VR 612 at p615, where His Honour said:

> "I reserve my opinion on the question whether if the defendant had been using the car in the company of and with the permission of and under the direction of the original thief, the defendant could be said to have assumed the rights of an owner and so appropriated the car."

The magistrate said the actual thief in the present case was present in the car with a large number of other persons and that the car was being used for Clark's purposes as much as any else's. Clark was the man whom the police thought had taken the car originally from outside the owner's premises at Collingwood. The Magistrate said that in the circumstances he was of opinion that there was no appropriation on the defendant's part and that the charge of theft of a motor car would be dismissed.

As to the second information, the Magistrate said that he would not rule finally on the submissions for the respondent which related to it. He said that there was no evidence before him that the respondent was at Collingwood on 26th April 1978 or that he handled any stolen goods on that day, and that accordingly the charge must be dismissed. He stated that had the second information charged that the defendant had dishonestly assisted in the retention of stolen goods at Morwell on the 27th day of April 1978 there may have been a case to answer.

By s72(1) of the *Crimes Act*, a person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. There was evidence that the defendant "in any manner used the motor car without the consent of the owner or person in lawful possession thereof" within the meaning of s73(14)(a) of the *Crimes Act*. The user of the car was by driving it, that is to say using its controls to procure it to carry the driver and others from place to place. This is the use of a motor car for the very purpose for which it exists and for the very purpose for which an owner acquires it. The owner did not consent to the use and no person was in lawful possession of the car. There was evidence, therefore, in support of a conclusive presumption that the respondent at the time of driving intended to permanently deprive the owner of the car.

By s73(4) any assumption by a person of the rights of an owner amounts to an appropriation. If the evidence shows that a person, knowing or believing that a car has been stolen, drives that car on a joy-ride, I am of opinion that this provides *prima facie* evidence that the person made an assumption of the rights of the owner of the car. It has been recently held that in order to constitute an "assumption" within s73(4), it is not necessary that there be an assumption of all the rights of an owner. In *Stein v Henshall* [1976] VicRp 62; [1976] VR 612 at p615, Lush J said:

> "The assumption of the rights of an owner referred to in sub-section (4) involves the taking on oneself of the right to do something which the owner has the right to do by virtue of his ownership".

And later on the same page His Honour said:

> "The question is, and is only, whether the defendant acted in relation to the car in a manner in which the owner would have the right to act."

is *prima facie* assuming the rights of' the owner within the meaning of s73(4), because it is using the car for the prime purpose for which a car is owned, and doing it with the intention (inclusively presumed) of depriving the owner permanently of the car.

There was no contention before me that the respondent acted otherwise than "dishonestly", the evidence for the prosecution raised a *prima facie* case that the respondent at the time of driving had no belief that he had a legal right to go joy-riding in this stolen car without the consent of its lawful owner, and a *prima facie* case for the view that he did not have the belief set out in s73(2) b). Accordingly, in my opinion, there was a case to answer on all the elements required by s72(1) to constitute an offence against s74 of the Act.

It was argued that the evidence showed that the defendant was driving the car "for the purposes of the original thief", and that the case fell "clearly within the statement of Lush J" in *Stein v Henshall* [1976] VicRp 62; (1976) VR 612. It was submitted that the alleged fact that the car was "still being used for the purposes of Clark must lead to the conclusion that there was no appropriation by the defendant." To say in the present case that the car was "still being used for the purposes of Clark", is not to define relevant activity with any clarity at all. In my opinion, the evidence in the present case showed *prima facie* that some persons in the car took turns to drive the stolen car on a joy-ride, and at the time of apprehension of the respondent, that this was the purpose of all.

To go to collect some alcohol was the purpose of all the adults, so was the riding about. But even if the evidence did show, or fail to exclude, that Clark was the thief and was in the car and had expressly said, "I permit you, the respondent, to drive the car, but subject always to all my directions, including and direction to cease driving:, and that Clark had said from time to time where to turn, I am of opinion that those matters would not necessarily make the slightest difference to the legal result in the present case. The evidence would still show *prima facie* that the respondent knew the car was stolen and that he freely assumed the right to drive it, which was *par excellence* the right of the owner. There is no suggestion in the evidence so far adduced of duress or of the respondent being the employed chauffeur of the thief or of anything which might be argued to detract from the result that I have last above stated.

Once it is accepted, as it was in *Stein v Henshall*, that the question is whether the defendant acted in relation to the car in a manner in which the owner was, by virtue of his ownership, entitled to act, it seems to me to make irrelevant to the present case the facts that the thief was present and was permitting the respondent to drive. But in a case where sub-s(14) undoubtedly operates to establish, from the fact of user by driving without the owner's consent, that the respondent intended at the time of his driving to deprive the owner permanently of the car, it seems to me impossible to say that at the same time the respondent did not intend to assume the rights of the owner. In my opinion it did not appear from the evidence in the present case that the defendant was driving "under the direction of" Clark. Nor did it appear that the defendant was driving under the direction of Clark and the other thief. I am of opinion that there was a case to answer on the first information and that the order nisi in respect of that information must be made absolute.

Turning to the second information, it is conceded by Mr Weinberg, correctly in my view, that the Magistrate had power to amend the second information to allege that the offence took

place at Morwell and on 27th April, and conceded also that he should have made the amendment unless, after giving both sides the opportunity to he heard on the matter, it appeared that there was some impediment to amendment. Accordingly, it is my opinion that the Magistrate should not have dismissed the information without calling on both sides to address him on the matter of the necessary amendments.

It may appear that some time limit upon prosecution would be contravened by the making of such amendments, and I express no opinion on any such matter. Some other and different impediment may appear from the researches and arguments of counsel when the matter comes to be heard. But subject to any impediment being shown, and subject, of course, to any other submissions made, the Magistrate's duty was, in my opinion, to make the obviously necessary amendment. As to the powers of amendment and their exercise, with or without an application to the Court for their exercise, I was referred by Mr Uren for the applicant/informant to s157 of the *Magistrates (Summary Proceedings) Act* 1975 and to *Garfield v Maddocks* (1974) 1 QB 7 at p12; *Warner v Sunnybrook Icecream* [1968] VicRp 11; (1968) VR 102 at pp104-106; (1967) 15 LGRA 135; *Thomson v Lee* [1935] VicLawRp 65; (1935) VLR 360 at p364; [1935] ALR 458; *O'Donnell v Chambers* [1905] VicLawRp 9; (1905) VLR 43 at pp45 and 49; 10 ALR 224; 26 ALT 73; and *Stait v Colenso* [1903] VicLawRp 43; (1903) 28 VLR 286 at p288.

As to the second information, Mr Weinberg contended that even if the amendment had been made, there would still have been no case to answer. The relevant words of s88(1) of the Act are as follows:

> "A person handles stolen goods if (otherwise than in the course of stealing) knowing or believing them to be stolen goods he dishonestly assists in their retention by or for to benefit of another person."

The words in parenthesis make it clear that the second information was alternative to the first, the respondent could be convicted only of one of the two charges. There was, in my opinion, evidence that the respondent knowing or believing the car to be stolen goods, assisted in the retention of the car by the thief, or thieves, or by all the occupants of the car, or for their benefit, or for the benefit of some of them, because there was evidence that the respondent drove the car with the intention of preventing the police from recovering the car. According to the evidence the car was "hot wired to start it" and Stephen and Raymond had told the respondent that they owned the car and the respondent knew they had stolen it, and when the police tried to make the stolen car pull over Stephen told the respondent, who happened to be driving it, to get going and not to stop. The respondent chose to obey. No duress is so far suggested. The only things that appear that Stephen had to fear were that he and/or Raymond would be apprehended for the stealing and that the car would be taken away.

Mr Weinberg contended that "assists" in s88 requires an intention to assist in the retention, and that it could not cover "unintentional assistance", because of the word "dishonestly". In my opinion the word "dishonestly" imports no more than that the Crown must prove the defendant received, or assisted, etc., without any belief that he had a legal right in all the circumstances to receive or assist, etc. That it was the police from whom the respondent fled was at least evidence that this requirement had been satisfied. But I agree that the assistance must be intentional.

I think that Mr Weinberg's real contention was that the evidence was consistent with the only intention in the respondent being to save himself from being apprehended for drunken driving, or alternatively, to save Stephen and/or Raymond from arrest from stealing. But the answer to this, in my opinion, is that there was evidence that the respondent knew that he was deliberately driving a stolen car at speed in order to prevent it being forced to a standstill by police who wished to investigate whether any crimes had been committed, and that he knew that the car was being retained by all of the adults away from the true owner.

It was, in my opinion, open to the Magistrate at the close of the prosecution case to be satisfied that these facts were established and to be satisfied that the only inference reasonably open on those facts was that the respondent did his evasive driving in the knowledge that if it were successful it would enable the group to retain the car and that he intended this result, that is to say the retention, to ensue. That is, in my opinion, a sufficient intention to assist to bring the case within s88. It is a mistake, I think, to confuse intention with either purpose or motive. That the respondent also wished to escape apprehension on other charges would be, in my opinion, beside the point.

As to the second information, the Magistrate should ask whether the amendments are sought and, if they are not, he should dismiss the information. If they are sought, he should, after hearing argument, determine whether there is any impediment to making them and decide whether to allow them. If they are properly refused, in accordance with what I have said earlier, then he should dismiss the information. If the amendments are allowed, then there is a case to answer. Order absolute in both cases; remitted to the Magistrates' Court to be dealt with according to law.

APPEARANCES: For the applicant Howard: Mr AG Uren, counsel. The State Crown solicitor. For the respondent Edwards: Mr M Weinberg, counsel. Ms K Norman, solicitor.
