

36/88

## SUPREME COURT OF VICTORIA

**ROCHOW v PUPAVAC**

Nathan J

19 May 1988 — [1989] VicRp 8; [1989] VR 73; (1988) 9 MVR 93

**MOTOR VEHICLES – THEFT OFFENCE – MOTOR CAR USED FOR PURPOSES OF COMMITTING THEFT – WHETHER "OFFENCE IN CONNECTION WITH THE DRIVING OF A MOTOR VEHICLE": ROAD SAFETY ACT 1986, S28(1)**

1. Section 28(1) of the *Road Safety Act 1986* gives a court power to suspend a person's driver licence where a motor car has been driven to effect a criminal purpose.

2. Accordingly, where a person drove his motor car to a car yard for the purposes of stealing a car cigarette lighter and was later charged with that offence, it was open to the Magistrate to conclude that that person was guilty of an "offence in connection with the driving of a motor vehicle" and to suspend that person's driver licence.

**NATHAN J:** [1] In October 1986 Rochow stole a car cigarette lighter from a vehicle parked in a used car sale yard at Geelong. In May of 1987 he pleaded guilty to that offence under s74 of the *Crimes Act 1958* No. 6231. The Magistrate fined him \$150.00 and suspended his licence to drive under the terms of the *Road Safety Act 1986* No. 127 (the Act). An order nisi was obtained on the ground that the Magistrate misdirected himself in holding he had power to suspend Rochow's licence, because the offence for which Rochow was convicted involved the driving of a motor car. The remaining grounds of the order nisi are merely reiterations of that proposition.

The facts surrounding the offence are as follows: Rochow, in company with a co-offender, drove his Holden [2] station wagon around the Geelong area for the purposes of checking out some used car yards. At about two o'clock on the afternoon he drove to the G.S. Car Sales Yards where he inspected some of the vehicles parked in the yard. He found the rear door of one of the cars open, he got into it and found that vehicle to have a car cigarette lighter in its dashboard the same size fitting and colour as that missing from his own car. Later that day Rochow and his companion returned to the used car yard for the specific purpose of taking the car cigarette lighter from the car knowing that the vehicle was not locked. Rochow drove his car to the car yard for the purposes of thieving. On arrival Rochow's companion went over to the parked car and actually took the car cigarette lighter from it. At that time Rochow was waiting in his car in the driver's seat. Upon his companion's return with the stolen lighter Rochow drove the car away.

I accept the evidence of Mr Gow, the prosecuting Sergeant of Police, who stated that the Magistrate raised with defence counsel and himself the issue whether he had the power to suspend Rochow's licence under the terms of the Act. I accept Rochow's counsel submitted there was no such power but that Gow himself submitted there was on the basis that Rochow had driven the car twice during and for the perpetration of the theft. That is what he characterised as the reconnoitring expedition in the afternoon and the driving to and from the scene at the time of the actual theft. The Magistrate accepted Mr Gow's submissions and duly ordered the suspension of Rochow's licence.

[3] I turn to the provisions of the Act relating to licence suspensions. That is s28(1). It reads as appropriately edited:

"28.(1) If a court convicts a person of, or is satisfied that a person is guilty of an offence against this Act — or of any other offence in connection with the driving of a motor vehicle, the court—

(a) in the case of an offence of driving a motor vehicle at a speed of 30 kilometres per hour or more in excess of that permitted ... must suspend ... all driver licences ...

(b) in any case but subject to paragraph (a), may suspend for such time as it thinks fit or cancel all driver licences ... disqualify him or her ..." (my emphasis) .

Paraphrased for the purposes of this judgment, the section reads as follows. If the Court is satisfied that a person is guilty of an offence in connection with the driving of a motor vehicle, the Court (sub-s(a)) shall with regard to some speeding offences suspend the licence, or (b) which is expressed to be subject to sub-s(a) may suspend it in any other case.

Mr Szabo, for Rochow, contended the section requires actual driving of the motor vehicle in connection with the direct and proximate commission of an offence. He says the section is not to be interpreted as if the words "in connection with the driving of a motor vehicle" read "knowingly use the motor vehicle for the commission of an offence". With that latter contention I agree. But he contends Rochow's driving of his motor vehicle was a peripheral matter to the theft, that the theft would have occurred in any event, and in the result the driving of the motor vehicle had little or nothing to do with the [4] commission of the offence. With that contention I do not agree.

He cited *Murdoch v Simmonds* [1971] VicRp 108; (1971) VR 887, and the authorities referred to therein of *R v Lyndon* (1908) 72 JP 227, and *King v Justices at Yorkshire* (1910) 1 KB 439. At first glance there would appear to be much that is attractive in that proposition, particularly when it is recalled that s28 falls within the provisions of the *Road Safety Act* rather than the *Crimes Act* or other Acts relating to road use. Section 1 of the Act recites its purposes as being:

"(a) to provide for safe, efficient and equitable road use; and

(b) to improve and simplify procedures for the registration of motor vehicles and the licensing of drivers; and

(c) to provide for the safe use of recreation vehicles; and

(d) to ensure the equitable distribution within the community of the costs of road use."

The Act specifically does not appear to be directed at providing penalties in respect of offences under the *Crimes Act* or any other Act, but addresses itself to the safe or proficient use of motor vehicles. Although I am enjoined to look at the Act as a whole, including its purposes section, I am cognisant of the fact that s28 of this Act had as its predecessor s26 of the *Motor Car Act* 1958 No. 6325, and an antecedent history which predates s1 of this Act. At first blush it would seem curious to find embedded in the *Road Safety Act* a provision which extends the consequences of criminal behaviour. But the historical foundation for that result [5] predates the Act. I find the words of s23 plain on their face, proffering no ambiguity, inconsistency or repugnancy internally or with any other Act. When the *Road Safety Act* was re-enacted, Parliament must be presumed to have known of the antecedent history of the section and the effect of its reach to provide for suspension of licences where a motor car was driven as part and parcel of the commission of an offence.

It was in fact appropriate for the legislature to have set up under the terms of Part III of the Act, (the Licensing provision), the power to extend the reach of that Part to all other Acts of this State. It would be an impossible task to have listed specifically the offences and Acts giving rise to the consequence of suspension of licences. Accordingly, the omnibus provision which finds itself expressed in s28 is less curious than it would first appear. For example the forfeiture of guns used in the commission of crimes is effected under the *Firearms Act* 1958 No. 6251 and not the *Crimes Act*.

Further, it must be borne in mind that a licence to drive is a personal privilege not a right (viz. Barwick CJ in *Banks v Transport Regulation Board (Vic)* [1968] HCA 23; (1968) 119 CLR 222; [1968] ALR 445; (1968) 42 ALJR 64); a licence permits a person to do an Act which in other circumstances would be unlawful. Therefore, the appropriate Act to provide for the suspension of licences is the Act which grants them in the first place, namely the *Road Safety Act*, and not whatever Act pursuant to which a specific offence may have been committed, in this instance the *Crimes Act*.

[6] I am satisfied that s28 gives a Court a power to suspend licences relating to the driving of a motor car in the following circumstances: Firstly, where offences are connected with the driving of the motor car under the actual terms of the *Road Safety Act*, eg s28(1)(a) the speeding offences. Secondly, where the offences are connected with the driving of a motor vehicle under

other Acts such as the *Motor Car Act* or the *Transport Act*, which deal specifically with the use of motor vehicles. Thirdly, with offences which are connected with the driving of a motor vehicle, where the vehicle itself is used as an actual instrument or tool to perpetrate the offence such as using a car to inflict malicious damage, or to purposefully wound and cause actual bodily harm. And fourthly, where the driving of the vehicle is inextricably connected with the commission of an offence, but where the vehicle itself may not be driven in a way which itself amounts to an offence.

For example, where a vehicle is driven as a mobile depot for a drug-pusher, or, as I will go on to find in this case, the vehicle is used as a part of the equipment or paraphernalia for the commission of an offence. The Act constrains the object to which the vehicle is put, as the driving of it, and not the mere use of it. The test is purposive. If the purpose or reason for driving the vehicle is to commit an offence, even if other means are available to do so, the vehicle is being driven "in connection with" that offence. For example Rochow may have chosen to walk to the car yard and then run away, or to have ridden a bicycle. However in this case he chose to drive his car, the purpose of so doing, was to steal the lighter.

[7] In this case I am satisfied that Rochow drove his car in a way which became inextricably connected with the commission of the theft. He may have driven it earlier in the afternoon on a general reconnaissance mission. But without doubt he drove it as a means of conveyance to the scene for the purposes of getting away from the scene of the crime. In this case there is only a qualitative difference between Rochow's driving of his vehicle and that of a bank robber who drives or has driven for him a car to a bank for the purpose of robbing it. In this case, the good or chattel to be stolen was a relatively trifling thing, namely a car cigarette lighter, but it is no different in kind than the money in the bank. No reasonable citizen would doubt that the "getaway" car, driven at speed from the scene of the "hold up" was being driven in connection with the robbery.

In my view, where the driving is merely an incidental and peripheral event to the commission of an offence, it cannot be said that the vehicle is being driven in connection with that offence. But where the driving facilitates the commission of the offence and becomes an ingredient in its commission then that driving is related to and "in connection with" the commission of that offence. It is encompassed by the words of s28(1). I am guided by the decision in *Murdoch v Simmonds*. Although that case is readily distinguishable on its facts from this. In that case a driver who believed he was being harassed by another driver drove after the harassing driver for the purposes of remonstrating with him. There was some kerb side exchange [8] and they drove to a shopping centre car park where remonstrance grew into an assault. Adam J held the driving was not in connection with the assault, accordingly there was no power under the predecessor of this section, for the Magistrate to suspend that driver's licence. He said, when referring to the power of suspension at p889:

"It is of a penal nature 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 more predisposed to giving to the words 'offence in connection 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 connection by, I think, Kitto J 'a substantial connection' is required to answer that expression".

And further, at p890:

"I have concluded that ... this wide form of expression must take its meaning from the context, and the context here suggests to me that the words must be read, at least, narrowly enough to require a substantial relation between the offence omitted and the driving of the car and that connection is absent."

In my view the causal and contextual relationship between the driving and the commission of the offence referred to by Adam J, absent in that case, is present in this one. The Act invests in a Magistrate a power of suspension in relation to the way a motor car is driven to effect a criminal purpose. If an offence is committed by necessarily driving a motor vehicle here as the "getaway" car, the vehicle is being driven in connection with an offence and the consequence of licence suspension may ensue. Of course these cases must turn on their particular facts. The

connection between the act of driving and the commission of an offence is one which will require [9] qualitative assessment by the presiding Magistrate in each case. No firm rules could or should be expressed other than to say that a connection must not be so remote and fanciful as to offend a reasonable man's concept of relationship of one event with another.

In this case Rochow's driving was not a mere incident to the theft of the car lighter. It was an inextricable ingredient in the commission of the offence and a part of its unsuccessful commission. Finally, had it been that Rochow had stolen the cigarette lighter at the time of reconnoitring the car yard and had not driven there specifically for the purposes of thieving, then indeed the Act would have been too remote and no suspension of his licence could have ensued. This observation entrenches the view that each case must be looked at in the light of its own facts. And, therefore, I discharge the order nisi.

Solicitor for the applicant: Legal Aid Commission.

Solicitor for the respondent: Victorian Government Solicitor.

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