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SUPREME COURT OF QUEENSLAND — COURT OF CRIMINAL APPEAL

R v CLARK

Kelly SPJ, Matthews and Shepherdson JJ

8 October 1986 — [1986] 4 MVR 245

MOTOR TRAFFIC – DANGEROUS DRIVING – TWO COUNTS ALLEGEDLY COMMITTED ON SAME DAY – FIRST COUNT STOOD DOWN – WHETHER EVIDENCE ON FIRST COUNT ADMISSIBLE IN RESPECT OF SECOND COUNT.

C. was charged with two counts of dangerous driving, such driving having occurred on the same day but on different carriageways. When the matter came on for hearing, C. pleaded guilty to the second count, the first having been stood down. The magistrate then read statements which were tendered. These statements dealt with the driving on both carriageways. After hearing the plea by C.'s counsel, the magistrate convicted C., sentenced him to three months' imprisonment and disqualified him from driving for two years. The prosecutor offered no evidence in respect of the first count. On appeal against sentence—

HELD: Appeal allowed. Sentence of imprisonment set aside and fined $400 in lieu thereof. Order for disqualification confirmed.
(1) Where acts of driving are substantially separated in time and place, in the absence of any connecting link evidence of the one act of driving is not evidence of the other.
***R v Horvath* [1972] VicRp 60; (1972) VR 533, applied.**

(2) In the present case, the acts of driving were separated in time and place to the extent that separate charges were laid. As the first charge had been stood down it was not open to the Magistrate to take into account when dealing with the second charge, material which related to the first.

KELLY SPJ: (with whom Matthews and Shepherdson JJ concurred): **[1]** The applicant was convicted in the Magistrates' Court at Maryborough of the offence of dangerous driving and sentenced to three months' imprisonment and he was disqualified from holding or obtaining a driver's licence for a period of two years.

The applicant came before the court on two charges of dangerous driving and in each case the offence was alleged to have been committed on 9th February 1985 at Maryborough. One charge related to driving in March Street and the other to driving in Iindah Road. It was not until 24th January 1986 that the applicant was questioned by the police in relation to the offences and subsequently arrested and the charges were ultimately heard on 2nd April 1986. The prosecutor asked that the charge relating to March Street be stood over while the charge relating to Iindah Road was dealt with. He then tendered a number of statements under the provisions of s110A of the *Justices Act* which the Stipendiary Magistrate appeared to read.

The hearing had commenced as a committal proceeding but after reading the statements the Stipendiary Magistrate indicated that he would deal with the matter summarily and counsel who appeared for the applicant entered a plea of guilty on his behalf. The prosecutor gave the court some particulars relating to the applicant and he informed the court that the applicant had no prior convictions, but he did not address on the facts. Counsel for the applicant addressed the court and after the Stipendiary Magistrate had sentenced the applicant the prosecutor offered no evidence on the charge relating to March Street.

The statements which had been tendered dealt with the driving of the vehicle in March Street and other streets in the city of Maryborough and also in Iindah Road. The applicant's vehicle was pursued for a considerable distance by police vehicles and the driving which was the subject of the charge on which the applicant was convicted occurred towards the end of the pursuit. The evidence which related to driving in Iindah Road was contained in the statement of Sergeant Lenord and was as follows:-

> "I crossed the Granville Bridge, and proceeded outbound along Gympie Road. **[2]** As I was travelling past the Tinana State School I was travelling at about 80 km/h, and had the blue revolving light and side blue flashing lights activated. As I was within 60 metres of the intersection of Iindah Road I saw a white coloured Falcon sedan cross the road from my left to my right. This vehicle was travelling at a fast rate of speed, I would estimate the speed to be at least 90 kilometres per hour. It appeared to be partly airborne as it entered onto Gympie Road and seemed to bottom or dip heavily about half way across. There was a shower of sparks coming from under the vehicle for thirty metres or so as it moved across the second half of Gympie Road. I could see the vehicle clearly in my headlights and I recognized the vehicle to be an XC Falcon sedan, with silver or chrome wheels.
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> I braked slightly, and turned right into Iindah Road, then accelerated. At the time of straightening into a direct course, the vehicle was some 200 metres in front of me. I maintained acceleration, and reached 160 kms per hour, but did not seem to gain any distance on the vehicle in front. I saw the brake lights of the vehicle come on, and then it turned left onto a gravel road. I also turned onto this road, but there were thick clouds of dust, and I was forced to travel at about 60 kms per hour."

For some reason the prosecutor chose to proceed first with the charge relating to driving subsequent to that which was the subject of the charge relating to March Street. The evidence of the manner of driving of the applicant at an earlier stage showed dangerous driving of a far more serious nature and continuing over a considerably greater distance than that which related to his driving in Iindah Road. I shall refer later to the question of the evidence which was admissible on the Iindah Road charge but it would appear that at all events the prosecutor proceeded in the belief that evidence relating to both charges was admissible on the Iindah Road charge. So far as the material shows counsel for the applicant offered no objection to the course which was followed nor to the admissibility on the Iindah Road charge of all the evidence contained in the statements tendered with the exception of one short passage in Sergeant Lenord's statement which followed the passage which I have set out and which was excluded by the Stipendiary Magistrate.

From the material it appears that counsel for the applicant did not limit his submissions to the driving in Iindah Road and in view of the sentence imposed I would think that the assumption is open that the Stipendiary Magistrate had regard to the applicant's manner of driving throughout the pursuit by the police and not only his driving in Iindah Road which was the subject of the charge. There is certainly nothing in the material to indicate that the Stipendiary Magistrate limited his consideration of the evidence to that relating to driving in Iindah Road.

On the question of the admissibility of the hearing of the Iindah Road charge of evidence of the manner of driving by the applicant at an earlier time and in a different place the principle to be applied is stated in *R v Horvath* [1972] VicRp 60; (1972) VR 533, at p538 in these words:-

> "Where acts of driving are substantially separated in time and place, evidence of one is not, in our opinion, evidence of negligence of the other, in the absence of some connecting link, such as existed in *R v Buchanan* [1966] VicRp 3; (1966) VR 9, or in *R v Lewis* [1913] VicLawRp 55; (1913) VLR 227; 19 **[3]** ALR 107. Failure to exercise care, depending, as it does, on the particular circumstances of the occasion is, in our view, not a constant feature of human behaviour and, accordingly, failure at one place and time not forming part of the occasion in issue does not, in itself, tend to prove failure at another time and place."

In the present case the acts of driving are separated in time and place to the extent that the prosecutor chose to make them the subject of separate charges and in those circumstances I am unable to see any connecting link, other of course than the fact that the acts related to the driving of the same vehicle on the same night, which would justify the admission on the hearing of the Iindah Road charge of the applicant's driving earlier that night, albeit that the driving in Iindah Road was the culmination of a course of conduct which had commenced some time earlier and some distance away. At the stage at which the Stipendiary Magistrate was dealing with the Iindah Road charge he was aware of the March Street charge which had merely been stood over but had not been dealt with.

If the Stipendiary Magistrate did take into account in sentencing the applicant on the Iindah Road charge all the material which had been placed before him he was in error in so doing. If, on the other hand, he limited his consideration of the material to the evidence which was properly admissible on the Iindah Road charge I would consider that his sentencing discretion miscarried.

The nature of the driving shown by the passage from Sergeant Lenord's statement to which I have referred was such as to be deserving of punishment but, having regard to the maximum punishment which may be imposed on summary conviction, namely, a fine of $500.00 and imprisonment with hard labour for six months, I would regard a sentence of three months' imprisonment to be manifestly excessive.

I would add that if the Stipendiary Magistrate in sentencing the applicant had properly been able to consider all the evidence as to the applicant's manner of driving on that night I would not then be prepared to say that the sentence which he imposed was excessive, but that, of course, is not the case.

The applicant was nearly 20 years of age at the date of the offence and had no previous convictions and in all the circumstances the matter should have been dealt with by the imposition of a relatively severe fine and a significant period of disqualification.

In my opinion leave to appeal against sentence should be granted, the appeal should be allowed, the sentence imposed should be set aside and in lieu a fine of $400 should be imposed, in default imprisonment for one month. The order for disqualification should stand.

[Judgment supplied courtesy of CSM Queensland]
