11/91

SUPREME COURT OF VICTORIA

WOODS v GAMBLE

Fullagar J

15, 25 January 1991 — (1991) 13 MVR 153

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER FOUND IN PARKED CAR WITH HEADLIGHTS ON – DRIVER STOPPED BECAUSE OF TIREDNESS – WHETHER DRIVER "INTENDS TO START OR DRIVE VEHICLE" – WHETHER "IN CHARGE": *ROAD SAFETY ACT* 1986, SS48, 49(1)(b), 53, 55.

Section 48(1)(b) of the *Road Safety Act* 1986 ('Act') provides:

> For the purposes of this Part—
> (b) a person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle."

G., a police officer, saw a motor vehicle parked at the roadside, headlights on and W. in the driver's seat who, when spoken to by G., admitted consuming of a quantity of intoxicating liquor and driving the vehicle one or two minutes before Police came on the scene. Subsequently, W. was charged pursuant to s49(1)(b) of the Act with being in charge of the motor vehicle with an excessive blood/alcohol concentration and was convicted. Upon order nisi to review—

HELD: Order absolute. Conviction/order set aside.
For a person to be in charge of a motor vehicle under s48(1)(b) of the Act, reasonable grounds must be shown that at the time of apprehension, that person had a present intention to start or drive the motor vehicle forthwith or in the very near future that is, the driver was about to start or drive the vehicle. In the present case, as there were no such reasonable grounds, the driver was not to be taken to be in charge of the vehicle within s48(1)(b) of the Act and the police officer was not entitled under s53 of the Act to administer a preliminary breath test nor make a requirement under s55 for a full breath test. Accordingly, the magistrate was in error in not dismissing the charge.
***Peebles v Hotchin* (1988) 8 MVR 147; MC 61/1988, referred to.**

FULLAGAR J: [1] This is the return of an order nisi to review the decision on 19 February 1990 of a Magistrates' Court at Prahran whereby the applicant was convicted of an offence under s49(1)(b) of the *Road Safety Act* 1986. The offence charged was that the applicant was on 17 September 1988 at East Kew in charge of a motor vehicle while more than the prescribed quantity of alcohol was present in his blood. A policeman gave evidence that at about 5.40 am on 17 September 1988 he was on patrol with another policeman when he saw the defendant's vehicle parked on the north side of High Street, East Kew about 60 metres north-east of the intersection with Harp Road. The headlights were on and the car, or the defendant in the driver's seat, or both, appeared to the witness policeman to be "suspicious", a piece of evidence which got in during the cross-examination of the policeman.

I think I should read at this point from the affidavit, in support of the order nisi, of the applicant who said that:

> "The policeman said that as he approached the vehicle he noted a male person seated in the driver's seat and he got out of the police car to speak with this person. That person was me. The constable said that when I saw him I wound the driver's window down, my movements were slow, that I looked drowsy and that my breath smelt strongly of intoxicating liquor. He said that in response to his question 'Whose vehicle is this?' I replied, 'Mine'. He said that in response to his question, 'Have you consumed any liquor this evening?', I replied, 'Yes'."

The affidavit then states that a preliminary breath test was done, which resulted in a positive reading. The affidavit then proceeds:

> "He, the policeman, said that he then had the following conversation with me. Question: 'Have you

been driving this vehicle this morning?' Answer: 'Yes'. Question: 'How long is it since you drove that vehicle?' Answer: 'A couple of minutes. I just stopped before you pulled over.' Question: 'Why did you stop here?' Answer: Because I was feeling tired.' Question: Where have you come from?' Answer: 'The Richmond Club.' Question: 'Where were you driving to?' Answer: 'My home in East Doncaster'."

[2] The evidence then went on:

"He said that during the conversation he had with me I said that I had consumed five 285 ml. pots of beer at the Golden Gate Hotel, six 375 ml. bottles of Crown Lager at the Richmond Football Club Social Club. He said that I said that I had travelled approximately 10 kilometres before pulling over to the side of the road but I had my first drink at 9.30 pm on the previous evening but I did not know when I had my last drink. He said that in answer to the question, 'Why did you pull over?' I responded 'Because I was pissed and felt too tired to drive. You know how it is. You start seeing double lines and too tired to drive.' When asked: 'How long were you parked in High Street?' The constable said that I replied, 'Only just got there before you came, about one minute.' When asked about my movements on that night, he said that I said that I left the Golden Gate Hotel at about 1.30 am, drove to the Richmond Football Club Social Club and left there about 5.30 am. He said that I told him that I was about 15 kilometres from where I'd stopped in Kew to my home in East Doncaster'.

The affidavit then discloses that a full breath test was taken at the breath analysis section, resulting in a reading of 0.2 per cent blood alcohol content. When the applicant was asked whether he had any comment about the reading, he said "No". He said that he was satisfied with the test. The affidavit proceeds:

"The constable then said that he asked me my reason for driving a motor vehicle while more than the prescribed concentration of alcohol was in my blood, to which I replied, 'All the other guys were, they enticed me to.' The constable said that he believed the headlights were on but he didn't notice anything else about the car."

Ground B of the order nisi was abandoned at the outset of the appeal before me and I should say that there was, in my opinion, no substance in that ground. The remaining grounds were, in substance, that the evidence did not support a conclusion that the applicant was in charge of his vehicle at the time of the alleged offence, or a conclusion that the applicant was found in charge of his vehicle for the purposes of s53(1)(a) of the Act. The latter conclusion was necessary to support admissibility of the certificate relied upon by the Prosecution to establish blood alcohol content.

[3] It is, of course, quite clear that the applicant was in charge of his vehicle at all material times upon the ordinary or common law meaning of "in charge". However, s48(1)(b) of the Act provides that, for the purposes of Part 5 of the Act, a person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle "or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle". In the present case no one saw the defendant start or drive or attempt to start, and it is the second limb of this provision which the respondent says applies; the Prosecution says there is evidence to support the belief that the applicant at the relevant time intended to start and drive the motor vehicle. The relevant time, for holding the intention whatever its content might be, is the time when the police apprehended him, although some subsequent time might of course suffice. This raises the question of the proper construction of the critical provision. When I refer to the critical provision, I refer to the second limb of s48(1)(b), and more particularly to the content of the intention to which it refers. It clearly refers to a present intention to start or drive. But is it a present intention to start or drive simpliciter – that is to say, a present intention to start or drive at any time in the future, however far removed in time – or is there some other, and what, limitation? Is the near or distant future relevant? A man who, at 6 p.m. has just driven from his work and has arrived in his driveway or carport at home and has just switched off the engine may then have the present intention to start and drive the car at 8 a.m. **[4]** the next day or, if it be a Friday night, perhaps a present intention to start and drive on the following Monday, but no intention to do so at any time in the intervening period. Is that sufficient to satisfy the provision? I do not think so. What, then, is the implied limitation? I have heard very little argument upon this critical question of construction.

It occurred to me that it may be possible to imply a qualification of the substance that the intention must be to start or drive with a *mens rea* consisting of a present intention to start or

drive at a contemplated point of time in the future at which the person presently contemplates that he will know, or believe, that he will still be in a condition (as he is at present) in which to drive would be to infringe, for example, paragraph (a) or paragraph (b) of s49. One or two of the decided cases tend to suggest that this might be so.

I have come to the conclusion, however, that no implied limitation upon the present intention will provide sufficient certainty other than that the relevant intention must be to perform the starting or driving at a time which is effectively forthwith. I have come to the conclusion that the defendant's intention referred to must be such that he is, in substance, "about to" start or drive. No other convincing construction of the second limb of s48(1)(b) has been suggested to me in the course of the argument which I have heard.

In the present case much was made in argument below about the alleged actual belief of the policeman, to which he deposed, that the applicant "intended to start or drive **[5]** the motor vehicle". When I delivered these reasons orally I offered the opinion that, in order to bring a case within the second limb of s48(1)(b), there does not have to be any belief in the policeman, or in anyone other than the Court. Upon this view the test for the application of the critical provision is that there must be reasonable grounds for believing that the person intends to start or drive, irrespective of whether anyone has or actually deposes to having had that belief. Of course it may help if someone deposes with reasons to the actual belief, and a policeman might perhaps be accused of being over-zealous if he did not hold the belief, but it is for the court to say whether there were reasonable grounds for a belief that the person intended to start or drive. Whether the policeman was reasonable or unreasonable in believing what he believed cannot be decisive.

What I had in mind, at the time of offering these opinions orally and *obiter*, was the thought that the true meaning of "intends to start or drive" might never cross the mind of the relevant policeman, or of any person who did not have to consider the precise time of starting (or driving) to be attributed to the defendant's intention. Thus a policeman's statement, that "I believed the defendant intended to start and drive the motor vehicle" may be unhelpful in circumstances like the present until it be discovered how – if at all – the policeman construed the statute, or at least until further particulars of the policeman's actual belief are given.

[6] Since orally delivering my reasons, however, I have carefully read the judgment of Southwell J in *Peebles v Hotchin* (1988) 8 MVR 147 where His Honour held that the second limb of s48(1)(b) requires that the person who requires a preliminary test pursuant to s53(1)(a) must himself, or herself, actually believe that the defendant upon apprehension "intends to start or drive the motor vehicle". I now think that the opinion I ventured orally that on-one need hold the belief went too far, and certainly further than my reasoning required, and I do not wish to be taken as formally dissenting from the view applied by Southwell J in *Peebles v Hotchin*.

In this case I am of the opinion that there were no reasonable grounds for a belief in anyone that the applicant was about to drive off, in the sense that his present intention related to very close futurity. The circumstances are, of course, quite capable of raising in any reasonable person a strong suspicion, to say the least, that the defendant in actual fact stopped and parked the car in very great haste only because he saw the patrolling police car some seconds before its occupants observed his car, he thus having barely time to park the car and switch off the engine before assuming an innocent air of relaxation, but without having time to switch off the headlights, or forgetting in his haste to switch them off, all this being done in a desperate, but entirely successful, attempt to avoid being seen to drive the car in what he knew to be, by his own admission, the alcoholic condition which is described, in fact, by s49(1)(a). It was never put by police to the applicant that this was, in fact, the truth.

[7] But even if all this matter of suspicion were established beyond reasonable doubt to be true, which of course it is not, that could not disclose any circumstance entitling a police officer under s53(1)(a) – or any part of s53 – to administer a preliminary breath test. This may seem to some people to be a substantial weakness in this curiously-worded statute. Again, it may be that the rather colourful admissions of the applicant in this case could be held to establish an offence under s49(1)(a) without recourse to any breath tests but that, even if it is correct, is irrelevant to the present order to review.

In the circumstances of the present case there were, in my opinion, no reasonable grounds for any belief in anyone that the applicant intended to start the engine or drive off forthwith, or to do so at any point of very close futurity. Indeed, if one "assumes the worst" of the applicant, and adopts for the moment the suspicions which I have referred to, and considers the very instant of apprehension, that is to say one second after the applicant realised the police had observed his car and were approaching him in his hastily parked car, there are even on that footing cogent reasons for believing that the applicant intended not to start the car until at least some considerable time had elapsed after the coast was clear, and indeed one might doubt very much that he would have continued the particular journey in his car after a frightening encounter with the police, whatever he may have said to them as to his intention before they came upon the scene. But, of course this is all speculation and I mention it only by way of illustration of my view of the ambit of the critical provision. **[8]** As I have concluded that, upon the proper construction of the second limb of s48(1)(b) of the Act, there were not reasonable grounds for the belief that the applicant intended to start or drive the motor vehicle, the order nisi must be made absolute.

Having regard to the wording of the grounds, I should hasten to add what must be obvious, that this conclusion does not mean that the Magistrate acted unreasonably but only that she misconstrued this difficult statute. Subject to any submissions as to form, the order of the Court will be in accordance with the following minutes:

1. Order that the order nisi be made absolute on grounds A(1) and A(b) thereof.

2. Conviction quashed and orders of the Magistrates' Court set aside.

3. In lieu thereof order that the information be dismissed.

4. Order that the respondent pay the applicant's costs of the proceedings in the Supreme Court, including all costs reserved.

APPEARANCES: For the plaintiff Woods: Mr A Marshall. counsel. Mr F Tisher, solicitor. For the defendant Gamble: Mr J Atkins, counsel. Ms M Ferlazzo, solicitor.
