13/82

SUPREME COURT OF VICTORIA

COOMBE v CURRUCAN

Murphy J

21 September 1981

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER CHARGED WITH .05 OFFENCE – EVIDENCE GIVEN BY POLICE INFORMANT THAT DEFENDANT OBSERVED PUSHING MOTOR CYCLE ON ROADWAY – WHETHER "DRIVING A MOTOR CYCLE" – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Conviction quashed.
In pushing the motor cycle from the hotel to the point at which the defendant was apprehended he could not properly be said to be driving the motor cycle within the meaning of the section. There must be a distinction between driving on the one hand and pushing a motor cycle on the other. To drive is not simply to control, and not simply to be in charge of a motor cycle, and that there must be something further that the person to be charged does, which would bring him within the ordinary understanding of the meaning of the word "drive" a motor cycle. Accordingly, the magistrate was in error in finding the charge proved.

MURPHY J: This is an Order to review a decision of the Magistrates' Court at Beechworth constituted by Mr JMS Humphrey whereby the defendant who is the applicant on the order nisi was convicted of driving a motor car whilst his blood alcohol content was in excess of .05 percent contrary to s81A of the *Motor Car Act* 1958.

The situation appears to have been, as it was accepted by the Magistrate at all events, that the applicant, having been to a hotel and imbibed a quantity of alcohol, decided that he was not in any condition to drive his motor cycle and on leaving the hotel began to push it along the roadway to his friend's home. He had pushed it some 400 feet or so and he had done this without starting the motor cycle and he did so by walking alongside the motor cycle and pushing it along and guide it with its handlebars in order to ease the propulsion of it to the point to which he wished to take it. He was apprehended whilst in the gutter, not riding the motor cycle, although it might appear, on one view, that at that stage he was contemplating doing so. At all events, he was not seen to move on the motor cycle and there was no evidence from any eye witnesses at any stage on that evening, at any relevant time, he was in fact driving the motor cycle.

The Magistrate accepted the evidence of the applicant on this point, and said as much, and the question therefor arises whether the pushing of a motor cycle for some 400 feet whilst walking alongside it, amounts to driving a motorcycle within the meaning of the section. At first glance it would seem an absurd proposition to suggest that a person was driving a motor cycle when he was simply pushing it or moving it from one point to another by physical force. However, owing to the difficulty that is often encountered in proving that a person who has imbibed too much alcohol has been or is in fact driving a motor car or a motor cycle as the case may be, several decisions appear in the authorities, which show the care with which one needs to approach this problem. Every case, of course, must be determined upon its own facts, and in this case it is my view that in pushing the motor cycle from the hotel to the point at which he was apprehended, the applicant could not properly be said to be driving the motor cycle within the meaning of the section.

The section contains no definition, nor does a definition of driving appear at any other point in the *Motor Car Act*, but I accept the view expressed by Widgery L, in *Regina v MacDonagh* [1974] QB 448; [1974] 2 All ER 257, where at All ER p260 he stated that in order to constitute an offence against a similar section in the English Act the activity which is being performed by the defendant must fall within the ordinary meaning of the word "drive". I also agree with His Lordship that there must indeed be a distinction between driving on the one hand and pushing

a motor cycle on the other. I agree with Gillard J's view as expressed in *McGrath v Cooper* [1976] VicRp 54; (1976) VR 535 that to drive is not simply to control, and not simply to be in charge of a motor cycle, and that there must be something further that the person to be charged does, which would bring him within the ordinary understanding of the meaning of the word "drive a motor cycle". In my view, in this case, there was nothing else to which the Magistrate could have directed his attention to enable him to decide that the applicant had in fact driven the motor car whilst his blood alcohol content exceeded the permitted limit. Accordingly, in my view, it was the duty of the Magistrate in the circumstances of this case to dismiss the information. He did not do so and in my view for this reason he was wrong. The order nisi should be made absolute on the first ground set out. ...
