42/88

SUPREME COURT OF VICTORIA

GILLARD v WENBORN

Marks J

27th July 1988

MOTOR VEHICLES – DRINK/DRIVING – IN CHARGE OF MOTOR VEHICLE – PERSON FOUND ASLEEP IN PARKED MOTOR VEHICLE – ENGINE RUNNING/LIGHTS ON – WHETHER "IN CHARGE" – "IS ATTEMPTING" – "INTENDS" – EFFECT OF: *MOTOR CAR ACT* 1958, S82.

Section 82(1)(c) of the *Motor Car Act* 1958 ('Act') (see now *Road Safety Act* 1986, s48(1)(b)) provides:

> "For the purposes of this sub-section a person shall not be deemed to be in charge of a motor car unless he is attempting to start or drive the motor car or unless there are reasonable grounds for the belief that he intends to start or drive the motor car."

1. Section 82(1)(c) requires the prosecution to prove a nexus between occupancy of a motor vehicle and some threat or apprehended threat to the public, that is, a link between the intoxicated person in charge of the motor vehicle and a risk that that person will drive it when in that unfit state. Further, the use of the present tense in the words "is attempting" and "intends" suggests that the Legislature intended to fix the time of the offence as that when the person is found.

2. Where a police officer came upon a parked motor car (with lights on and the engine running) and a person asleep in the front seat, it was not open to a Magistrate to conclude that that person was in charge of the motor car within s82(1)(c) of the Act.

MARKS J: **[1]** This is the return of an Order Nisi of Master Barker, 11 December 1987, to review the decision on 12 November 1987 of the Magistrates' Court at Heidelberg whereby the Applicant was convicted of being at Templestowe on 25 September 1986 in charge of a motor car whilst under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of such motor car and admitted to a community based order. The information **[2]** was expressed to be pursuant to s82(1)(b) of Act No. 6325 (the *Motor Car Act* 1958). *[His Honour set out the provisions of the Section and continued]* ... The only account of what took place in the Court below is in the Affidavit in support of the Order Nisi. It is clearly a truncated narrative of the proceedings and provides a somewhat confused picture.

Although Counsel for the Respondent criticised the Affidavit and submitted I should not rely on it, neither the Respondent nor the Magistrate has availed himself of the right to fill out or contradict the material contained in the Affidavit before **[3]** this Court. It seems to me that I am bound to act on what is before me if sufficient sense can be made out of its very unsatisfactory form. After careful re-reading sufficient appears to make out at least a reasonably coherent picture of what the Applicant claims to have been the evidence and what the Magistrate said. Although the proceeding was clearly more extensive any artificiality of my adjudication results from the failure of the Respondent and the Magistrate to provide any missing detail which might mitigate that artificiality. In particular, the failure of the Magistrate to provide reasons, as I think the circumstances required, has not assisted my task. Counsel for the Respondent submitted that I should not accept that the Magistrate said as little as here alleged or that he did say merely that he found that the Applicant was asleep and the charge proved. But the Magistrate and Respondent have been served with the Affidavit and do not seek to suggest that any more or anything else was said. Indeed when on the day the hearing of this appeal began there was no appearance for the Respondent until reminded by the legal advisers of the Applicant that it was listed for hearing. In due course a solicitor, Mr Martin, appeared for the Respondent to seek a short adjournment pending the briefing of Counsel and told the Court that he had reread the Affidavit of the Applicant over the telephone to the Respondent and that it was not proposed to seek leave to file an answering Affidavit.

In the Court below the prosecution evidence was provided by the Respondent who swore that shortly before 6.00 a.m. on 25 September 1986 he was in a police car with **[4]** Inspector Ellis when he observed the motor car of the Applicant parked off the bitumen on Williamsons Road with the lights on and the engine running. He went to the vehicle and saw the Applicant in the front seat apparently asleep He knocked on the window for some minutes before the Applicant woke up. The Applicant was confused and appeared ill. The Respondent said that the Applicant turned the engine off and on again and could not properly identify the controls of the car. It is not clear, however, from the Affidavit whether this conduct was in response to a request of the Respondent to test the ability of the Applicant to control the motor car. It is clear that he gave evidence to that end.

The Respondent took the Applicant to the Doncaster Police Station where he conducted a long interview but the Applicant swore he could not remember what was given in evidence as to its contents. If it had any significance or aided the prosecution case I have not been told about it by the Respondent. At the end of the prosecution case a no case submission on behalf of the Applicant was rejected.

The Applicant told the Court that on the Wednesday evening, 24 September, he had been to a birthday party arranged by some business associates at Casey's Night Club, Glenferrie Road, Hawthorn. He left the party at about 1.00 a.m. on 25 September with a Miss Greene. He had asked her to drive the car because he had drunk too much. He said he could not and should not drive a car. He said he sat on a seat in Glenferrie Road for about an hour and then at about 2.00 a.m. got into the back seat of the car **[5]** and fell asleep. Miss Greene drove the car. At about 3.00 a.m. he woke up and discovered that he was alone on Williamsons Road about 3 kilometres from his home. He tried to telephone his wife on the car telephone but could not reach her or others to come and get him. In the course of telephoning he turned on the engine to heat the car as it was about 9 degrees Celsius. He fell asleep about 5 a.m. with the engine running for that purpose. He was woken up about 6.00 a.m. by the Respondent. His evidence was supported by Miss Greene to the extent that she drove the car and left it parked off the bitumen with the Applicant asleep in it.

In paragraph 21 of his Affidavit the Applicant swore:-
"The Magistrate found the charge proven and found as a fact that I was asleep in the car."

Nothing more appears. As I said at the outset it is the only evidence of what the Magistrate said and I must accept that he did not elaborate further.

The grounds of the Order Nisi are also in unusual and unsatisfactory form. They are unhappily worded and might well have been the subject of some closer scrutiny by the Master. I have concluded, however, that they nevertheless raise the main issue here sought to be argued and as a consequence granted an amendment to clarify what seems to be the central question, namely whether the evidence was sufficient to found the conviction. I allowed an amendment to ground 3 by substituting therefor the words:-

> "There was no evidence on which the Magistrate could reasonably have found that the Applicant was in charge of the motor car within the meaning of s82(1)(b) and (c) of the *Motor Car Act*."

[6] The substance of what is now s82 was first introduced into the motor traffic code in 1949 by s18(c) of Act No. 5450 which amended s23(2) of the *Motor Car Act* 1928. It contained the equivalent of s82(1)(c) but did not provide, as now does s82 that the influence of intoxication was required to be sufficient to render the person incapable of having proper control of the motor car.

The words "in charge" without more are vulnerable to a wide interpretation. They could, for example, encompass a sole occupant of a motor car asleep on the back seat being "in charge" in a like sense of a watchman asleep on duty. Section 82(1)(c) however provides the "something more" and requires the prosecution to link occupancy with some threat or apprehended threat to the public, in other words, to link the intoxicated person in charge of the motor car with a risk that he will drive it when in that unfit state. It is clear enough that this is the object of s82(1)(c). On 28 September 1949 on the second reading of the Bill which contained the amendment, the Chief Secretary (Lieutenant Colonel Leggatt) said:-

> "The last sub-clause limits the interpretation of being in charge of a motor car to attempting or apparently intending to start or drive the car. That is adopting a suggestion made previously that a person could be in his club and yet still be held to be in charge of his motor car. I think that is a clearer definition." (*Hansard*: Parliamentary Debates, Vol. 230, p2395).

The evidence before the Magistrate shows, as he appears to have found, that when the Respondent came upon the motor car the Applicant was asleep. The engine was running but the Applicant said that he had it running so that the heater would keep him warm.

[7] As the Applicant was asleep the Respondent clearly did not prove that he was doing any of the things with s82(1)(c) required him to establish. The Magistrate did not purport to find reasonable grounds for believing the Applicant intended to drive the car. If he did, he did not say so and I do not think it was open. As the Applicant was asleep such reasonable grounds could not really be said to have been founded in the evidence. Indeed Mr Dennis of Counsel for the Respondent conceded that if proof of the offence is confined to the circumstances obtaining at the time the Respondent came upon the scene the conviction cannot stand. He submitted, however, that the decision of the Magistrate can be supported by reference to the circumstances which obtained when the Applicant started the motor car, as he admitted, to operate the heater. He submitted that before starting it the Applicant must be taken to have formed the intention to do so. Also he made an attempt. Accordingly, Mr Dennis argued that one or more of the states of affairs prescribed in s82(1)(c) existed, albeit at an earlier time.

In my opinion this submission is not tenable to maintain the conviction. Although the Respondent did not, or so it appears, provide particulars it must be concluded that his proof rested on evidence directed to his observations when he came upon the scene and any admissions concerning the Applicant's condition and competence at that time. The prosecution appears to have been conducted on the basis that the offence alleged occurred at that time. The evidence of ability to control the motor car related to **[8]** that time. There was no evidence of that ability at some earlier time although an inference might well have been open. I am inclined to think, however, that whatever constellation of circumstances obtained at an earlier time, they could only have constituted commission of an offence other than the one alleged and relied on by the prosecution. There is a distinction between evidence which supports the conviction for reasons other than that given by the Magistrate and evidence which would support conviction for another offence although of the same character. The law sets its face against scatter-gun prosecutions. A prosecutor cannot pluck a conviction, as he now seeks to do, out of defence evidence for an offence constituted by different facts and circumstances from those on which he launched the prosecution.

In *Ex parte Lovell re Buckley & Anor* (1938) 38 NSWSR 153 at 174; 55 WN (NSW) 63 Jordan CJ said:-

> "...if a person were charged upon particulars giving one set of facts, a conviction based upon proof of an entirely different set of facts could not be supported unless the accused has had a fair opportunity of defending himself with respect to the new particulars." [See also *Ex parte Burnett; re Wicks & Anor* (1968) 2 NSWR 119 at 120).

It is true that here there were no particulars. But the prosecution is not to be advantaged by their absence so as to be free to roam among such facts as emerge at the hearing and to fix on a constellation of them, some out of the mouth of the defence, which were not on analysis the foundation of the prosecution and of which no notice of particulars was given. Finally, there is some significance in the tense of the language of s81(1)(c), for example, "he is **[9]** attempting" and "he intends to start or drive", which suggests strongly that the legislature intended to fix the time of the offence at that when the person is found. This provides added reason for thinking that the time relied on by the prosecution was that when the Respondent came upon the Applicant asleep in the motor car. Ground 3 accordingly is made out. The Order Nisi is made absolute. The conviction and community based order are set aside and the information dismissed.
