40/69

SUPREME COURT OF VICTORIA

HOLLINGSWORTH v BEAN

Crockett J

23 March, 3 April 1970 — [1970] VicRp 101; [1970] VR 819

CRIMINAL LAW – ILLEGAL USE OF A MOTOR CAR – DEFENDANT GIVEN PERMISSION TO ENTER THE CAR AND LISTEN TO THE RADIO WHILST EATING HIS LUNCH – DEFENDANT NOT GIVEN PERMISSION TO DRIVE THE CAR – DEFENDANT FOUND DRIVING THE MOTOR CAR AND CHARGED WITH THE OFFENCE – WHETHER DEFENDANT ILLEGALLY USED THE CAR – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S81(2).

HELD: Order nisi absolute. Remitted to the Court for further hearing.
1. The defendant never had legal possession of the motor car conferred upon him. He did not have the right to full use or control of the vehicle. There plainly was no intention on the part of the car owner to give separate and exclusive control of the car to the defendant so as to render the defendant a bailee of it.

2. The circumstances in this case admitted of no other finding than that of a grant to the defendant of a mere licence to make a limited use of the motor car. This did not involve nor was there a grant of legal possession to the defendant. The use consented to was completely different in character from the use to which the defendant put the car.

3. It followed that the Magistrate's decision that the offence charged was one that the defendant could not commit because of his prior lawful possession of the motor vehicle was a decision to which he was not on the evidence permitted in law to arrive at. What the defendant did was clearly an unlawful use of the vehicle.

CROCKETT J: This is the return of two orders nisi to review decisions of a Court of Petty Sessions at Ringwood dismissing informations charging the defendant/respondent with offences created by s81(2) of the *Crimes Act* 1958.

In the first case the defendant was alleged to have taken and used a motor car on 12 June 1969 without the consent of the owner or person in lawful possession thereof. In the second case an attempt to commit the same offence on 18 June 1969 was alleged.

Both informations were dismissed at the conclusion of the case for the informant/applicant. The stated ground of dismissal was that the evidence demonstrated the defendant to be in the possession of the motor car in question at the material time, and he was, therefore, incapable of unlawfully taking and using it. It was this finding which was challenged before me.

Before dealing with this point, two other matters mentioned in argument may be disposed of. Counsel for the informant in the court below indicated that the informations may be bad for duplicity. He asked that if I took such a view I amend the informations by deleting the words "and use". Counsel for the defendant maintained the informations were not duplex. The precise point arose in identical circumstances before Newton J in *Clements v Brearley* (unreported, 6 May 1968). His Honour then said:

> "Mr Charles who appeared before me for the applicant/informant, Senior Detective Clements, pointed out in his opening that the information may be bad for duplicity because the information charged the defendant that he did take and use the car without consent, and under s81(2) taking a motor car without consent and using a motor car without consent appear to be two separate offences: cf *Wimble v Foulsham* [1908] VicLawRp 18; [1908] VLR 98; 13 ALR 727; *R v Murphy* [1957] VicRp 75; [1957] VR 545; [1957] ALR 593; *sub nom. Murphy v R* [1957] VicRp 75; [1957] ALR 593. This aspect of the case was not apparently appreciated at the hearing in the Court of Petty Sessions nor, indeed, until after the order nisi had been granted. It may be that the words 'and use' in the information ought to

be regarded as mere surplusage: cf. Paul's *Justices of the Peace*, 2nd ed., p175, para. (vii). It may be remarked that in *Donoghue v Terry* [1939] VicLawRp 27; [1939] VLR 165; [1939] ALR 215, no question was raised as to duplicity in a case under s19 of the *Motor Car Act* 1930 where the defendant had been charged with taking and using a motor car without consent, notwithstanding that that section appears to have created alternative offences of taking without consent and using without consent."

Although Newton J proceeded to amend the information pursuant to power conferred by s160 of the *Justices Act* 1958, he appears to have done so *ex abundanti cautela*. His inclination appears to have been against the view that the information was duplex. Having regard to previously expressed judicial opinion and because the defendant expressly makes no complaint, I think that I should not treat the informations as bad for duplicity and, accordingly, I do not propose to amend them.

The second matter is this: counsel for the informant conceded that in relation to the second information if the Stipendiary Magistrate who constituted the court was wrong in the view he took on the question of possession, nevertheless the evidence made it plain that the defendant had committed the offence of illegally using the car and not a mere attempt to commit that offence. That concession was undoubtedly correct. Whilst on any indictment charging a person with committing the offence the accused may be convicted of an attempt (*Crimes Act* 1958, s421), counsel for the informant did not think the converse was correct in relation to an information charging merely an attempt to commit an offence. Still less did he think that such an information could support a conviction of an attempt to commit an offence where the completed offence was proved. Accordingly, he did not oppose the dismissal of the order nisi in the second case.

Having regard to the stated attitude of the informant I do not pause to examine the question and that order nisi will be discharged.

Because the discharge of the order nisi arises in this way it is not to be taken as representing a concluded or even a properly informed view on the question, although I note what appears to be support for such a result in a decision of the Divisional Court in *Rogers v Arnott* [1960] QB 244; [1960] 2 All ER 417. That case, as does this present one, dealt with an offence which was disposed of by summary procedure. It is a decision which has been much criticised by the commentators. As both the attempt and the completed offence are misdemeanours it would appear that the offence charged by the second information cannot be governed by s422 of the *Crimes Act* 1958. This section provides that if upon the trial of an accused the evidence proves felony the accused may nevertheless be convicted of a misdemeanour, e.g. an attempt to commit the felony which is itself a misdemeanour at common law. This provision avoids the results in most cases of the common law doctrine of merger, which causes the destruction of the separate legal existence of a misdemeanour if the same facts which constitute the misdemeanour also constitute a felony. But cf R *v Welker* [1962] VicRp 36; [1962] VR 244. Furthermore, where the defendant consents to be dealt with summarily instead of upon indictment the section would appear to have no application: see generally Howard, *Australian Criminal Law*, pp272-6.

This leaves for resolution the principal matter debated before me. It is raised by the grounds of the order nisi which are as follows:–

(1) The Stipendiary Magistrate should have found that any permission given by the owner of the vehicle to the defendant in relation to it did not extend so as to permit the defendant to take and/or use the vehicle within the meaning of s81(2) of the *Crimes Act* 1958.

(2) That on the evidence the Stipendiary Magistrate should not have found—

(a) that the defendant was in lawful possession of the vehicle;

(b) that the defendant was entitled to use the vehicle by driving it.

(3) That on the evidence the Stipendiary Magistrate should have held that the defendant had a case to answer.

The evidence that was before the magistrate is to be found in the affidavit of the informant. An answering affidavit sworn by the father of the defendant has been filed, but, in my opinion, it contains no contradictory material in any relevant detail. One Dixon and the defendant were

in May and June of 1969 fellow employees. They worked with a firm called Highway Timber at Croydon. Dixon was a foreman. He was accustomed to leave his car each day at a nearby public car park in or adjacent to the Croydon Park. On occasions Dixon allowed the defendant, who was then only 17 years of age, to sit in his car at lunchtime simply for the purpose of listening to the car radio whilst he ate his lunch. The informant deposed to the defendant having in a signed record of interview admitted that Dixon "used to give me the keys to get in his car and listen to the radio while I ate my dinner". I take this to mean that the keys were necessary to unlock the door of the car in order to get into it, and possibly also to permit the radio to be turned on.

The defendant further said (according to the same record) in answer to the question: "Did he [Dixon] say at any time that you could drive it?"--"No, he doesn't let his car be driven by anyone except his son."

On 18 June 1967 when he had entered the car in these circumstances he commenced to drive the car away. After travelling some 200 yards he was intercepted by the police. During an interrogation that immediately took place the defendant admitted that he had no permission to drive the car but only to sit in it. On this evidence the magistrate was persuaded that the defendant was initially in lawful possession of the car, and in consequence was unable to be guilty of any unauthorized taking or using of the vehicle. In my judgment, this was an incorrect conclusion to which the magistrate came.

Reliance for such a conclusion appears to have been placed on *Mowe v Perraton* [1952] 1 All ER 423; 35 Cr App R 194. In that case a driver was employed by his employer to perform certain carrying and delivery work. He used a van for this purpose. During the course of the day's work he used the van on a private delivery job of his own. He was charged under United Kingdom legislation similar to s81(2) of the *Crimes Act*. Lord Goddard LCJ, speaking for the Divisional Court held that on these facts the driver had taken and driven the van as part of his work and, therefore, could not be said to have committed the offence created by the section.

Although the judgment of the court (despite the expressions used in the headnotes of each report) contains no discussion of the nature of the driver's acquisition of the vehicle, the decision appears explicable on the ground that at no time did the driver have more than mere custody of the van. In other words, the custody of the defendant never ripened into possession of any kind, let alone that degree of unlawful possession that is necessary for there to be a taking within the meaning of the section. It is trite law that except where a servant receives a chattel from a third person to hold for his master the servant merely has custody of his master's goods, legal possession thereof remaining with the master.

This is made clear in two later cases: *R v Wibberley* [1966] 2 QB 214; [1965] 3 All ER 718, and *Clements v Brearley*, *supra*. In the first of these cases a truck driver failed to return his vehicle to his employer's yard at the end of the day's work. Instead he took it to his home and in the evening used it for purposes of his own. The Court of Criminal Appeal distinguished *Mowe v Perraton* on the ground that in that case of the driver's "tour of duty" had not concluded when he used the vehicle for his own purposes, whereas it had in *Wibberley's Case*.

In *Wibberley's Case* the offence did not occur whilst the driver had lawful custody. That ceased when he parked the vehicle at the end of the day's work. What he did thereafter amounted to a wrongful taking of possession, no less than if he had returned the vehicle to the employer's yard in the first place and in the evening returned, broken into the yard and driven the vehicle away.

In *Clements v Brearley*, *supra*, Newton J reached a like conclusion when dealing with facts not greatly dissimilar in their essential features from those in *R v Wibberley*, *supra*. His Honour said:

> "The servant takes the car when he begins to use it for his own purposes after working hours, and after the time when he should have returned it to his employer. He then has possession of the car, not merely custody as before. On the other hand, there is no taking if all that the servant does is to use the car for his own purposes before his working hours or tour of duty are completed".

But it seems to me to be a misconception to have recourse to these cases in order to

determine the present matter. The defendant was not the servant of Dixon. He was never custodian of the car by virtue of any master-servant relationship.

This is not a case where a decision has to be made as to whether or not initial custody has ripened into possession in law which can be characterized as a taking in breach of s81(2).

In the three cases to which I have already referred the argument of the defendant was:

> "I cannot be guilty of the offence as I never had possession— nly custody." In the present case (which is said in reality to be a bailment case) the submission has to be: "I cannot be guilty as I always had possession and it was a lawful possession."

What the defendant's contention in truth amounts to, I think, is rather the converse of the employee-driver cases. It is that Dixon by his actions and words bailed the car to the defendant who thereupon at all relevant times had legal possession of the car and was, therefore, incapable of wrongfully taking something of which he was already in lawful possession. If the defendant had become the bailor of the car this result may well follow: see *Ex parte Johnstone* (1935) 52 WN (NSW) 194. In that case the defendant borrowed a car with the owner's consent on condition that it be returned not later than 9 p.m. on the day it was borrowed, but in fact he drove the car to a town a considerable distance away and failed to return in it. No offence of taking and using a motor vehicle without the consent of the owner was held to have been committed. It should be noted that the New South Wales Act, unlike the Victorian legislation, employs the expression "takes and uses".

But cf *McLeod v Hanrahan* [1886] VicLawRp 124; (1886) 12 VLR 587, and *Wimble v Foulsham* [1908] VicLawRp 18; [1908] VLR 98; 13 ALR 727. The latter case was concerned with legislation (74 of the *Crimes Act* 1890) in much the same terms as s81(2) of the *Crimes Act* 1958, save that the prohibition related to horses instead of motor cars. In that case a horse had been bailed to the defendant. The defendant used the horse for his own purposes during the bailment. Hodges J ruled (contrary to his own opinion but due to the compulsion of the reasoning of the Full Court in *McLeod v Hanrahan*) that an offence had been committed remarking:

> "It does not mean that a person who has lawful possession of the horse can as far as this section is concerned do what he please with it."

It may be noticed too that in *Keogh v Pratt* [1927] VicLawRp 24; [1927] VLR 174; *sub nom McKeogh v Pratt* [1927] ALR 144, Mann J (as he then was), pointed out that the section "was framed for the protection of possession".

However, I find it unnecessary to express any conclusion on the question whether a person in lawful possession of a motor vehicle can breach s81(2) and, if so, whether such breach is limited to cases where it is necessary to prove "a use" of the vehicle as an element of the charge. In my opinion, the defendant never had legal possession of the motor car conferred upon him. He did not have the right to full use or control of the vehicle. There plainly was no intention on the part of Dixon to give separate and exclusive control of the car to the defendant so as to render the defendant a bailee of it.

Pollock and Wright in their *Essay on Possession in the Common Law* point out (p58) that in addition to cases on the one hand of bailment where possession passes, and, on the other hand, of custody of a servant of the property of his master where possession does not pass "there may be cases of handing over for a limited purpose which are on the face of them not obviously within either of these classes. It must then depend on the true intent of the transaction as ascertained from all the circumstances whether there is a bailment or a mere authority or licence to deal with the thing in a certain way".

The circumstances in this case, in my opinion, admit of no other finding than that of a grant to the defendant of a mere licence to make a limited use of the motor car. This did not involve nor was there a grant of legal possession to the defendant. It follows that the Stipendiary Magistrate's decision that the offence charged was one that the defendant could not commit because of his prior lawful possession of the motor vehicle was a decision to which he was not on the evidence permitted in law to arrive at.

I should add that in seeking to show cause counsel for the defendant relied upon one further argument. He contended that if I were of the view that the defendant had not had possession of the car conferred upon him but had wrongfully taken it, the unamended information required that the informant must establish that the defendant also "used" the car without the consent of the owner.

It was argued that the "uses" to which the car might be put were not divisible. It was said that a consent to use the car to sit in it involved the right to make any other use of the car with impunity. I cannot accept this submission. Possibly the argument to some extent in some circumstances may have validity. To give consent to use a car provided that the use was, for example, limited to its being driven only on sealed roads could scarcely mean that an offence was committed if the car were driven on an unsealed road. But where the uses are totally different, I think, different considerations apply. The use consented to in this case was completely different in character from the use to which the defendant put the car. Consequently, I think that, in the circumstances under review, what the defendant did was clearly an unlawful use of the vehicle.

In the first case I shall make the following orders:–

(1) Order that the order nisi be made absolute.

(2) Order that the order of the Court of Petty Sessions at Ringwood dismissing the information to be set aside.

(3) Order that the case be remitted to the Court of Petty Sessions at Ringwood for further hearing.

(4) Order that the costs of the applicant including all reserved costs be taxed and when taxed be paid by the respondent.

(5) Order that the respondent be granted an indemnity certificate under s13 of the *Appeal Costs Fund Act* 1964.

In relation to the second case the order nisi will be discharged without costs.

Solicitor for the informant: Thomas F Mornane, Crown Solicitor.
Solicitor for the defendant: WH Aughterson.
