16/88

SUPREME COURT OF VICTORIA

MESLEY v RALTE

Gobbo J

21 March 1988 — (1988) 7 MVR 170

MOTOR TRAFFIC – MOTOR CAR ACCIDENT – PERSON INJURED – TAKEN TO HOSPITAL – DOCTOR NOT PRESENT – NO BLOOD SAMPLE TAKEN – ADMISSIBLE EVIDENCE AS TO OCCURRENCE OF ACCIDENT – WHETHER DOCTOR REQUIRED TO TAKE BLOOD SAMPLE IF NOT AT HOSPITAL: *MOTOR CAR ACT* 1958, S80DA.

Section 80DA(1) of the *Motor Car Act* 1958 ('Act') provided (see now s56(1) of the *Road Safety Act* 1986 (as amended)):

> "Where a person of or over the age of 15 years enters or is brought into a hospital for examination or treatment in consequence of an accident involving a motor car, the legally qualified medical practitioner immediately responsible for the examination or treatment of the person shall take from the person a sample of the person's blood for analysis..."

When P. was brought into hospital, he was examined by a nursing sister, W., who was unsure whether P. had suffered a head injury. W. telephoned the defendant R., a legally qualified medical practitioner, at his home, who told W. to admit P. into hospital and carry out head injury observations. R. did not take a sample of P's blood for analysis and was subsequently charged with a breach of s80DA of the Act. At the hearing of the charge, P. was not called as a witness and the only evidence that P. had been involved in a motor car accident was hearsay assertions of W. the nursing sister and the police informant, together with the informant's opinion evidence that P's injuries were consistent with their having been sustained in a motor car accident. The charge was found proved. Upon order nisi to review—

HELD: Order absolute. Conviction set aside. Information dismissed.
1. It was an ingredient of the offence that the prosecution prove that the person brought into the hospital had been injured in a motor car accident. The evidence which was admitted in this regard was insufficient to find the charge proved.

2. *Obiter*. Section 80DA of the Act applies to any doctor who is authorised or allocated to carry out an examination or treatment and is at the hospital. If the doctor so responsible is not at the hospital, that doctor does not fall within the operation of the section until he or she reaches the hospital.

GOBBO J: **[1]** This is the return of an Order Nisi to review a decision of a Magistrate given in the Magistrates' Court at Kerang on the 25th September, 1986. The Magistrate had before him an information wherein Neil Ronald Mesley was the informant and Lal Buatsaiha Ralte, a medical **[2]** practitioner, was the defendant. The charge was that on the 22nd March, 1986 the defendant failed to take a sample of blood for the purposes of analysis as required under s80DA(1) of the *Motor Car Act* 1958. The offence was found proved on the 25th September, 1986 and the further hearing of the matter was adjourned to the 26th March, 1987 on the applicant entering a recognisance in the sum of $200 to be of good behaviour. At the hearing, Jean Walle, a nursing sister employed at Kerang Hospital, gave evidence that at approximately 2.20 a.m. on the 22nd March, 1986 one Robert Peatling was brought into the Hospital. Miss Walle stated she examined Mr Peatling and then rang the defendant, a legally qualified medical practitioner, at his home. The nursing sister said she informed the defendant that she was unsure whether or not Mr Peatling had suffered a head injury and that she could smell alcohol on him. She also said that she had been informed that Mr Peatling had fallen off a motor cycle whilst checking irrigation. The defendant told the nursing sister to admit Mr Peatling into the hospital and to carry out head injury observations.

The informant, who was the respondent in the Order to Review, gave evidence that he was a police officer stationed at Kerang and that he attended the Kerang Hospital at approximately 2.28 a.m. on the 22nd March, 1986 where he observed Mr Peatling. He said that he observed Mr Peatling to be injured in a manner consistent with his having fallen off a motor cycle. He also said that his **[3]** enquiries thereafter revealed that Mr Peatling had been riding a motor cycle checking irrigation water. The informant further gave evidence that on interviewing the defendant

he admitted receiving a telephone call from Sister Walle, who informed him that Mr Peatling had been in an accident involving a motor cycle and that the defendant had instructed Sister Walle to admit Mr Peatling for observation. Moreover, the defendant admitted that he was the doctor immediately responsible for the treatment of Mr Peatling and no blood sample was taken by him. The defendant had given evidence that he had been told that Mr Peatling had fallen off a motor cycle. He said that he was the person immediately responsible for the treatment of Mr Peatling and that he had not taken a blood sample from him. There was some evidence that the defendant had come to the hospital on the same morning but there was nothing to establish the time of this visit save that it was beyond the night shift and so, presumably, after 7 or 8 a.m. There was no evidence as to the defendant's position at the hospital and as to what arrangements existed as between the hospital and himself.

Objection had been taken to the nursing sister's evidence as to the happening of any accident on the grounds that it was hearsay. The objection had been overruled. It does not appear whether the informant's evidence as to the injuries being consistent with a motor car accident was objected to but in the absence of any material that **[4]** there was any objection, I infer that this was accepted into evidence without objection. There were in substance two challenges to the conviction. The first was that the defendant was not the person immediately responsible within the meaning of the section. The second was that the hearsay evidence had been wrongly admitted and used in order to support an essential ingredient of the offence, namely the happening of a motor car accident. As to the first argument, I dispose at the outset of the point made by the defendant as a justification, namely, that the alleged accident took place on private property. It was conceded – properly so – before me that the statute was not intended to be limited to a motor car accident on a public highway. See *Carr v Walukiciwick* [1969] VicRp 97; (1969) VR 758. Section 80DA(1) of the *Motor Car Act* provides:

> "(1) Where a person of or over the age of 15 years enters or is brought into a hospital for examination or treatment in consequence of an accident involving a motor car, the legally qualified medical practitioner immediately responsible for the examination or treatment of the person shall take from the person a sample of the person's blood for analysis, whether or not the person consents to the taking thereof, unless in the opinion of the legally qualified medical practitioner the taking of a sample of the person's blood would be prejudicial to the proper care and treatment of the person."

It was argued on behalf of the defendant that the section could only be properly interpreted on the basis that the doctor responsible was the one who first carried out examination and treatment. It was put there were uncertainties in any other construction since there was **[5]** otherwise no time limit on the obligation and there would be difficulties if the patient was in fact examined and treated by someone other than the person immediately responsible. There would also be particular burdens on doctors serving country hospitals where they were on call but were perhaps a considerable distance from the hospital.

The opposing view was that the phrase "immediately responsible" had to be given a meaning; it could not be assumed that the word had no operation as would be the case if the obligation simply rested on the doctor who first carried out an examination and treatment. It was therefore argued that the doctor "immediately responsible" meant the doctor authorised or obliged to examine or treat and that the word 'immediately' was merely used to identify the doctor and to exclude other doctors later involved or even those in administration with an overall responsibility. There is undoubtedly an ambiguity in the phrase and its proper meaning in s80DA. It is also clear that the construction put forward on behalf of the respondent-informant can lead to some anomalous, if not absurd, result. Thus in a small country hospital where there is no doctor present but one is on call, the doctor in question may be some distance away. He would presumably be under the obligation imposed by the section either from the moment the patient entered the hospital or from the time he was called. He may be under this obligation even if he concluded, after discussing the matter with the nursing sister on duty, that his attendance was not required then or even at all. Again, the doctor may be exposed to liability even if he was then engaged on other more urgent work. These consequences would **[6]** not be relieved by any defences provided by the section. Indeed, the statement of defences tend against the respondent's argument. The first of the defences set out in the subsection, namely as to the age of the patient, appear to contemplate a state of belief formed as a result of examination. Sub-section (3) provides the doctor with a defence where, because of the patient's behaviour, the doctor is unable to take a sample of blood "at the time when the person entered or was brought into the hospital or within a reasonable time thereafter".

This provision suggests that the obligation attaches to a doctor who is present when the patient enters or is brought into the hospital. This is also implicit in the proviso in subsection (1) that exempts the doctor who forms the opinion that the taking of a sample "would be prejudicial to the proper care and treatment of the person".

It is to be noted that the obligation to take the blood sample has no time limit. This means that a doctor would remain under a continuing obligation to take a blood sample many hours, even days, after the patient entered the hospital. There may be circumstances where the doctor for a variety of good reasons may not attend the hospital for some considerable time, even though he remained the only doctor authorised to treat the patient and to give directions to the nursing staff as to the patient's treatment. Though a sample may be able to be used even where it was taken more than two hours after the act of driving, see *R v Cheer* [1979] VicRp 53; (1979) VR 541, it would nonetheless appear to be a somewhat bizarre result if a doctor was still under **[7]** an obligation to take a blood sample say twelve or even twenty four hours after the patient's entry to the hospital.

I have come to the conclusion that the ambiguity in the phrase should be resolved in a way that links the obligation to entry to the hospital and to examination of the patient. More particularly, I find that on its proper construction the section imposes its obligation on a doctor who is present at the hospital at the relevant time. I have reached this conclusion for four main reasons. In the first place, this view gives greater recognition to the word 'immediately' than does the alternative view. Secondly, this conclusion avoids most if not at all of the consequences and anomalies I have referred to. Thirdly, this conclusion accords more with the terms of the section used as a whole and in particular the defences afforded by the section. Fourthly, it is a view that gives some sensible time dimension to the section. The very absence of a time limit is an argument for adopting a construction that provides one, namely a blood sample must be taken within a reasonable time.

I have not overlooked the fact that this means that a doctor not at the hospital would not be liable until he reached the hospital, even though he is obliged as a matter of his arrangement or contract with the hospital to attend. But this would not appear to be a serious gap for the doctor would no doubt have to attend the hospital in due course. If he does not, then it is difficult to see how he could be described as being immediately responsible for the examination of the patient. The section appears to refer to examination and treatment by the doctor. I do not read the section as referring to examination, for example, by another **[8]** doctor or by nursing staff for, again, this would not seem consistent with the notion of being immediately responsible nor does it tally with the other provisions in the section relating to the opinion of the doctor as to prejudice and as to behaviour by the patient preventing this doctor from taking a sample. It follows that in my view the doctor does not fall within the operation of the section unless he or she is the doctor authorised or allocated to carry out examination or treatment and is at the hospital. If such doctor is responsible for the examination and treatment at entry but is not at the hospital, then he or she does not become immediately responsible until he or she reaches the hospital.

In the present case there was no evidence as to what was the arrangement between the hospital and the doctor beyond his admission that he was the doctor immediately responsible. But it is also to be inferred that he was not at the hospital. To the extent that his admission covers questions of fact it may be properly affected by other evidence that contradicts it. To the extent that it is an admission as to a question of law, it cannot in the present situation bind the defendant. There was some evidence that the defendant attended later that morning. But there was no evidence as to the time. It could have been as late as just before midday if one takes 'morning' literally. There was evidence that it was later than the termination of the nursing sister's night shift. It is a question of fact as to whether the doctor was still under an obligation at the time **[9]** he came to the hospital and saw the patient. But it is difficult to see how a decision could be made that this was a reasonable time after entry unless the time of this examination was known. I do not need to express any final view on this matter for I have in any event concluded that the conviction must be set aside on the ground that an essential ingredient, namely, the happening of a motor car accident, was not properly proved.

As I have already indicated, there were three items of evidence relied upon to prove that Mr Peatling had been involved in a motor car accident. There were the hearsay assertions of the

nursing sister; secondly, similar material from the informant; and thirdly, the opinion evidence of the informant that Peatling's injuries were consistent with having been sustained in a motor car accident. The hearsay evidence was objected to but admitted over objection, but the third item of evidence was not apparently the subject of objection. It would appear to have been open to objection, having regard to the somewhat bald conclusion that was given. There was not only express objection to the hearsay evidence but, just as important, a submission had been made both at the close of the prosecution case and at the conclusion of all the evidence that the prosecution had not established proof that Mr Peatling – who had not been called – was involved in a motor car accident. The affidavits do not indicate what reasons were given in over-ruling the objection. I am unable to see that the nursing sister's statement, which was only based on what she was told, could be properly admitted as proof that Peatling **[10]** had in fact been involved in a motor car accident. It may have been admissible as merely going to prove what the defendant was told and as going to prove his state of information, in order to negative a defence under s80DA(1). But it is clear that the learned magistrate relied upon the hearsay evidence that had been objected to as proof of that ingredient. It may be that the learned magistrate could have relied on the opinion evidence of the informant for that was not objected to. But the inference is that at the very least he relied in part on the hearsay material and thus fell into error.

It does not necessarily follow that because evidence is improperly admitted that any conviction must be set aside. See *Knox v Bible* [1907] VicLawRp 87; [1907] VLR 485 at 496-7; 13 ALR 352; 29 ALT 23. But here I am not satisfied that on the evidence properly admitted the defendant clearly should have been convicted. In this case the evidence was not unimportant, and it went to an ingredient of the offence. Moreover, the other evidence that might be said to make out the proof of the prosecution case, namely the opinion evidence of the informant, was affected by two shortcomings. In the first place, it did not prove that Peatling had been injured in a motor car accident; at best it proved his injuries were consistent with such an accident. Secondly, it was opinion evidence of a kind that was on any view unsupported by any evidence as to the basis upon which the opinion was formed. Finally, I note that this ingredient of proof could have easily been supplied by calling Mr Peatling. In all of these circumstances and having regard to the time that has now elapsed and the nature of **[11]** the offence and the penalty imposed, I am satisfied that I should set aside the conviction – and not remit it for further hearing – and that the information should stand dismissed.
