58/94

SUPREME COURT OF VICTORIA

CRAMMER v McDOUGALL

Batt J

30 January 1995 — (1995) 21 MVR 363

MOTOR TRAFFIC – ALTERCATION BETWEEN DRIVERS – DRIVER ASSAULTED AND MOTOR CAR DAMAGED – WHETHER OFFENCES "IN CONNECTION WITH THE DRIVING OF A MOTOR VEHICLE" – WHETHER OPEN TO MAGISTRATE TO SUSPEND OFFENDER'S DRIVER LICENCE: *ROAD SAFETY ACT* 1986, S28(1).

Whilst driving his motor vehicle, a motorist beeped his car horn at C. for cutting the motorist off. Both vehicles stopped. C. got out of his car, assaulted the motorist and damaged his vehicle with a machete. At the hearing of the charges against C. of unlawful assault with a weapon and criminal damage, the magistrate in addition to the imposition of a partially suspended term of imprisonment, ordered that C's driver licence be suspended for a period of 6 months. Upon appeal against the licence suspension order—

HELD: Appeal allowed. Order as to licence suspension quashed.
1. Section 28(1) of the *Road Safety Act* 1986 gives power to a court to suspend a driver licence in respect of an "offence in connection with the driving of a motor vehicle".

2. There must be, in a very real sense, a relationship between the offence and the driving or a substantial connection.
***Murdoch v Simmonds* [1971] VicRp 108; [1971] VR 887, followed.**

3. The present offences were not in connection with the driving of a motor vehicle. There was no real relationship or substantial connection. Any connection was an incidental or accidental one.

BATT J: [1] These are two appeals pursuant to s92 of the *Magistrates' Court Act* 1989 on questions of law from orders made by the Magistrates' Court of Victoria at Heidelberg, constituted by Mr Maher, Magistrate, on 25 August 1994. In one case the appellant was convicted on his plea of guilty of a charge of unlawful assault with a weapon, under s24(2) of the *Summary Offences Act* 1966 and in the other case he was convicted on his plea of guilty of a charge of intentionally and without lawful excuse destroying property, namely a car window, under s197(1) of the *Crimes Act* 1958. The part of the orders challenged relates only to the suspension of the driving licence of the appellant in the terms which I will refer to in more detail shortly.

The offences occurred on 10 June 1994 and the orders made were that the defendant be sentenced to imprisonment for a term of 30 days, which was partially suspended, with the term to be served being two days. The operational period of the order was 12 months. But in addition the magistrate ordered that the defendant be suspended from driving in the State of Victoria for a period of six months, that order being effective from 25 August 1994. The appellant obtained from Master Wheeler on 22 September 1994 in one case and 26 September 1994 in the other case a stay of the implementation of the order appealed from.

The questions of law to be decided, as stated by the Master's order, are:

(a) was it open to the magistrate to suspend the appellant's driving licence pursuant **[2]** to s28 of the *Road Safety Act* 1986 or at all?

(b) did the magistrate err in suspending the appellant's licence without giving counsel an opportunity to make submissions on this aspect of the sentence?

The proceedings in the Magistrates' Court after the appellant had entered a plea of guilty to both charges took the form of the police prosecutor, Senior Constable Eliades, reading to the court a summary of the offences, which was accepted by Mr Metcalfe, then appearing for the present appellant, as a fair summary. Mr Metcalfe then made a plea on behalf of the appellant,

after which the magistrate pronounced sentence.

The second of the questions stated by the Master was not argued by Mr Metcalfe, who appeared for the appellant, in view of the concession helpfully and properly made by Mr Just that the appeal was irresistible. Mr Metcalfe simply reserved a right to argue that question in the event of a change of mind on my part appearing before judgment was given. There has been no such change of mind. Since it is unnecessary to consider the second question of law, it is unnecessary for me to go into the facts on which that question is based. Essentially, it is said that the order affecting the appellant's driving licence was made without any submissions being made as to whether such an order was appropriate in the circumstances and without the magistrate having indicated before sentence that he was intending to interfere with the appellant's **[3]** licence. As I say, I do not need to consider those facts put forward or the legal conclusions from them.

It is, however, necessary in respect of the first question stated to refer to the summary of offences that was read by the police prosecutor to the magistrate. With one agreed or accepted correction of a misdescription of a party, that summary is substantially as follows: On 10 June 1994 the appellant was driving his vehicle east in Burgundy Street, Heidelberg, when another motorist, whose name was Harold Smith, beeped his car horn at him for cutting him (the other motorist) off. Both cars then turned into Cape Street, where the appellant got out of his car and ran towards the other driver's parked car with a machete in his hand. The other driver, still being in his car, drove off, but, after driving off, returned to where the appellant was with his car. It was then that the appellant rushed towards the other driver's car with the machete raised and swung the weapon at that other driver's car, smashing the driver's side front window. The appellant then swung the machete at the rear of the vehicle as it drove off, thereby scratching its duco. The other driver thought that the machete was going to be used on him. Minor damage was caused by the scratching of the car, the damage being estimated at $200. No injuries were sustained by the other driver.

Section 28(1) of the *Road Safety Act* 1986 provides, so far as relevant, that if a court convicts a person of, or is satisfied that a person is guilty of, an offence against that Act or "of any other offence in connection with the driving of a motor vehicle" the **[4]** court may suspend for such time as it thinks fit all driver licences and permits held by that person. There is in the present case no question of conviction or guilt of an offence against the *Road Safety Act* 1986. The question is whether in the circumstances disclosed by the summary read to the court by the police prosecutor the offence of unlawful destruction of property under s197(1) of the *Crimes Act* 1958 or the offence of unlawful assault with a weapon under s24(2) of the *Summary Offences Act* 1966 was an offence "in connection with the driving of a motor vehicle".

Whilst offences against either of those sections might in other factual circumstances well be offences in connection with the driving of a motor vehicle, in my opinion the offences of assaulting Mr Smith by brandishing or threatening him with the machete and of intentionally destroying the car window with the machete are not here offences in connection with the driving of a motor vehicle. The case is factually very similar to the case of *Murdoch v Simmonds* [1971] VicRp 108; [1971] VR 887. There the defendant, while driving his motor car, became annoyed at the manner of driving of another motorist and subsequently followed the other vehicle to a shopping centre in order to remonstrate with that driver. As a result of the subsequent incident the defendant was charged and convicted of assault by kicking the other driver. After conviction, the magistrate, purporting to act under s26(1) of the *Motor Car Act* 1958, which was then in force, cancelled the defendant's licence to drive a motor car. That provision, so far as material, was almost identical with the present provision, but **[5]** here we are concerned with suspension rather than cancellation. Mr Justice Adam held that the offence of which the defendant had been convicted did not fall within s26(1) of that Act and that the magistrate had no jurisdiction to cancel the defendant's licence in the circumstances. At p888 His Honour drew attention to the width of the words "in connexion with" and said that from their context they could be given a variety of meanings, some wide, some narrow, and that the problem, of course, was to construe them in the then present context. There was, he observed, in a sense, of course, some connection or relationship between the offence of assault by kicking in that case and the driving of a motor car but he asked whether it was sufficient that in the history of the commission of the offence of assault by kicking there was an incident connected with the driving of a motor car, both by the victim and by the defendant. In the end, Adam J answered that question in the negative. At p889-890 His Honour said:

> "The context is important in all these cases where the words 'in connexion with' are used in legislation. One would naturally be disposed to treat the words 'in connexion with the driving of a motor car' in their context as meaning that in connexion with the manner of driving the car there were grounds for disqualifying the driver from holding a licence. One would naturally treat such an occasion as the present, where there is some link between earlier driving of a motor car and a subsequent assault which had in itself nothing to do with the driving of a motor car as outside the bounds of an offence in connexion with the driving of a motor car. That conclusion would be reinforced by reason of the fact that it is a highly penal provision; this additional punishment, goes beyond that provided under the *Summary Offences Act*. The cancelling of a licence in some cases is, of course, far more serious as a penalty than any fine that can be inflicted. It is of a penal nature **[6]** and in accordance with the well-settled rules of construction where the language is vague or general the onus does lie on the informant seeking to obtain the penalty to show that the defendant was clearly intended to come within the scope of the legislation. So one is the more predisposed to giving to the words 'offence in connexion with the driving of a motor car' a meaning which indicates that in a very real sense the offence in question is related to the driving of a motor car. As it is put in one case in another connexion by, I think, Kitto J, 'a substantial connexion' is required to answer the expression.
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> The problem is not, I think, devoid of some helpful authority to which Mr Shatin referred me, and I would rely, in particular, on the two earlier English decisions in which a similar legislation had to be construed. The question being in each of these cases whether where a driver of a motor car left his motor car as an obstruction on a highway then the offence of obstructing a highway was one in connexion with the driving of a motor car. Of course, in a sense there was a connexion because were it not for the place to which the car was driven the car would not have been there as an obstruction. So one could not say there was no association or connexion between the driving of a motor car and the commission of the offence. But, in each of the cases, on language similar to s26, the court held that there was no power to deal with the licence. One case was *R v Lyndon* (1908) 72 JP 227. The other was *King v Justices of Yorkshire* [1910] 1 KB 439. In the latter case emphasis was placed on the context in which the words 'in connexion' were used, and the conclusion was reached that the offence had to be in some way connected with the manner in which the motor car was driven. It had to be, in a real sense, an offence connected with the driving of the car and it was insufficient where the driving had been concluded before any offence was committed. Emphasis in the latter case was laid on the fact that other statutes made the offence for which the penalty was imposed an offence, and to that extent made it unnecessary that you should read the equivalent to s26 as making provision for a further penalty. The notion there was also expressed that the offence should have something to do with the actual locomotion of the car to come within the words 'offence in connexion with the driving of a motor car'."

[7] His Honour pointed out that there was no element at all of driving at the time the offence of assault by kicking was committed. As he noted, there are many other cases on the words "in connexion with", but that expression varies in its denotation according to context and I do not think it is necessary to delve into the treasury of cases on it.

In my view, I should, as a single judge, follow the decision of Adam J which has stood for over 20 years, on legislation involving an almost identical provision. There must, then, be in a very real sense a relationship between the offence and the driving or a substantial connection. In my view there was no such relationship or connection here. There is, of course, as there was in *Murdoch v Simmonds*, some connection, but it is an incidental or accidental one, to use the words of Carter J in a case I shall mention shortly. It is true that, had the appellant not been driving and had Mr Smith not been driving, the offence would not have occurred. In that sense the driving is a cause *sine qua non*, but more is required. Here the driving, by the appellant at least, had concluded before the offences commenced to be committed and in my view, although the cases may suggest *obiter* the contrary, the driving in question must be that of the defendant (or, here, appellant) in order to warrant as a matter of policy or principle the authorisation of the suspension or cancellation of the defendant's or appellant's driver licences or permits.

The decision in *Murdoch v Simmonds* was applied in *Buckley v DPP* **[8]** (unreported, Ashley J, 4 August 1994), in somewhat different circumstances, being circumstances further from those in the present case or those in *Murdoch v Simmonds.* Ashley J distinguished *Rochow v Pupavac* [1989] VicRp 8; [1989] VR 73; (1988) 9 MVR 93, where Nathan J held that s28(1) of the *Road Safety Act* 1986 did authorise the suspension of the applicant's driver licence where the applicant had been convicted of stealing a car cigarette lighter from a vehicle parked in a used car yard, to which he had driven in another car. At 75-76 Nathan J formulated four circumstances in which he considered s28 gave power to suspend licences. That formulation is commented upon by Ashley J in *Buckley v DPP*. But, leaving that aside, none of the four circumstances in the formulation is

applicable here. The fourth, which is the widest, is where the driving of the vehicle is inextricably connected with the commission of an offence but the vehicle itself may not be driven in a way which itself amounts to an offence. The purposive test posed by His Honour would not be satisfied here. Nor is the connection inextricable.

But, in any event, because of its closeness factually and because of its unchallenged history, I consider that I should apply *Murdoch v Simmonds.* The reasoning of Adam J in that case when applied to the facts of this case leads to a negative answer to the first question of law stated in the Master's orders. In other words, the Magistrates' Court did not in my view have jurisdiction, or authority or power, to suspend the appellant's licence. I would only add that in *R v Ward, Marles* **[9]** *and Graham* [1989] 1 Qd R 194 *Murdoch v Simmonds* was referred to with, at any rate, substantial approval in the judgment of Carter J at 199, where he referred to a circuit judgment of his own in which he had considered *Murdoch v Simmonds.* In the latter judgment he had said that one must look for a substantial connection between the use of the property (that being the relevant phrase there) and the commission of the offence, not a mere accidental or incidental connection.

I note incidentally that in the judgment in *R v Ward, Marles and Graham* at 200 the unnamed judgment of Kitto J referred to in *Murdoch v Simmonds* at 889 is identified as being *Berry v FCT* [1953] HCA 70; 89 CLR 653 at 658; 10 ATD 262; (1953) 5 AITR 591; (1953) 27 ALJR 660. There, in a far different context, Kitto J said that there was need for "a substantial relation, in a practical business sense" between the receipt of money "for or in connection within the acquisition of the goodwill of a service station lease and the acquisition of the property."

Section 89 of the *Sentencing Act* 1991, which authorises suspension or cancellation of driver licences in certain circumstances, is inapplicable here. For the reasons I have given, the appeals will be allowed and, subject to anything counsel may say, there will be orders in each appeal in accordance with the following minutes:

1. Appeal allowed.

2. So much of the order of the Magistrates' Court of Victoria at Heidelberg made on 25 August 1994 as ordered that the defendant (the appellant) be suspended from driving in the State of Victoria for a **[10]** period of six months and ordered that the order on the licence be effective from 25 August 1994 be quashed.

3. The respondent pay the appellant's taxed costs of this proceeding, including any reserved costs.

4. A certificate be granted to the respondent under s13(1) of the *Appeal Costs Act* 1964.

APPEARANCES: For the appellant Crammer: Mr C Metcalfe, counsel. Toop Harris & Metcalfe, solicitors. For the respondent McDougall: Mr D Just, counsel. Solicitor for Public Prosecutions.
