27/78

HIGH COURT OF AUSTRALIA

JACKSON v HARRISON

Barwick CJ, Mason, Jacobs, Murphy and Aickin JJ

1, 2 September 1977; 16 May 1978

[1978] HCA 17; (1978) 138 CLR 438; 52 ALJR 474; 19 ALR 129 (Noted 52 ALJ 703)

NEGLIGENCE – MOTOR VEHICLE COLLISION – PERSON INJURED – DEFENCES TO – ILLEGALITY – PARTICIPATION BY PLAINTIFF WITH DEFENDANT IN ILLEGAL ENTERPRISE – AGREEMENT TO DRIVE WHILE DISQUALIFIED – ACCIDENT CAUSED BY NEGLIGENT DRIVING – WHETHER DUTY OF CARE OWED TO PASSENGER – WHETHER COURT WOULD DETERMINE STANDARD OF CARE OWED – WHETHER DAMAGES RECOVERABLE – PRINCIPLE IN *SMITH v JENKINS* – MOTOR VEHICLES – DRIVING OFFENCES – DRIVING WHILE DISQUALIFIED – PASSENGER AIDING OFFENCE – INJURED BY NEGLIGENT DRIVING – EFFECT ON CIVIL DUTY OF CARE OWED BY DRIVER – WHETHER DAMAGES RECOVERABLE – WHETHER DEFENCE OF PARTICIPATION IN JOINT ILLEGAL ENTERPRISE.

The parties, two youths, took a car on a jaunt from Adelaide to Port Augusta and shared the driving. Each knew that the other was disqualified from holding a driver's licence, and would be committing the offence of driving while disqualified. During the trip negligent driving by the appellant caused an accident in which the respondent was injured. He sued the appellant in the Supreme Court of South Australia, where at first instance the trial judge dismissed the action on the ground that the appellant owed no duty of care to the respondent because they were engaged in a joint illegal enterprise. However, this decision was reversed by the Full Court, and a verdict entered for the respondent for $30,500.00. On appeal to the High Court—

HELD:

(i) Per Mason, Jacobs, Murphy and Aickin JJ, (Barwick CJ dissenting): The appeal should be dismissed, since there was no defence to the respondent's action that his injury occurred while he was aiding and abetting the appellant in the commission of the offence of driving while disqualified.

(ii) Per Mason, Jacobs and Aickin JJ: There was no absolute rule that participants in a joint illegal enterprise owed no duty of care to each other. However, a plaintiff's case would fail when the joint illegal enterprise in which he and the defendant were engaged was such that the court could not determine the particular standard of care to be observed. Before the court would say that the appropriate standard of care was not permitted to be established there must be such a relationship between the act of negligence and the nature of the illegal activity that a standard of care owed in the particular circumstances could only be determined by bringing into consideration the nature of the activity in which the parties were engaged.

Progress and Properties Ltd v Craft **[1976] HCA 59; (1976) 135 CLR 651; (1976) 12 ALR 59; 51 ALJR 184, followed;**

Smith v Jenkins **[1970] HCA 2; (1970) 119 CLR 397; (1970) ALR 519; 44 ALJR 78, distinguished.**

Bondarenko v Sommers **(1968) 69 SR (NSW) 269; [1968] 1 NSWR 488; 79 WN (NSW) 615;**

Henwood v Municipal Tramways Trust (SA) **[1938] HCA 35; (1938) 60 CLR 438; [1938] ALR 312;**

Godbolt v Fittock **(1963) 63 SR (NSW) 617; [1964] NSWR 22; 80 WN (NSW) 1110;**

Andrews v Nominal Defendant **(1965) 66 SR (NSW) 85; [1965] NSWR 1614, considered.**

In the present case the court was able to determine the appropriate standard of care, since the facts concerning the joint illegal enterprise had no bearing on the standard of care reasonably to be expected of the driver.

(iii) Per Murphy J: The defence of illegality should be confined strictly, so that, where the plaintiff's offence was statutory, recovery would be denied only where denial of recovery was statutory policy, and not because the court, for reasons of policy, declined to adopt a standard or recognize a duty of care. Otherwise, recovery should be denied only where there was a voluntary assumption of the risk.

(iv) Per Barwick CJ (dissenting): Where there was a joint venture to do an act punishable by fine or imprisonment, no narrow or pedantic view should be taken of the nature and scope of the arrangement between the parties when applying the principle of *Smith v Jenkins*, and the consequence to one of the participants of any act done in furtherance of the arrangement or in obtaining the benefit of having carried it out should not give rise to a cause of action. The relationship of those participants should not be regarded as giving rise to relevant rights or duties.

Cur. adv. vult.

BARWICK CJ: Two young men, the appellant and the respondent, respectively aged 18 and 19 at the time of the occurrence giving rise to this appeal, had both been disqualified from driving a motor vehicle on a public road in South Australia, their licences in that respect having been suspended by a court. The respondent's licence had been suspended because of his conviction of a criminal offence and that of the appellant for a breach of the traffic laws. But the appellant owned a Morris Isis car. The young men, who lived in Adelaide, formed the intention of taking the car for a 'jaunt' to Port Augusta over a weekend. It may be, though from so much of the evidence given at the trial of the action brought by the respondent against the appellant which has been reproduced for the purposes of this appeal it is not clear, that the plan to do so was conceived before the respondent's licence was suspended. But, whether this was so or not, they did agree that, though each knew of the suspension of the other's licence and that neither could lawfully use the appellant's car by driving it on a public road, that they would do so for the weekend, sharing the driving, each doing so in turn. As the car was at the home of the appellant at Semaphore within the metropolitan area of the city of Adelaide, it was agreed between them that the respondent would tell the parents of the appellant, who were aware of the suspension of the respondent's licence as well as of that of the appellant, that he, the respondent would drive the car away from the appellant's parents' home and whilst it was in the metropolitan area where police might observe the appellant if he were driving it.

In fact, the respondent did so inform the parents of the appellant and did drive the car as thus planned. Also as planned, the respondent and the appellant from time to time drove the car on the public roads, travelling from Adelaide to Port Augusta. I need not detail what they did there, though the extent to which they consumed liquor may have played its part in the ultimate result. Suffice it to say that whilst the car was travelling easterly on the Quorn-Port Augusta road near Stirling North, due to the appellant's negligence in driving the car, it swerved across the roadway and collided with vehicles stationary on the unsealed verge of the roadway. Both young men were injured.

The respondent sued the appellant in the Supreme Court of South Australia for damages, asserting the causal negligence of the appellant. The Supreme Court (Mitchell J) finding that the appellant was driving the car at the time and that he did so negligently, assessed the damages for the respondent's injuries in the sum of $30,500.

But the learned judge found that the 'venture upon which they set out was to drive to and from Port Augusta, each intending to drive some of the way, notwithstanding that he was disqualified from holding a driver's licence and each being well aware that the other would also be committing an offence of driving under disqualification'. Because of the provisions of the *Motor Vehicles Act* 1959 as amended (SA) and of the provisions of the *Justices Act* 1921 as plaintiff and the defendant could have been successfully prosecuted for the offence of driving whilst his licence was suspended at any time during the trip to and out of Port Augusta when either of them was driving the vehicle.' The penalty for such an offence is imprisonment for six months. 'So that at the time of the accident each of them was committing the offence of driving under disqualification; this was a joint venture and each was committing the same offence at all times during the trip to and out of Port Augusta.' With these findings I fully agree. Indeed, throughout subsequent proceedings in the case, I do not understand them to have been challenged...

JACOBS J: The respondent sued the appellant for damages resulting from the negligent driving of a motor vehicle in which the respondent was a passenger. Negligence and the facts that the respondent was a passenger and the appellant the driver were found proved by the trial judge. However, Mitchell J held that the respondent was not entitled to recover damages for his injuries suffered as a result of the negligent driving of the appellant because at the time of the occurrence the appellant was committing the offence of driving the motor vehicle while under disqualification (*Motor Vehicles Act* 1959 s91(5)), the respondent knew that the appellant was committing that offence and was a joint participant in the commission of that offence. A majority in the Full Court took a different view and held that these circumstances did not disentitle the respondent from recovery of damages, and directed judgment in favour of the respondent. The question for us is — which view is correct?

The recent decision of this court in *Progress Properties Ltd v Craft* [1976] HCA 59; (1976) 135 CLR 651; (1976) 12 ALR 59; 51 ALJR 184 was not before the Supreme Court of South Australia when it gave its decision. The basis of the principle whereby in some cases a defence of illegality may be raised in an action for negligence was there examined. In my reasons for judgement, with which Stephen, Mason and Murphy JJ agreed, I said: 'A plea of illegality in answer to a claim of negligence is a denial that duty of care arises out of the relationship of particular persons one to another. An illegal activity adds a factor to the relationship which may either extinguish or modify the duty of care otherwise owed. A joint illegal activity may absolve the one party from the duty towards the other to perform the activity with care for the safety of that other. That, it seems to me, is the effect of *Smith v Jenkins* [1970] HCA 2; (1970) 119 CLR 397; (1970) ALR 519; 44 ALJR 78. Where there is a joint illegal activity the actual act of which the plaintiff in a civil action may be complaining as done without care may itself be a criminal act of a kind in respect of which a court is not prepared to hear evidence for the purpose of establishing the standard of care which was reasonable in the circumstances. A court will not hear evidence nor will it determine a standard of care owing by a safe blower to his accomplice in respect of the explosive device. This is an example which gives no difficulty, but other cases can give difficulty in classification' (ALR at 73; ALJR at 190).

I adhere to that statement. I think that it is correct to base the defence upon a denial of a duty of care in the particular circumstances rather than upon a denial of remedy for a breach of the duty of care. A legal duty of care pre-supposes that a tribunal of fact can properly establish a standard of care in order to determine whether there has been a breach of the duty of care. If the courts decline to permit the establishment of an appropriate standard of care then it cannot be said that there is a duty of care.

Before the courts will say that the appropriate standard of care is not permitted to be established there must be such a relationship between the act of negligence and the nature of the illegal activity that a standard of care owed in the particular circumstances could only be determined by bringing into consideration the nature of the activity in which the parties were engaged. The two safe blowers provide the simplest illustration. What exigencies of the occasion would the tribunal take into account in determining the standard of care owed? That the burglar alarm had already sounded? That the police were known to be on their way? That by reason of the furtive occasion itself a speed of action was required which made it inappropriate to apply to the defendant a standard of care which in lawful circumstances would be appropriate? The courts will not engage in this invidious inquiry. The reason is no doubt based on public policy. If, then, no standard of care can legally be determined, it cannot be said that there is any duty of care.

I had first to consider this question of the relationship between duty of care and joint illegal enterprise in *Bondarenko v Sommers* (1968) 69 SR (NSW) 269; [1968] 1 NSWR 488; 79 WN (NSW) 615. The jury had been told: 'If all four, including the plaintiff, participated in the theft then certain legal consequences flow therefrom which I will tell you, one of them being that the plaintiff cannot maintain this action against either defendant no matter if Sommers was negligent or careless in his driving. It does not matter from this point of view whether the plaintiff was a driver or whether he was only a passenger because there was an illegal purpose that was being effected, if the defendant's case is correct, which was that there was an illegal purpose to take this car, steal it and drive it unlawfully around the back roads and to indulge in a speed contest for personal sport and enjoyment' and further told: 'If these four persons were jointly engaged and all participated in the theft of this Oldsmobile and that one of the purposes was that they should split into pairs, one pair to go in one car and the other pair in the Oldsmobile and that they should drive around the streets illegally in the stolen car and that when an occasion presented itself that they should then indulge in a race, and if they do that and thus indulge in a race up a street or travel at high speeds to satisfy their personal desires in that respect, and if an accident happens then no damages can be claimed against any one of the participating thieves who was driving the other vehicle, nor can any damages be claimed in those circumstances against the owner of the stolen car.'

Having set out these impugned passages in the summing up I said in my reasons for judgment:

> 'The reason for the stress placed by the learned trial judge upon the activities after the stealing of the car in relation to the issue of criminality or illegality that he wished to stress to the jury that

> the immediate illegal purpose was still being carried out at the time when the injury occurred to the plaintiff. There must be a relation between the criminal act and the act of negligence complained of. If, to use the language of Latham CJ in *Henwood's case* [1938] HCA 35; (1938) 60 CLR 438; [1938] ALR 312, the person injured by want of care is a burglar on his way to a professional engagement, the fact that he is a burglar has no relation causally or otherwise to the injury to him in a motor accident on the highway. On the other hand, if the burglar in the act of breaking in is so negligent that he injures his accomplice, the accomplice cannot in my view sue for negligence, because the actual act of which he would be complaining as done without care would itself be a criminal act of a kind in respect of which a court would not hear evidence for the purpose of establishing the particular standard of care which would be expected in the circumstances. There must in my view be this relation between the act complained of and the criminal act.'

Later I said

> 'The illegal act complained of was the taking and using of a motor vehicle and it is the using of the motor vehicle which is complained of as having been done negligently. Thus the actual act complained of as done negligently is itself the criminal act in which both plaintiff and defendant were engaged.'

The latter passage is an application to the facts of the case of the principles which I had attempted to enunciate in the earlier passages which I have quoted above. I adhere to that enunciation. I Would add that in accordance with *Henwood's case* [1938] HCA 35; (1938) 60 CLR 438; [1938] ALR 312, it is necessary in the case of a statutory offence to consider whether "it is part of the purpose of the law against which the plaintiff has offended to disentitle a person doing the prohibited act from complaining of the other party's neglect or default, without which his own act would not have resulted in injury"— per Dixon and McTiernan JJ in *Henwood's case* at p460. But such a purpose must be clear. If it is not express then it seems to me that in respect of civil liability for negligence it can only be inferred by taking account of the same factors as I have described in respect of the relation between the illegal activity and the act of negligence complained of.

I do not think that this approach is inconsistent with the decision in *Smith v Jenkins*. The reasoning of the various members of the court differed in certain respects which have been analysed at length in the judgments delivered in the present case in the Full Court. I do not think that it is necessary to embark on a further analysis, but it is to be noted that in that case the plaintiff and defendant had jointly robbed the owner of a motor car of his money and his car keys. They had forced him to tell them where his car was. They had used the keys to take his car and some time later in the same evening, after they had each taken turns at driving the car, when the defendant was driving it at 80 or 90 mph the car ran off the road and hit a tree. These additional circumstances appear in the enunciation of the facts by Windeyer J (119 CLR) at 405 Barwick CJ stated at 399-400:

> 'The driving of the car by the appellant, the manner of which is the basis of the respondent's complaint, was in the circumstances as much a use of the car by the respondent as it was a use by the appellant. That use was their joint enterprise of the moment ... In my opinion, the appellant, in the particular circumstances of the case, should succeed ...'

Owen J referred throughout his judgment to the crime as the taking and using of the motor vehicle, not simply the illegal using of the vehicle. It appears to me that these facts lie at the basis of the conclusion that there was a relevant joint criminal enterprise. It was a jaunt, an escapade, a joy-ride even though of a most serious kind from the beginning to the end. How could a standard of care be determined for such a course of criminal activity? I doubt that the decision would have been the same if the accident had occurred days, weeks or months later when the circumstances of the taking of the vehicle had ceased to have any significant relationship to the manner in which the vehicle was being used.

In *Godbolt v Fittock* (1963) 63 SR (NSW) 617; [1964] NSWR 22; 80 WN (NSW) 1110 the defendant was driving a utility truck with the plaintiff as passenger. The purpose of the journey was a joint venture of stealing cattle from farms along the road, transporting them in the truck to a market town, selling them in the market and sharing the proceeds. Some cattle had already been stolen and were in the truck. The plaintiff could not succeed in an action based on negligent driving of the truck. In my opinion the correct basis for this conclusion was that the court would not enter upon an inquiry on the standard of care appropriate to such circumstances.

On the other hand in *Andrews v Nominal Defendant* (1965) 66 SR (NSW) 85; [1965] NSWR 1614 the fact that the plaintiff had permitted the driver of the vehicle to drive that vehicle when it was unregistered and uninsured was held not to be a bar. I would base this conclusion upon the ground that the fact of the vehicle being unregistered and uninsured did not bear upon the question whether or not the degree of care exercised by the driver was in the circumstances reasonable.

In the present case the driver of the car was disqualified from driving and therefore his driving of the car was an offence; the passenger knew that the driver was disqualified and aided and abetted him in driving whilst so disqualified. The question is what bearing have those facts on the standard of care reasonably to be expected of the driver? The answer is — none whatsoever. I would dismiss the appeal.

APPEARANCES: EF Johnston QC and EH Martin for the appellant; TM McRae and PW Erikson for the respondent.
