41/97; [1997] VSC 34

SUPREME COURT OF VICTORIA — COURT OF APPEAL

TSOLACIS v KELLY

Winneke P, Hayne and Kenny JJA

28 July 1997 — (1997) 25 MVR 549

MOTOR TRAFFIC – DRIVING – DUTIES OF DRIVER OF MOTOR VEHICLE – MOTOR VEHICLE STATIONARY – DRIVER ALIGHTING FROM VEHICLE – DRIVER ASKED TO PRODUCE LICENCE AND STATE NAME AND ADDRESS – REFUSAL TO COMPLY – WHETHER PERSON "DRIVER OF A MOTOR VEHICLE": *ROAD SAFETY ACT* 1986 S59(1).

Section 59(1) of the *Road Safety Act* 1986 ("the Act") creates in drivers three duties namely, to stop the vehicle when requested to do so, to produce a licence for inspection and to state a name and address. Clearly the second and third duties contemplate that the request imposing the duties will be made at a time when the vehicle has been stopped and the driving is at an end. Accordingly, any sensible construction of s59 of the Act leads to the conclusion that the "driver" contemplated by the section comprehends a person who has driven and parked a motor vehicle and alighted to the roadway contemporaneously with the request to produce a licence and state a name and address.

***Tsolacis v Kelly* MC16/96, affirmed.**

WINNEKE P: [1] The appellant, George Tsolacis, is a taxi driver by occupation. As long ago as 15 June 1991 he drove his own vehicle along Burnley Street into Bliss Street, Richmond, at about 3 o'clock in the morning, having finished his tour of duty in the taxi, and proceeding home in his own vehicle. He parked his car in Bliss Street and proceeded to alight from his car. Unbeknown to him he had been followed along Burnley Street and Bliss Street by a police car driven by a Constable Simon Kelly who was to become the informant in proceedings thereafter conducted against him. As the appellant parked his car in Bliss Street, he became aware of the police vehicle behind him. As he was alighting from his car he was approached by Kelly who asked him for his name and address and his licence. He refused to comply on the grounds that he was not, when so requested, the driver of his vehicle and that therefore Kelly was not entitled to make the request.

On 24 September 1991 Kelly laid information against the appellant charging him with two offences against s59(1)(a) of the *Road Safety Act* 1986. Relevantly that sub-section provides as follows:

> "(1) The driver of a motor vehicle on a highway has the following duties:
>
> (a) To stop the motor vehicle, produce for inspection his or her driver licence document or permit document and state his or her name and address if requested or signalled to so by—
>
> (i) a member of the police force ..."

Sub-section (2) of the same section prescribes the penalties for failure to comply with the relevant requests outlined in sub-s(1).

[2] The extent of the powers reposed in police officers by this section is not made abundantly clear by its terMs The appellant has consistently maintained that he was not in breach of the duty prescribed by the sub-section because, at the time the request was made, he was not "the driver of a motor vehicle on a highway". It has been, for him, I might say, a protracted and expensive campaign. The information was first returned before the Prahran Magistrates' Court on 4 March 1992. He did not appear because, as he said, he had been given no notification of the date of the hearing. He was fined in his absence $400 on each of the counts and ordered to pay $40 costs. Not surprisingly he was displeased and requested a rehearing on the grounds that he had not been notified. His request was granted and the matter was reheard before Ms Jennifer Coate SM on 5 June 1992. Again he was convicted of each offence but on this occasion fined $50 on each charge and ordered to pay $40 costs. Thereafter, pursuant to s92 of the *Magistrates' Court Act*

1989, the appellant appealed against the magistrate's order on questions of law which, on 20 July 1992, Master Williams, pursuant to Rule 58.09 of the Rules of the Supreme Court, stated as follows;

> "(a) whether for the purposes of s59(1)(a) of the *Road Safety Act* 1986, the appellant was at the relevant time the driver of a motor vehicle on a highway;
>
> (b) whether for the purposes of the said section the request by a member of the police force referred to in the section is required to be made at a time when the person to whom it is made is the driver of a motor vehicle on a highway."

These questions ultimately fell to be determined by **[3]** O'Bryan J on 23 May 1996. Just why some four years had elapsed between the date when the appeal was lodged and the time of the hearing has not been explained to this court. In any event, on 27 May 1996 His Honour dismissed the appeal and ordered the appellant to pay the taxed costs of the respondent. Thereafter, on 21 June 1996, McDonald J enlarged the time pursuant to which the appellant was entitled to appeal to this court. On 28 June 1996 the appellant filed and served his Notice of Appeal against the judgment and orders of O'Bryan J. The grounds of his notice challenge the correctness of His Honour's reasons for decision.

The learned judge had recited a passage from the appellant's evidence that he had noticed the respondent's vehicle whilst he was parking his own and that he was in "the process of getting out" of his car and had been "outside and about to close the driver's door" when approached by the respondent. His Honour noted that it was the appellant's submission that, by the time the respondent's request had been made of him to state his name and address and produce his licence, he had come to the end of his journey and was neither in control or charge of the motor vehicle and accordingly was not "the driver" of that vehicle. His Honour concluded that, for the purposes of s59(1), the appellant had remained "the driver" notwithstanding that the request was made after the appellant had completed his journey and had alighted or was alighting from his vehicle. His Honour said that:

> "It would make nonsense of the duties imposed upon a driver by sub-s(1) if the section is construed narrowly to mean 'one who is driving'."

[4] Notwithstanding the persuasive arguments which have been presented by the appellant to this court, I am clearly of the view that His Honour's construction of the sub-section in the circumstances of this case is the correct one. The sub-section creates in drivers three duties raised as the consequence of the conduct of a police officer; the first, to stop the vehicle when requested or signalled to do so; the second, to produce a licence for inspection when requested to do so; and the third, to state the driver's name and address when requested to do so. Clearly the second and third duties contemplate that the request imposing the duties will be made at a time when the vehicle has been stopped and the driving is at an end, otherwise, as His Honour said, compliance with the section would be stultified. No doubt the policeman making the request must have seen the person of whom the request was made driving the vehicle and to have made his request for name and address and production of licence at a time which is proximate to and not remote from the driving. In each case that will be a question of fact.

If the narrow construction of the sub-section for which the appellant contends were to be accepted, the administration and execution of the purposes of the Act by police could be wholly frustrated simply by the driver stopping the vehicle, turning off the ignition and alighting. It is clear from the perusal of the whole of the Act that such a construction was not intended. As His Honour noted, there is no definition in the Act of what persons are taken to be the "driver of the motor vehicle on a highway" for the purposes of raising the duties contemplated by s59 or, for that matter, for **[5]** the purposes of other sections in this Act giving rise to similar duties. (See, for example, s46.) But any sensible construction of the words of the whole of s59 must, in my view, lead to the conclusion that the "driver" contemplated by the section comprehends a person in the circumstances in which the evidence discloses the appellant to have been in this case.

Much emphasis was laid by the appellant, both in this court and below, upon the question whether or not he could be said to be at the time relevantly in charge of, or in control of, the motor vehicle so as to constitute him to be "the driver of the motor vehicle". In support of these

contentions he drew the attention of the court to a number of authorities dealing with the meaning of the words "driving a motor vehicle" as used in statutes making it an offence to drive a motor vehicle with certain proscribed physical or other characteristics, such as excessive blood alcohol limits or the required licence to do so. (See, for example, *Tink v Francis* [1983] VicRp 74; [1983] 2 VR 17; *Davies v Waldron* [1989] VicRp 43; [1989] VR 449; (1989) 8 MVR 363.) In those cases it was clear beyond peradventure that the proscribed behaviour which needed to be proved was behaviour coincidental with the driving. It goes without saying that the words "drive", "driving" or "driver" where used in statutory offences must in each case take their colour from the context of the statutory provision in which the term is used. In every instance the first inquiry must be to determine the natural and ordinary meaning of the word in the context of the statutory provision in which the word is used. (I refer to McInerney's J's statements in *Tink v Francis* above **[6]** at p26.)

For my own part I do not think that any assistance can be derived in determining whether a person is a "driver" upon whom the duties created by s59(1) are imposed, by referring to authorities which have considered whether a person has certain proscribed characteristics coincident with the "driving" of the car. In the former case the scope and nature of the duties imposed upon the driver must necessarily assist in defining the circumstances in which that driver is obliged to conform with those duties. (Compare *Grace v Fraser* [1982] VicRp 105; [1982] VR 1052; *Jones v Prothero* [1952] 1 All ER 434.)

Because the duties imposed by s59(1) of the instant case are duties which can only be performed in circumstances which are not coincident with the driving, I am satisfied that His Honour was correct in concluding that those duties were imposed upon the appellant in the circumstances which the evidence here disclose. In those circumstances I need not concern myself with the limits of contemporaneity or nexus with driving which the section might be thought to require beyond which the duties raised by the section will be spent. It is sufficient for me to say that in my view His Honour was correct to conclude that:

> "In the present case the acts of the appellant in driving, parking and alighting to the roadway were so contemporaneous with the requests that the learned magistrate was entitled to find the appellant was at the relevant time the driver of a motor vehicle on a highway"

upon whom the duties contemplated by the section are imposed.

I would like to add that, although the appellant was unrepresented upon this hearing and although his appeal **[7]** will be dismissed, I have been much assisted by the arguments which he addressed to this court. I would accordingly dismiss the appeal.

HAYNE JA: I agree.

KENNY JA: I agree.

WINNEKE P: The appeal is dismissed with costs.

APPEARANCES: The appellant appeared in person. For the Respondent: Mr G Burns, counsel. Victorian Government Solicitor.
