58/84

SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v ABRAHAMS

Street CJ, O'Brien CJ of Cr D and Begg CJ at CL

7 June 1984

[1984] 1 NSWLR 491; 13 A Crim R 113; (1984) 2 MVR 89; 1 ACLR 209; noted 9 Crim LJ 51

MOTOR TRAFFIC – DRIVING WITH EXCESS ALCOHOL IN BLOOD – DRIVING IN HOTEL CAR PARK -- NO EVIDENCE OF DRIVING ON A PUBLIC STREET – DEFINITION OF "PUBLIC STREET" – WHETHER OFFENCE MUST BE COMMITTED ON SUCH A PLACE – WHETHER CAR PARK "A PUBLIC STREET": *MOTOR CAR ACT* 1958 (Vic.), SS3, 81, 82.

Section 4E(1) of the *Motor Traffic Act* 1909 (NSW) provides:

"Any person who whilst there is present in his blood the higher prescribed concentration of alcohol—
(a) drives a motor vehicle, or
(b) occupies the driving seat of a motor vehicle and attempts to put the motor vehicle in motion,
shall be guilty of an offence under this Act."

A was convicted of driving a motor car whilst having an excessive blood/alcohol concentration. The evidence disclosed that A. had driven his motor car in a car park which formed part of an Hotel. A. appealed to the District Court, submitting that an offence against s4E(1) of the *Motor Traffic Act* 1909 only applies to offences committed on "a public street", and that the Hotel car park is not "a public street" within the meaning of the Act. Upon a case stated by the Judge of the District Court as to whether the car park was "a public street" and whether an offence under s4E may be committed other than on "a public street"—

HELD: Both questions answered affirmatively.
(1) The definition of "public street" extends at least to car parks of privately-owned premises where the proprietor thereof has extended an invitation to members of the public without discrimination to visit the premises to engage in business with the proprietor and use the facilities of the car park.
***Schubert v Lee* [1946] HCA 28; [1946] 71 CLR 589, discussed.**

(2) There is no justification for importing a restriction into s4E(1) that the driving should be in a public street when those words do not appear in the sub-section and the legislation expressly uses them for offences which are intended to be confined to a public street.
***Carr v Walukiciwick* [1969] VicRp 97; [1969] VR 758; and**
***Green v Carter* [1974] VicRp 55; [1974] VR 461, considered and applied.**

O'BRIEN CJ of Cr D: (with whom Street CJ and Begg J agreed) *[Having set out the facts and the various statutory provisions His Honour continued]:* ... **[15]** It is apparent then that throughout the history of this legislation offences concerning driving when under the influence of intoxicating liquor or when there is the prescribed concentration of blood alcohol have not been defined so as to include as a necessary element of the offence that the driving be upon a public street whereas other driving offences have been specifically defined so as to include that element in the offence. The only basis upon which it is otherwise submitted that this element was an element of the offence under s4E(1) of which the appellant was convicted is by calling in aid the definition of "motor vehicle" and since for the reasons I have given this submission fails, I would answer Question (b) in the affirmative.

This may seem to be a novel result or an impracticable result or a result which overall could scarcely be intended by the legislature. Of its allegedly possible implications dramatic examples were instanced by Fox J in *Blewitt v Mackay* [1967] 10 FLR 449. That it is not altogether a novelty is sufficiently indicated by the fact that such a question has been stated for the determination of this Court. A similar result has been achieved under the Victorian motor traffic legislation. **[16]** A rather similar problem was encountered in an order for review made returnable before the Full Court of the Supreme Court (Winneke CJ, Gowans, and Gillard JJ), in *Carr v Walukiciwick* [1969]

VicRp 97; [1969] VR 758. The *Motor Car Act* 1958 created offences under s80B of driving under the influence of intoxicating liquor and under s81A of driving with an excess percentage of alcohol in the blood. The respondent had been acquitted by the magistrate of each of these offences in relation to an incident in the early hours of the morning when he was found by police in a car in a grassed area between the embankment of a railway line and a fence bordering and adjoining road. There was evidence from which it could be inferred that the car had left the road and gone through the fence into the area some distance from where the respondent was found and after surmounting various obstacles had travelled some distance up the side of the embankment. When found by the police the respondent was engaged in reversing the car slowly and erratically along the grassed area, which was roughened by ditches and rocks, and was unsuccessfully endeavouring to overcome a number of boulders by moving the car forward some feet and charging backward into the boulders until the car stalled and then repeating the manoeuvre. There was evidence that the percentage of alcohol in his blood was .220 but there was no evidence that he had been seen driving on the adjoining road or that the area where he was driving was part of a highway. The magistrate dismissed the informations that in the absence of proof that the driving had taken place on a highway within the meaning of s3(1) of the Act there was no case of an offence under either of the sections. The point on review centred on the fact that the word "highway" did not appear in either section.

[17] "Motor car" was defined by the Act to mean "any vehicle propelled by ... power and used or intended for use on any highway". It was held that it does not follow from this description of the physical things with which the Act was concerned that it deals with them only when they are being used on a highway or that its provisions necessarily look to that use. It may be conceded, the Court said, that provisions as to the registration of motor cars and its incident matters should be regarded as hanging on the provisions of the section prohibiting their use on a highway without being registered. So also the provisions as to the licensing of drivers centre around the provisions against driving a motor car on a highway without a relevant licence. But when the Act turned to such things as hours of driving there were to be found in juxtaposition with provisions which refer to driving on a highway others which make no such reference and there was no obvious reason for treating the latter as confined in the same way as the former. Hours of driving were labour and safety laws which prescribe the duration of hours of driving and prohibit driving outside that duration, and neither the period nor the prohibited act of driving was expressly or necessarily associated with the highway. The prescription of the driving offences under consideration in the case were found, the Court noted, set out cheek by jowl with the prescription of driving offences expressly confined to the highway. A survey of the Act accordingly was held to show that it was necessary to reject the characterisation imputed to the Act of being concerned only with the regulation of motor vehicles solely in relation to highways. This argument, therefore, did not assist to produce the implied limitation relied upon for **[18]** ss80B and 81A.

The Court was referred to the decision of Fox J in *Blewitt v Mackay* [1967] 10 FLR 449. It was contended that to attribute an operation to the sections which was unlimited in point of location would produce such absurdities that it was not to be contemplated as expressing the intention of the legislation. As the Court said (at p761/2):

> "When were invited to contemplate the possibility of the sections being applied to golfers with a blood alcohol content in excess of .05 percent operating power-driven golf buggies on the fairways of a private golf course after having successfully negotiated a dissecting road; and to inebriated householders mounted on driver-transporting motor mowers in the privacy of their own gardens after having successfully mown the front nature strip. To these drivers, and to the intemperate householder driving his own car in his own drive, and to the intemperate farmer in his own paddock, the legislation, it was said, could not have been intended to apply."

The Court considered, however, that having regard to "the more basic sections" of the Ordnance there relied upon and the difference between the provisions of the Ordnance and the Act the Court was considering, no support could be found in the provisions of the Act or its scope and operation to justify the importation of the implication contended for. But more could be said than that since the Court considered there were indications in the language used in the Act and in part of its history which gave positive support to the view that the sections were not to be limited in their operation as suggested.

Having dealt with the history of s80B (driving under the influence) the Court went on to

deal with s81A (driving **[19]** with excess percentage of alcohol). The Court held (at p763):

> "Section 81A does not have such a significant history. It went straight into the *Motor Car Act* 1958 by the *Motor Car (Driving Offences) Act* 1965 [No.7327). But its setting is of some consequence. It was inserted between s81 (careless driving) which expressly related to driving on a highway and s82 (drunk in charge) which expressly related to a motor car on a highway or in any parking place, drive-in theatre or other like place of public resort. Yet s81A was not qualified by reference to any location. It would be curious if it were intended that there should be implied in this section a limitation of the kind set out in its next preceding section in preference to one of the kind set out in its next succeeding section. But indeed the language, history and setting of the sections all point strongly to the conclusion which a survey of the Act and its operation indicates that there is no basis for importing into these sections a limitation that the driving referred to in them must be performed on a highway."

The reference to s82 of the Act in this passage was no more than in passing but the section was more specifically for consideration in *Green v Carter* [1974] VicRp 55; [1974] VR 461. An order for review came before Dunn J of the dismissal by a magistrate of information under s82 that the defendant was 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 a car. Section 82(1) was in these terms:

> "(a) Every person in charge of a motor car on a highway or in any parking place, drive-in theatre or other like place of public resort whether dedicated to the public or not who is apparently under the influence of intoxicating liquor or of any drug may be apprehended without warrant by any member of the Police Force and charged with an offence under this Act and such motor car may be driven or conveyed to and detained at any police station pending the **[20]** admission of such person to bail or (where he is not the owner of the motor car) a demand by the owner thereof.
>
> (b) Every person proved to have been under the influence of intoxicating liquor or of any drug while in charge of a motor car to such an extent as to be incapable of having proper control of the motor car shall be guilty of an offence..."

The magistrate dismissed the information because the place where the defendant was arrested was not a "parking place". The defendant had left his car parked at the back of a service station which was private property and was not on that part of the service station where people went to purchase petrol from the service station petrol bowsers. He was found by police in the car revving the engine and breath analysis showed an excess blood alcohol level. His Honour held that para (a) provides the authority for the arrest of a person apparently under the influence of liquor and charging him with some offence under the *Motor Car Act*. He followed a decision of Macfarlan J in *Doyle v Harvey* [1923] VicLawRp 39; [1923] VLR 271; 29 ALR 180; 44 ALT 179, of the construction of a similar provision of an earlier Act, and held that such a person may he charged with any offence under the Act. Section 81(1)(b) alone created an offence of "being under the influence of liquor whilst driving a motor car" and para (b) was in perfectly general terms. His Honour held there was no justification for importing into it from para (a) the limiting words of "highway, parking place, drive-in theatre or other like place of public resort". After citing Lord Bramwell in *Cowper Essex v Local Govt. Board for Acton* [1889] 14 AC 153 at p169 and Lord Evershed MR in *Tinkham v Perry* (1951) 1 KB 547; [1951] **[21]** 1 TLR 91 at p92; [1951] 1 All ER 249 to the effect that words should not be added by implication to a statute unless it is necessary to do so to give sense and meaning to a provision in its context he referred to *Carr v Walukiciwick* (above cited) and to the refusal of the Full Court to import into s81A any limitation confining the driving with an excessive blood alcohol concentration to a highway or other public place. The reference in the judgment in that case to s82 did not purport to suggest that s82 was confined to a highway, parking place, drive-in theatre or other like place of public resort. His Honour held (at p463):

> "A perusal of the sections in Division 2 of Part VI of the *Motor Car Act* leads to the conclusion that, in respect of offences which were intended to be confined to a highway or public place, the legislature expressly so provided in the section creating the offence: cf. ss80A, 81, 83 with ss80B, 81A, 82(1)(b) and 82A. For these reasons, in my opinion, the learned stipendiary magistrate was in error in upholding the submission that the offence had to be committed on a highway, any parking place, drive-in theatre or other like place of public resort."

I have come to the same conclusion that there is no justification in the Act for importing

a restriction into s4E(1) that the driving should be in a public street when those words do not appear in the sub-section and the legislation expressly uses them for offences which are intended to be confined to a public street. I turn then to Question (a) whether on the evidence it is open to the Court to hold that the Newport Arms Hotel Carpark is a public street within the meaning of the *Motor Traffic Act*, 1909 as amended. "Public Street" is defined **[22]** by the Act in these terms:

> "'Public Street' means any street, road, lane, thoroughfare, footpath, or place open to or used by the public, and includes any place at the time open to or used by the public on the payment of money or otherwise."

Counsel for the appellant based his submissions primarily on a passage in the judgment of the High Court in *Schubert v Lee* [1946] HCA 28; [1946] 71 CLR 589 which I think can be misunderstood. That decision dealt with applications for special leave to appeal from a judgment of the Supreme Court of Western Australia upholding convictions by a magistrate of two applicants Schubert and Morris of offences against reg 327 made under the *Traffic Act* 1919-1941 (WA). It is sufficient to refer to the application of Schubert who was charged that he stood with others in a lane off Fifth Avenue in such a manner as to obstruct the free passage of traffic along the same contrary to reg 327. There was evidence that he was accepting bets with members of the public in a T-shaped passage which ran alongside and between separately occupied allotments of land. There was evidence that it was in fact regularly used by the public but it was not established positively that the lane had ever been dedicated to the public as a highway. Schubert appealed to the Supreme Court on the grounds, as presently relevant, that the magistrate was wrong in deciding that the lane was a road within the meaning of the definition in s4 of the *Traffic Act* which, by the *Interpretation Act*, 1918-1938 (WA), was made applicable to regulations made under the Act. Section 4 of the Act defined "road" in these terms:

> **[23]** "'Road' means and includes any street, road, lane, thoroughfare footpath or place open to or used by the public."

It is to be noted that this definition of "road" is almost identical in terms to the substance of the definition of "public street" in the New South Wales Act. It was not disputed in the High Court that the passage in question, which was wide enough for wheeled vehicles, was a "lane". The sole question raised by the applicant in this regard is stated in the judgment of the Court in this fashion:

> "It is contended for the applicant that the definition applies only to streets, roads, lanes &c, which are open to or used by the public as of common right and not to such places although in fact open to or used by the public if they are not places which the public is entitled to have kept open or which it is entitled to use. It is argued that it would produce an unreasonable result to construe the words of the definition so as to make the *Traffic Act*, with its many provisions relating to the licensing of vehicles, the regulation of motor and other vehicles, width of tyres &c., to apply to roadways and passages upon land which the public used only by the licence of the owner."

Since it was not disputed that, as the judgment states, the passage was a "lane" and that "there was evidence that the public regularly used the lane" the only question relating to this aspect of the application was whether the definition required that the public be entitled to have the lane kept open or be entitled to its use. As to this the argument for the respondent is recorded thus:

> "The definition of 'road' in the *Traffic Act* is to be read according to the ordinary meaning of the words used. An English road means any street, &c., to which the public have access. It is not necessary that it **[24]** should be dedicated. Private roads have been held to be dedicated." (*Harrison v Hill* [1932] SC 13 and *Bugge v Taylor* [1940] 104 JP 467).

This latter case of *Bugge v Taylor* is reported in the authorised reports at [1941] 1 KB 193; [1940] 104 JP 467. The judgment of the High Court on this point is short and I will cite it, but I will for the moment omit a passage where shown. Adopting the two decisions cited by the respondent it proceeded as follows:

> "The definition contained in the statute might very readily have been limited to 'public' street, roads, lanes, &c., but such a limitation has not been included in the definition... *Prima facie* the words of the section mean streets &c., which actually are open to or used by the public, so that there is some

> need for protection of the public in the use of such street, &c. This is a view which has been taken of not dissimilar provisions contained in the *Road Traffic Act* 1930 of the United Kingdom, where a definition of the term 'road' includes the following words – 'and any other road to which the public has access'. It has been held by the Court of Session that a road falls within the definition if the public in fact has access to it, even though it is privately owned, and the public has no right of access to the road. It was so held in the case of *Harrison v Hill* [1932] SC 13; [1931] SLT 598, and that decision has been followed in England in relation to the same Act in the case of *Bugge v Taylor* [1941] 1 KB 198; [1940] 104 JP 467. In our opinion the words 'open to or used by the public' should, as the Full Court has held, be construed in the same way, so that a lane falls within the definition if in fact it is 'open to or used by the public', whether or not there is a public highway over it. There was evidence that the lane in question in this case was in fact regularly used by the public."

This was sufficient for the determination of the appeal but the passage which I have omitted was in these terms:

> "The words 'open to or used by the public ' are apt to describe a factual condition **[25]** consisting in any real use of the place by the public as the public – as distinct from use by licence of a particular person or only casual or occasional use. It may be necessary to distinguish places open to members of the public as such from places left open by the owner but obviously intended only for the use of a particular description of person, for example, visitors to his shop or other premises."

It is this passage which has caused considerable difficulty since in the application it was conceded that there was evidence that the public regularly used the lane, it was not suggested that this use was by licence or a particular person and the debate was not directed to what was meant by use by the public as the public. It is, I think, to be kept in mind that the court was considering a passageway and not "a place" and that for proof of the offence reliance has been placed upon evidence not that the passageway was "open" to the public in the sense that there was evidence from which an inference could be drawn of a permission to the public to use it as a passage but that there was evidence that it was in fact regularly "used by" the public. The distinction between permission extended to the public to use a place and the fact of actual user has proved to be important when the question is to be determined not only in relation to a road, which must first of all qualify as such by constituting a means of passage or communication between places, but more particularly in relation to a place which is private property in the ownership of an individual person (or corporation) who makes the place open to the public by extending an invitation expressly or impliedly to the public to be upon it.

It might be thought that either the invitation of such a particular person must be to members of the public **[26]** at large to be upon the place in their own interests without there being any interest to be served on the part of the particular person in the acceptance by them of his invitation; or even that such an invitation without any interest on his part to be served by such acceptance cannot render the place open to the public since they then go upon the place by the licence of a particular person. However, in the United Kingdom authorities, from two of which the Court found some persuasive guidance, there is a series of decisions to the contrary, on the meaning of the expression "to which the public have access" which I take to be the equivalent of the expression "open to or used by the public". They acknowledge the cogency of the judgments of the Court of Session in *Harrison v Hill* as well as the Divisional Court in *Bugge v Taylor* and they all, with one exception expressly apply *Harrison v Hill* as a leading decision of persuasive authority but they deny the propositions I have mentioned. The exception is the decision of the English Court of Criminal Appeal in *R v Collinson* (1931) 23 Cr App R 49 a decision which preceded *Schubert v Lee* but which was not cited to or by the Court. That decision rejected an argument that for the public to have access to a place the place must be a public place and held that the public was properly to be regarded as having access to a place which was found to be in private ownership and to which members of the public gained access by licence of the owner for a limited purpose and for a limited time on a specific day. In order to understand the effect of these decisions it will be necessary, I feel, to refer to them rather fully so that the development of judicial reasoning may **[27]** may be seen in the approach that has progressively been taken to the more recent phenomenon (not yet in contemplation in 1946, but of which the present case is an example) of car parks established as a facility for the use of customers of business and commercial enterprises. I will take them more or less in chronological order. *[At pp27-98 of the judgment, His Honour referred to the authorities, and continued]. ...* **[98]**

From all of the foregoing consideration of the decisions in the United Kingdom, in Canada

and in Australia, it seems to be that there is an overwhelming preponderance of judicial and other learned opinion that the motor traffic acts are to be construed as Hewart LCJ held in *Collinson's case* in 1932, namely, "with regard to the evils that they are expected to avert" and that, as McKenna J held in *Sandy v Martin* [1974] RTR 263: "It would not be a very sensible conclusion that unless the general public without any limitation had access to a place, the place was not a public one. The danger to the public from driving offences is certainly no less in the car parks of public houses than in other places to which the public resort". Since the decision in *Schubert v Lee* in 1946 there has been an enormous expansion in the ownership and use of **[99]** motor vehicles with a corresponding increase in the parking facilities which their effective use necessitates. Whilst in 1946 street parking of motor vehicles was not a significant problem, streets steadily became unable to cope with the demand for parking space. In order to minimise congestion and to secure some orderliness in meeting the requirements of commerce and residence it because necessary to impose restrictions on the use of public streets for car parking and to erect numerous signs and devices to indicate and enforce those restrictions.

Furthermore the expansion in the use of motor vehicles meant that commercial and residential premises became very such motor vehicle orientated. All this has led to the introduction of off-street car parking facilities associated with those premises for the use of persons resorting to those premises and more recently to statutory requirements for the provision of such facilities, at least in any substantial commercial or residential development. Car parks have, therefore, become a feature of shopping centres, hotels and other retail outlets as well as of factories and other similar establishments. Where an invitation is extended without discrimination or selection to members of the public to attend at such business premises and to make use of the associated car park it seems obvious that the protection of the motor traffic legislation is required for such members in their use of such a facility as much as in their use of the nearby public street. They receive that protection if the car park is a place which is open to the public so that it is a public place within the meaning of the legislation.

It should be held to be a place open to the public by regard being had to the evil sought to he averted and not to any narrow construction of the definition. In my **[100]** opinion that definition for present purposes extends at least to persons who resort to the car park associated with the premises of a privately owned enterprise by reason of an invitation extended by the proprietor of the enterprise to the members of any significant class of the populace without discrimination between them to visit the premises to engage in business with the proprietor and to use the facilities of the car park for that purpose.

The definition, in my opinion, is not to be confined to a car park (whether under cover or in the open) which is made available either by a private individual or corporation or a public authority by a licence or invitation to the populace at large to use the facility of the car park without concern for the identity or purpose of those who use the facility, beyond their desire to park therein, whether on payment of a fee or otherwise. The adoption of any other view would, it seems to me, disregard the social and commercial developments of recent decades and would lack a realisation that the car parks to which I refer have, for practical purposes, become as much a public facility for the parking of cars as has been the public streets. I would, for the foregoing reasons, answer both the questions submitted for the opinion of this Court in the affirmative. I would make no order for the costs of the proceedings in this Court.
