50/77

SUPREME COURT OF VICTORIA

ANDREWS & BOLTON v ENGLAND

Anderson J

11 May 1977

MOTOR TRAFFIC – DRINK/DRIVING AND SPEEDING CHARGES – DEFENDANT PLEADED NOT GUILTY TO THE DRINK/DRIVING CHARGES BUT GUILTY TO THE SPEEDING CHARGE – IDENTITY OF DRIVER DISPUTED IN COURT – ADMISSIONS OF FACT BY PLEA OF GUILTY – UNCONTRADICTED EVIDENCE CONSIDERED – DRINK/DRIVING CHARGES DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR.

The defendant was charged under the *Motor Car Act* 1958 with driving whilst under the influence of intoxicating liquor (s80B); driving whilst blood alcohol exceeded .05% (s81A), and under the *Road Traffic Regulations*, exceeding 100km/h; exceeding 60km/h in a built-up area. There were two further charges – hindering Constable Bolton and resisting Constable Andrews in the execution of their duties. (s52 *Summary Offences Act*). When charged the defendant pleaded guilty to exceeding 60km/h in a built-up area, and not guilty to the remaining charges.

The first four charges arose out of the same circumstances, the last two related to the defendant's behaviour at his home. The evidence led by the prosecution told of an erratic course a motor took pursued by a police patrol through the city, of the vehicle being followed by the police to the home of the defendant, of a man identified as the defendant going into the house, of his apparent inebriated condition – briefly, of a course of evidence leading to a blood test of .170%. At the close of the informant's case a submission was made that the charges should be dismissed on the ground that the prosecution had failed to prove that the person charged was the person whom the police saw driving the motor vehicle on the night in question. The Magistrate after hearing some argument, stated he was not satisfied that the police had proved the identity of the driver and dismissed the first and second informations, but convicted on the charges of speed exceeding 60km/h, hindering and resisting.

The informants in the first two cases, obtained orders nisi on broad grounds that it was not open to the Magistrate at that stage to find because of the uncontradicted evidence of the prosecution and the defendant's plea of guilty to one of the driving charges, that he was on the police evidence not satisfied that the defendant was the driver.

HELD: Order absolute. Orders of the Magistrates' Court set aside and remitted for further hearing according to law.
1. There was uncontradicted evidence that the defendant was the man who had got out of the car and was also the man who had pleaded guilty to have driven that motor car at the relevant time at an excessive speed. The admission contained in such plea was an admission of the facts essential to the crime charged.

2. In the circumstances, it was unreasonable at the stage when the Magistrate said he was not satisfied, to disbelieve or reject the evidence for the informant as to the identity of the driver of the motor car, the more so, because the Magistrate appeared to have given no reasons for his departure from the form which Madden CJ in *Richards v Jager* [1909] VicLawRp 26; [1909] VLR 140; 15 ALR 119; 30 ALT 163 predicated.

ANDERSON J: … In my view, only one reasonable conclusion could have been drawn, and that was that the defendant was the driver of the motor car. Not only was there direct uncontradicted evidence that the defendant was to that effect, but there was the further point raised by Mr Uren counsel for the informant which I think is equally pertinent and that is that the defendant, having pleaded to the charge of driving the motor car in question at a speed exceeding sixty kilometres per hour, had thereby admitted to the Court the facts essential to the offence with which he was so charged and had pleaded guilty. An essential element of such an offence was that he was the driver of the vehicle and it would be curious indeed that he who had pleaded guilty to being the driver of the motor vehicle which had exceeded a speed limit was not also the driver when it was at the same time being driven in other allegedly unlawful circumstances.

All six cases were being heard together, and admission contained in the plea of guilty that he was the driver of the vehicle at an unlawful speed is quite contradictory to the submission made

by his counsel that there was no evidence that he was the driver in respect of the other alleged charges committed, if they were committed, at the same time. There was uncontradicted evidence that he was the man that had got out of the car and was also the man who had pleaded guilty to have driven that motor car at the relevant time at an excessive speed. The admission contained in such plea is an admission of the facts essential to the crime charged, (see *R v Broadbent* [1964] VicRp 94; [1964] VR 733, at p735; *R v Riley* (1896) 1 QB 309 at p318). The defendant's plea of guilty to driving at an excessive speed was "a solemn admission of the ingredients of the crime alleged" (*R v Tonks and Goss* [1963] VicRp 19; [1963] VR 121 at p127), one ingredient of which was that he was the driver of the vehicle in question and another was that the speed at which it travelled at the relevant time was excessive. These admissions did not include any admission of a number of the other elements involved in the other offences charged, as to which other evidence had been tendered and had to be considered.

The obligation upon the prosecution to prove all elements of an offence charged always exists, and in relation to the .05 charge and the driving under the influence of liquor charge, these were elements, which the prosecution had to prove in addition to the fact that the defendant was driving at the relevant time. Proof of those other elements depended upon other evidence the prosecution had called and it is, of course, not suggested that by reason of the plea of guilty to the excessive speed charge the other charges were proved. But the element common to the charges of excessive speed and the .05 charge and the driving under the influence of liquor charge was the allegation that the defendant was the driver of the vehicle in question at a time that was common to all four charges. Perhaps on occasions some things may be said *per incuriam* by a party or his lawyer, but the formal answer to a charge by the defendant in this case, however much his counsel may afterwards have regretted it, is something which the Court in the circumstances of the case, could not overlook. One is constantly faced with the consideration that in a criminal matter the onus is on the prosecution to prove each and every element of each offence alleged. Mere silence or absence proves nothing. Conduct may or may not assist. But if a person answers to a name called, the Court takes cognisance of the admission by him that he is the person charged. Likewise, if he pleads guilty to a charge, the Court, in relation to that charge, acts upon that admission contained in the plea of guilty.

In the circumstances of this case, the defendant could not be heard to say, in effect in one breath, "I drove the car for the purposes of one charge, but not for the others." Had the defendant entered upon his defence and given evidence, for him then to swear that he was not the driver would seem to be out of the question. At the stage when counsel made his submission, and though the defendant had denied to the police that he was the driver, there was before the Magistrate the uncontradicted police evidence. In *Richards v Jager* [1909] VicLawRp 26; [1909] VLR 140; 15 ALR 119; 30 ALT 163, Madden CJ said "...

> " ... where there is evidence sworn to prove one side of the issue, and there is no evidence whatever sworn on the other side to contradict it, the Court is bound to accept it unless that evidence is in itself so incredible and so unreasonable that no reasonable man could accept it. If for any reason which recommends itself to the mind of the Bench who deal with the matter they think fit not to accept the evidence of the witness who is the only witness before the Court and are founding their decision on their disbelief of him, they are bound to disclose it. If they do not, then they are deciding in the teeth of the evidence without showing why they do so, and I do not think that is reasonable in any court of justice, or according to the principles applied by courts of justice."

Not only was there the uncontradicted police evidence, but there was the plea of guilty to driving at an excessive speed fortifying that evidence, and to my mind it was unreasonable at the stage when the Magistrate said he was not satisfied, to disbelieve or reject the evidence for the informant as to the identity of the driver of the motor car, the more so, because the Magistrate appears to have given no reasons for his departure from the form which Madden CJ predicated. Accordingly, the orders nisi will both be made absolute, the orders of the court below set aside and each case remitted to the Magistrates' Court for further hearing according to law.
