

05/87

SUPREME COURT OF QUEENSLAND — FULL COURT

R v MURRAY

Kelly SPJ, McPherson and Dowsett JJ

19 December 1986 — (1986) 4 MVR 331

MOTOR VEHICLE – PASSENGER HOLDING STEERING WHEEL WHILST VEHICLE IN MOTION – WHETHER "DRIVING."

1. The notion of "driving" involves in a substantial sense controlling the movement and direction of a vehicle and also having some control of its propulsion.

Tink v Francis [1983] VicRp 74; [1983] 2 VR 17;

MacNaughtan v Garland (1979) Qd R 240; and

Allan v Quinlan; ex parte Allan [1987] 1 Qd R 213; [1986] 3 MVR 343, followed.

2. Where a passenger took hold of the steering wheel for approximately 150 metres, he was controlling the direction of the vehicle. However, it could not be said that he had any control of the propulsion of the vehicle and accordingly, was not "driving".

KELLY SPJ: [with whom McPherson and Dowsett JJ agreed] [1] The appellant was convicted in the Magistrates' Court at Proserpine on 2nd July 1986 of dangerous driving of a motor vehicle. The appellant was a passenger in a vehicle driven by a Miss Lyon. The Stipendiary Magistrate found that he took hold of the steering wheel and at that instant Miss Lyon "froze", taking her hands off the wheel. The vehicle was then steered in a veering manner solely by the appellant for a distance of about 150 metres at a speed of between 90 and 100 km/h. The appellant caused the vehicle to "fishtail" a number of times. Miss Lyon then resumed control of the steering but the vehicle went completely out of control and rolled over. The Stipendiary Magistrate held that the actions of the appellant constituted "driving" the vehicle.

Before us it was accepted that the matter should be dealt with on the basis that the appellant had sole control of the steering of the vehicle during the period for which he held the steering wheel and the question raised on the appeal is whether in so doing his conduct amounted to "driving" within the meaning of s328A of the *Criminal Code*.

The question of what constitutes "driving" a motor vehicle has been considered in a number of cases in Australia, in England and Scotland and also in Canada. It has been dealt with in two cases in this Court, *MacNaughtan v Garland, ex parte MacNaughtan* (1979) Qd R 240 and *Allan v Quinlan, ex parte Allan* [1987] 1 Qd R 213; [1986] 3 MVR 343 and there is a comprehensive review of the authorities by the Full Court of Victoria in *Tink v Francis* [1983] VicRp 74; (1983) 2 VR 17. As is pointed out in that case by Young CJ at p19,

the question is largely one of fact and the courts have not attempted to give an exhaustive definition of the word "drives" but rather have said whether in the circumstances of the particular case the defendant was driving the vehicle within the ordinary meaning of the verb.

[2] The proposition which emerges from *MacNaughtan v Garland* (*supra*) and *Allan v Quinlan* (*supra*) is that the notion of driving involves in a substantial sense controlling the movement and direction of the vehicle and also having some control of its propulsion. This accords with the conclusion reached in *Tink v Francis* (*supra*), is in conformity with a substantial body of authority and is that which should be adopted. Young CJ in *Tink v Francis* considered that it is a mistake to regard the authorities as laying down a test and I would, with respect, agree with that view. However, at the same time it is desirable so far as this Court is concerned that there should be an authoritative statement of the proper approach to the question and I would hope that this has now been achieved.

It follows from what I have said that the view of the majority of the Supreme Court of

Canada in *Belanger v R* (1970) 2 CCC 206 in which the Court was constituted by nine judges, relying upon control over the direction of the vehicle alone as being sufficient to constitute "driving" the vehicle, is inconsistent with the line of authority to which I have referred and should not be followed. In seeking to uphold the conviction the Crown submitted that the appellant by his actions substantially put himself in the position of the original driver and that, for the limited period found by the Stipendiary Magistrate, he had harnessed the propulsive capacities of the vehicle in executing the series of veering movements described as "fishtailing". I am unable to accept this submission. I would not consider that it could properly be said that when the only mechanism over which the appellant was exercising any control was the steering he had any control of the propulsion of the vehicle. The appellant was controlling its direction and that was all and in these circumstances it would not be correct to say that he was "driving" the vehicle.

I would allow the appeal, quash the conviction and direct that a judgment of acquittal be entered. In my view it would not be appropriate to order a new trial on the charge brought against the appellant.

[Judgment supplied courtesy of CSM Queensland].
