

25/91

## SUPREME COURT OF VICTORIA

***PEARCY v ELIDEMIR***

Beach J

4 February 1991

**MOTOR TRAFFIC – CARELESS DRIVING – MOTOR VEHICLE DRIVEN WITH NINE PASSENGERS (FOUR ADULTS, FIVE CHILDREN) – NO EVIDENCE THAT DRIVER'S ABILITY TO DRIVE INTERFERED WITH NOR REAR VISION IMPAIRED – WHETHER CARELESS DRIVING: ROAD SAFETY ACT 1986, S65.**

1. When considering a case of careless driving, it is necessary to take into account not only the driving but also the surrounding circumstances.
2. Where a person drove a motor car with 9 passengers in it, but there was no evidence that the person's ability to drive was being interfered with or that the ability to use the rear vision mirror was impaired, a magistrate was not in error in dismissing a charge of careless driving.

**BEACH J: [11]** This is the return of an Order nisi to review the decision of the Melbourne Magistrates' Court made on 28 June 1990, whereby the Magistrate dismissed an information by the applicant against the respondent, charging the respondent with careless driving.

The ground on which the Order Nisi is based is that the Magistrate erred in law in dismissing the information. The background to the laying of the information appears in para.5 of the affidavit of Michael Norman Percy sworn in support of the application for the Order Nisi. That paragraph reads: "After being duly sworn I gave evidence-in-chief as follows: On the 11 February 1990 at about 10.20 p.m. I saw the defendant drive a motor car registered number CTA-986 in a westerly direction along Grattan Street in Carlton. At the time it was between sunset and sunrise and I observed that the tail lights were not operating on the vehicle. I intercepted the defendant for this reason and on doing so observed that the vehicle contained a large number of people. In the back seat, I observed three female adults seated with Four young children on their laps. None of the adults or children were wearing seat belts, nor were they restrained in any way. The driver, I observed, was wearing her seat belt, and the male front seat passenger was wearing his. I observed, however, that another male child was seated on the floor of the vehicle at his feet in the front seat (bucket seats fitted to front).

I said to the driver who had by this time alighted "State your full name and address and produce your driver's licence". She said "Hulya Elidemir, 148-33 Alfred Street, North Melbourne" and produced a Victorian Probationary Licence number 44278281/8 current to the 22 July 1994 and issued on probation to the 22 July 1990. I said "How many people have you got in the car?" she said "Ten". I said "How many are children?" she said "Five". I said "How old is the boy in the front?" she said "Four". I said "And the others in the back?" **[12]** she said "Six, four, three and three". I said "Three boys and one girl, correct?" she said "Yes". I said "Why are you carrying so many persons in the vehicle?" she said "We've been to a party in Collingwood and he had had a few (indicating the male passenger - 40) to drink so I was just going to drive them home". I said "Where are you going to?" she said "North Melbourne". I said "Why did you take so many in the car in one go?" she said "They're all one family". I inspected the vehicle and observed that there were no 'P' plates displayed to either the front or rear of the vehicle. I said "You are required to display 'P' plates?" she said "Yes", but it's not my car, I just drove them home because he'd had a few". I said "Do you own your own vehicle?" she said "No". I said "What is your reason for failing to display 'P' plates?" she said "It's not my car". Just prior to the interception the defendant's speed was checked at a steady 60 kilometres per hour. At all relevant times the traffic was light".

At the hearing before the Magistrate, there was no cross-examination of the informant by Counsel for the defendant and no other witnesses were called for the prosecution. Counsel for the defendant then submitted that there was no case to answer in relation to the information

for careless driving. The Magistrate upheld that submission and dismissed the information. The matter now comes before this Court seeking a review of the Magistrate's decision. In my opinion, it was open to the Magistrate to take the view he did of the matter.

Whilst it is true that when one is considering a case of careless driving it is not sufficient to look merely at the driving, as such, one must also consider the driving in the light of the surrounding circumstances. If I drive a vehicle [13] along an empty road, on a clear sunny day at 100 kilometres an hour, in the absence of more that could hardly be said to be careless driving. On the other hand, if at twelve noon on a business day I drove down Collins Street at 60 kilometres an hour it could well be said that that would amount to careless driving. I agree that it is not sufficient simply to look at the act of driving itself in isolation, one must look at the surrounding circumstances.

What are the surrounding circumstances in this case? Well, it is said that there were nine passengers in the car and that the simple presence of those passengers in the car would, of itself, cause one to categorise the driving of the defendant as "careless" because either of the fact that there would be a risk of injury to those passengers if the car was involved in a collision, or the presence of those passengers in the car could well interfere with the defendant's ability to drive the vehicle, or could well interfere with her vision, that is, her ability to properly use the rear vision mirror in the car.

The fact of the matter is that there is no suggestion whatsoever that the presence of the nine passengers in the car interfered in any way with the defendant's ability to drive the car; it, therefore, is a matter of sheer speculation. One may say: well, one could speculate that if one had only two passengers in the rear seat, one of them by some stupid action may interfere with the driver's ability to drive the car, [14] but as I say, there is nothing in this case to indicate that the defendant's ability was interfered with in any way.

As I said during the course of discussion one could envisage a situation where the sheer presence of a large number of persons in the car would affect a driver's ability to drive in that they may be crowding all over him and just prevent him physically from controlling, amongst other things, the steering wheel properly. Nor is there any evidence at all to suggest that the defendant's ability to use the rear vision mirror was in any way impaired. There is no evidence one way or the other as to whether there were rear vision mirrors attached to one or more sides of the vehicle. And, again, it is not for me, or for that matter, the Magistrate, to speculate in relation to it. The case really comes down to the fact that the defendant was driving a car with nine passengers in it. Had she been driving a Combi-van with nine passengers in it it would hardly be said that she was, in the circumstances of this case, guilty of careless driving.

In my view the Magistrate acted quite properly in dismissing the information. The Order Nisi to review will be discharged. I order that the respondent's costs of the Order Nisi be taxed and paid by the applicant.

**APPEARANCES:** For the applicant Percy: Mr NR Bird, counsel. Victorian Government Solicitor. For the respondent Elidemir: Mr NB Batten counsel. North Melbourne Legal Services.

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