28/96

SUPREME COURT OF VICTORIA

BURNETT v GALTIERI

Nathan J

25 March 1996

CRIMINAL LAW – THEFT OF MOTOR VEHICLE – VEHICLE SEIZED BY POLICE – RETURNED TO RIGHTFUL OWNER – VEHICLE TAMPERED WITH BY UNKNOWN PERSON – DEFENDANT DEPRIVED OF OPPORTUNITY OF EXAMINING VEHICLE TO ESTABLISH IDENTITY – WHETHER ABUSE OF PROCESS – "MOTOR VEHICLE" – MEANING OF – WHETHER VEHICLE WITH DIFFERING IDENTIFICATION NUMBERS A MOTOR VEHICLE – WHETHER DEFENDANT GUILTY OF THEFT: *CRIMES ACT* 1958 S73(14).

A vehicle in B.'s garage which was seized by police had a compliance plate on it from a previous vehicle owned by B., but a chassis number for a vehicle belonging to O. After the seizure, the police returned the vehicle to O. When B. wished to inspect the vehicle subsequently to ascertain whether it belonged to O. or somebody else, it was discovered that the chassis number had been removed. B. submitted at the hearing that the proceeding should be stayed as an abuse of process. The magistrate rejected this submission and found the charge proved. Upon appeal—

HELD: Appeal dismissed.
1. Given the evidence as to the ownership of the vehicle, it was fair and reasonable for the police to return the vehicle to its rightful owner. B. was not deprived of all chance of challenging the identity of the vehicle. Accordingly, the magistrate acted within constraints of fairness and propriety by rejecting the abuse of process argument.

2. A motor vehicle is an object, moveable, capable of conveying humans and goods and driven by its own motive power. In the present case, given the nature of the vehicle and the admission by B. that he drove it, it was open to the magistrate to find that the vehicle was a motor vehicle belonging to another person, that it was used by B. and that B. was guilty of theft.

NATHAN J: [1] This matter is an appeal from the Magistrates' Court. It comes by way of s92 of the *Magistrates' Court Act*. I shall state the facts shortly and succinctly and then move to the questions of law raised. The appellant, Burnett, was charged under the provisions of the *Crimes Act*, s73(14), with the theft of a motor car. He was convicted. The appeal arises out of that conviction. The circumstances of the theft are as follows. On 5 August 1994 members of the police force went to Burnett's home searching for stolen goods. They found a motor car parked in the garage of the house and checked its registration plates and also the compliance plates which are attached to the engine of the motor car. I should say that vehicles in this State are identified not merely by the registration plates on the external parts of the car but by compliance plates which are attached to the engine and by numbers which are embedded in the chassis structure of a car. Checks of these various numbers resulted in Burnett being charged with driving an unregistered vehicle, which charge was dismissed and with using false registration plates, which was also dismissed and also in the theft charge to which I have referred. Investigations revealed that the compliance plate attached to the engine mountings was not that of the vehicle as a whole, but was that issued, in respect of a vehicle, which Burnett had previously owned. The vehicle was towed away and a search of the number engraved on its chassis revealed the chassis to be that belonging to a vehicle owned by a Mr Ottone. Mr **[2]** Ottone then attended at the police station and identified the car by its external features and not by its chassis number as being his. Ultimately that car was returned to him.

It is the surrender by the police members of the car to the owner, Mr Ottone, that has given rise to the substantial ground of this appeal. For it is said that the police, by surrendering the exhibit, thereby deprived Mr Burnett of the possibility of challenging the identification of the car and depriving him of the prospect of asserting that the vehicle found in his garage was not the vehicle of Mr Ottone. This becomes so because after the vehicle had been returned to Mr Ottone the chassis number was removed. It has not been suggested that this tampering, if indeed it were, was conducted by members of the police force.

Before the Magistrate counsel for Mr Burnett asserted that the process was an abuse of the court's procedures in that insufficient opportunity had been proffered for tests to be conducted arising out of the surrender of an important police exhibit, namely the motor car. It was said that the way the Magistrate despatched the application concerning abuse of process, he misdirected himself, took into account matters he should not have and used admissions, or so-called admissions, made by Mr Burnett in his record of interview in a manner which was inappropriate and unfair. It was argued vigorously, if I may say, by Mr Lavery for Mr Burnett, that the section of the *Crimes Act* to which I have referred should he constrained to those cases **[3]** where a vehicle has been illegally used, probably for joy-riding purposes, and could not be seen to extend to cases of theft as more appropriate charges of handling stolen goods, or receiving stolen goods, should have been instituted.

I turn now to rehearse the grounds upon which this appeal has been launched. The first one is, did the Magistrate correctly exercise his discretion in dismissing the application that the proceedings be stopped as being an abuse of process? The second is, did the Magistrate err in ruling that he should not, in the circumstances, order the defendant provide particulars of the alleged theft? The third question is, did the Magistrate, in the use he made of the appellant's record of interview, in that he relied upon some answers therein, to establish a consciousness of guilt, err in law? And, finally, in view of the findings of fact, in particular to the consciousness of guilt, did the Magistrate err in convicting him of theft in circumstances where Mr Burnett may have come into possession of the vehicle as a receiver of stolen goods?

I dispose of a jurisdictional issue at the commencement. This appeal raises issues and seeks remedies in the nature of relief under the terms of O56 of the *Rules of the Supreme Court*. That is, for orders quashing the findings of the Magistrate and seeking either relief in the nature of Mandamus or of *certiorari*. I am satisfied that the appropriate vehicle – and the pun is intended – which brings this matter to the court is by way of s92 of the *Magistrates' Court Act*. **[4]** The supervisory functions of a superior court of record as this is should not be brought to nothing by fine points of procedure. I am satisfied that the appeal process over-reaches and over-arches procedural difficulties, it invests this court with the real power to dispatch questions of law. So much was ultimately held by Hansen J in *DPP v Velevski* (1994) 20 MVR 426 and also by myself in the matter of *Stevenson v Ellis* an unreported decision of 22 February 1996. I pass no reserved comment about the interaction of s92 and O56. It must be borne in mind that s92 relates to orders which are finally pronounced and O56 to steps in a litigious process which may be interlocutory. The jurisdictional issue was not argued extensively before me, and I would want to reserve any ultimate consideration.

Returning to the grounds of appeal. The first point, I reiterate, is the abuse of process argument. Abuses of process have their nascence in the court's obligation to deliver fairness to the parties before it and should a process be unfair, or untoward in any way, it is then said that to pursue it, or to persist in such a course, results in causing the court to abuse its powers. See *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, a case referred to by Gallop J in *R v Reeves* (1994) 122 ACTR 1; (1994) 121 FLR 393. In the latter case the trial judge found there had been an abuse of process, when documentation essential to the defendant to establish alternative defences, had been destroyed whilst in the custody of the prosecuting **[5]** authorities. The head-note recites the principle, which is thus:

> "As a result of the destruction of the documents it was not possible for Reeves to receive a fair trial. That destruction created a fundamental defect which went to the root of the trial and there was nothing that a trial judge could do in the conduct of the trial that could relieve against its unfair consequences."

The principles are clear and there is no need for me to list them further. In this case I am well satisfied the Magistrate was acting within the constraints of fairness and propriety by not acceding to the application to dismiss the process as an abuse. The return of the car by the police to the person they considered its rightful owner was a matter which was fair and reasonable in the circumstances. Given the material then in the hands of the police, namely that the imprinted number on the chassis, was that of a vehicle owned by Mr Ottone, one wonders what else they should have done. To deprive a man of the possession and use of his own car because it is said the defendant wants to look at the chassis number in order to ascertain whether it was

Mr Ottone's car or somebody else's, is to require an extension of courtesy and facility beyond that which is reasonable in the circumstances. It was put to me that by returning the vehicle to its true owner caused the police to rely upon the notations of an investigating police officer and his evidence as to what was in fact the engraved number on the chassis. That being so, the position is to the detriment of the prosecution and to the benefit of the defendant, **[6]** because it exposes the prosecution to the possibility of having its evidence disbelieved or not accepted. In fact, in this case there was a thorough going attack upon the credit of the policeman which came to nothing. The Magistrate was quite entitled to accept the notation of the chassis number by the investigating police member and his evidence of what he visually saw. To suggest that that evidence deprived the defendant of all chance of challenging the identity of the vehicle is, in my view, misplaced.

The second point raised is the manner in which the Magistrate despatched the abuse of process argument. In this case he heard the evidence from the prosecution as an omnibus and whilst delivering his reasons for judgment despatched an essentially interlocutory application. It was said that this was unfair. In my view it was not. This matter was not a trial process before a jury but before a Magistrate. He chose to assess the efficacy of the abuse of process argument by hearing the evidence as a whole. I can see, as a practical matter, it was necessary to do so. In order to dispatch the abuse argument it was necessary for him to canvass the context in which it was raised, this resulted in the entire evidence for the prosecution being before the Magistrate at the one time and place. He was accordingly entitled, in my view, to proceed to dispatch the threshold and substantive arguments at the one time and place. Courts are frequently enjoined to dispose of litigious issues expeditiously and contemporaneously. The Magistrate did nothing else. It was then put that the Magistrate erred in taking **[7]** account of some limited admissions in the record of interview as establishing a consciousness of guilt. In my view the Magistrate was not deflected from the essential tasks before him and nor did he exercise any discretion improperly.

The High Court has recently pronounced in *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23 the way juries might be addressed concerning admissions in records of interview. There is no need for a Magistrate to have followed the same processes. In this instance I have, of course, had access to that record of interview. It contains many statements which are indicative of Mr Burnett's guilt. Here an essential issue was the question of "use" of the motor vehicle. I shall return to this point shortly. The Magistrate chose, in his reasons, to make reference only to one matter affecting his belief or disbelief of Mr Burnett and that related to the manner, or mode, in which the compliance plates had been attached to the engine. He disbelieved Mr Burnett when he had said that he did not know how such things could happen or could occur. However, an examination of the record of interview as a whole reveals there was a plenitude of evidence relating to Mr Burnett's guilt, which the Magistrate was entitled to accept. And the reference to one minor point relating to the compliance plate was merely used by the Magistrate as an illustration of the larger canvas and it was not determining it. Accordingly I can find no fault in the Magistrate's thinking and reasoning process in this respect.

[8] I come to the final ground of appeal and perhaps its most substantive one and that is the section was misapplied by the Magistrate and alternative provisions of the Act which might have been more happily pursued were not. The *Crimes Act* 1958, s72, contains the basic definition of theft, viz: "A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it." So far as motor vehicles are concerned, the notion of use is amplified in s73(14) and as appropriately edited it reads thus:

> "For stealing a motor vehicle proof that the person charged in any manner used the vehicle without the consent of the owner shall be conclusive evidence that the person charged intended to permanently deprive the owner of it."

For conviction under this section the object must be a motor vehicle and the action must be the use of it. I turn to those concepts. The simple term "motor vehicle" has exercised the judicial mind in various jurisdictions and that which would appear to be relatively simple becomes complex when a motor vehicle such as a grader or a crane can be used for purposes other than conveyance. In this case there was some evidence that the engine of Mr Ottone's

vehicle had been replaced by another shortly after he purchased it or between the time it was returned to him by the police and the hearing of the matter. So it was argued by Mr Lavery that whatever might have been the object of the charge might not have been a motor vehicle because it might not have included the engine. **[9]** Superficially attractive though this argument is, it falls down upon an examination of the cases.

In *Egan v Hughes* (1984) 1 MVR 146, a decision at single instance in the Supreme Court of Western Australia, Pidgeon J had to consider the linkage mechanism between an articulated trailer and a further trailer which was attached, which in turn was attached to the prime mover. In effect a road train. He had little difficulty that the vehicle, as a whole, was a motor vehicle and to do otherwise would have rendered the *Vehicle Standard Regulations* 1977 (WA) absurd. Similarly in *Gibson v Mansell* (1988) 8 MVR 141, again in Western Australia, Seaman J considered a moped which was set into propulsion by human or pedal power, was a motor vehicle when being used to coast across a road. In this State a motorised crane which when in use as a crane was lifted by jacks off the road surface remained a motor vehicle when being used for lifting purposes despite its temporary use for other purposes.

I distil from these authorities the commonsense principle that if something looks like a motor vehicle and has an engine and goes like a motor vehicle it is one. It is a commonsense notion and the peculiarities of different types of vehicles will be endless. The essence of being a vehicle is that it is an object, moveable, capable of conveyance, for both humans and goods, and driven by its own motive power. Plainly Mr Ottone's car was such a vehicle, it being the same as the vehicle found in Mr Burnett's garage. Of that vehicle Mr Burnett himself said in his record of interview that he only drove it very seldom, **[10]** that he did work on the engine of it, that he changed it by altering the decoration, by removing wheels and replacing other wheels on the vehicle and by generally titivating its outward looks.

Not only is there the mere fact of possession but there are the admissions as to use, which in my view entitled the Magistrate to find, on the evidence as a whole, that Mr Burnett used the motor vehicle of another which, under the terms of the section, he was found to have stolen. It may be that s73(14) was initially enacted to deal with the problems of joy-riders and a search of the records of *Hansard* reveals as much. But the fact is that the language of the statute is not ambiguous, nor does it admit of an absurd result to find that a person who uses a motor vehicle in such a way, whether as a joy-rider, whether as a putative handler of such a vehicle, or whether as the receiver of stolen goods, all of which may be additional or collateral criminal offences, is nevertheless a thief within the meaning of the section. Intended or otherwise, behaviour such as that exhibited by Mr Burnett renders him a thief under the terms of the *Crimes Act*. **Order:** It follows I can find no fault in the Magistrate's findings, the processes by which he arrived at them, or of his application of the law to the facts and the appeal will be dismissed. I order that the appellant pay the respondent's costs.

APPEARANCES: For the Appellant: Mr J Lavery, counsel. Solicitors for the Appellant: Ian Polak. For the Respondent: Mr D Just, counsel. Solicitors for the Respondent: DPP.
