04/88

SUPREME COURT OF VICTORIA

BUTTERLEY v CAIN

O'Bryan J

24 February, 1 March 1988 — (1988) 6 MVR 423

PRACTICE – COPY CERTIFICATES LEFT WITH ACCUSED'S HOUSEKEEPER – CERTIFICATES READ BY ACCUSED THE SAME DAY – WHETHER PERSONAL SERVICE OF CERTIFICATES EFFECTED – MEANING OF "PERSONALLY SERVED": *MOTOR CAR ACT* 1958, SS80D(5), 81A.

Section 80D(5) of the *Motor Car Act* 1958 ("Act") provides (so far as relevant):

> "No certificate given pursuant to this section shall be tendered in evidence ... unless a copy of such certificate is proved to have been personally served on the accused ..."

A police officer handed copies of certificates under Schedules 6 and 8 of the Act to C's housekeeper after being informed that C. was asleep in the house. The housekeeper accepted the certificates and placed them on top of a stereo. Later that day when C. awoke, the housekeeper told him about the documents; C. picked them up and appeared to read them. On the later hearing of the drink/driving charge, the Magistrate accepted a submission that the accused had not been personally served with copies of the certificates and dismissed the charge. Upon order nisi to review—

HELD: Order absolute. Dismissal set aside. Remitted for further hearing.
(1) "Personal service" does not necessarily mean actual service upon the person to be served. It is sufficient if shown that the documents came into the person's hands or to the person's knowledge.
***R v Heron; ex parte Mulder* [1884] VicLawRp 108; [1884] VicLawRp 159; (1884) 10 VLR (I) 93; 6 ALT 143; 10 VLR (L) 314; and**
***Pino v Prosser* [1967] VicRp 107; (1967) VR 835, applied.**

(2) In the present case, the copy certificates, although left with the accused's housekeeper, came into the accused's possession on the same day, and this constituted personal service as required by s80D(5) of the Act.

O'BRYAN J: **[1]** The respondent was charged on information that on 4th January 1986 at The Basin he did drive a motor car whilst the percentage of alcohol in his blood, expressed in grams per 100 millilitres of blood, was more than .05 percentum, contrary to s81A of the *Motor Car Act* 1958. On 27th October 1986 the said information was dismissed in the Magistrates' Court at Ferntree Gully. On 26th November 1986 Master Evans ordered that the respondent show cause why the order of the Ferntree Gully Magistrates' Court should not be reviewed on the ground that the learned Magistrate erred in law in concluding that on the evidence before the Court the *Motor Car Act* Schedules 6 and 8 Certificates had not been personally served on the respondent in accordance with s80D(5) of the said Act.

[2] Section 80D of the Act provides that upon hearing for an offence against s81A evidence may be given of the taking of a sample of blood from a person by a legally qualified medical practitioner within two hours after the alleged offence, of the analysis of that sample of blood by a properly qualified analyst and of the percentage of alcohol expressed in grams per 100 millilitres of blood found by that analyst to be present in that sample of blood at the time of analysis. Sub-section (3) thereof provides that a certificate purporting to be signed by a person who purports to be a legally qualified medical practitioner, in or to the effect of Schedule 6, shall be admitted in evidence in any proceedings as *prima facie* proof of the facts and matters therein contained. Sub-section (4) provides that a certificate purporting to be signed by a person who purports to be an approved analyst, in or to the effect of Schedule 8 as to the percentage of alcohol expressed in grams per 100 millilitres of blood found in any sample of blood analysed by such analyst, shall be admitted in evidence in any proceedings as *prima facie* proof of the facts and matters therein contained. Sub-section (5) provides:

> "No certificate given pursuant to this section shall be tendered in evidence without the consent of the accused unless a copy of such certificate is proved to have been personally served on the accused more that ten days before the day on which such certificate is tendered in evidence".

The point at issue here is the meaning of the expression "personally served" in ss(5) and whether the learned Magistrate ought to have been satisfied that a copy **[3]** of the Schedule 6 and Schedule 8 Certificates was personally served on the respondent. No issue arises of whether personal service was effected outside the time prescribed by ss(5).

On 7 June 1986 Keith John Pattinson, a senior constable of police, handed certain documents including a copy of a Schedule 6 and a Schedule 8 Certificate to one Caroline Cook at 4 Walker Street, The Basin at 8.35 a.m. and requested the said Caroline Cook to hand the documents to the respondent. The said Caroline Cook was employed by the respondent as a housekeeper. The respondent resided at 4 Walker Street, The Basin on the said date. Caroline Cook gave evidence that on 7th June a policeman came to the premises where she was employed by the respondent, stating that he was looking for the respondent. As the respondent was asleep, she informed the policeman that her employer was asleep, whereupon the policeman gave her a bundle of documents folded. The said Cook said that she did not read the documents but placed them on top of a stereo. Later in the day when the respondent awoke she told him about the documents and he picked up the bundle and appeared to read them. The said Cook further said that she accepted the documents from the policeman on behalf of the respondent. None of these facts was in dispute.

Before the Magistrates' Court, counsel for the respondent submitted that personal service had not been effected and that s80D(5) required personal service upon the respondent and that service by an agent was insufficient. The learned Magistrate accepted the **[4]** submission that personal service upon the respondent in accordance with ss(5) had not been proved and he dismissed the information. It appears from the material that counsel for the respondent submitted that the expression "personally served" should be strictly construed because s80D is concerned with criminal proceedings.

Personal service of curial process is prescribed by Statute, Regulation or Rules of Court. I am unaware of any authority which draws a distinction between personal service of criminal process and personal service of civil process. Mr Atkins of counsel, who appeared for the informant, found no such authority in his researches. In 1884, in a case decided by the Full Court, Higinbotham J held that if a notice required by s7 of *The Fences Statute* 1874 "is either delivered to the person himself into his own hands, or so that he is enabled to obtain possession of it, or if it be sufficiently shown that it has come into his hands, there has been personal service upon him to all intents and purposes." *R v Heron ex parte Mulder* [1884] VicLawRp 159; (1884) 10 VLR (I) 93; 6 ALT 143; 10 VLR (L) 314. Although *The Fences Statute* of 1874 did not expressly require personal service of notices, the court held that personal service was necessary. *Mulder's case* was cited to the learned Magistrate.

A more recent authority bearing upon the meaning of personal service is *Pino v Prosser* [1967] VicRp 107; [1967] VR 835, a decision of McInerney J. A writ, of which personal service was required by Rules of Court, had been left with the defendant's wife who handed the writ to her husband **[5]** later on the same day when he returned from work. Mr Justice McInerney reviewed a considerable number of authorities before holding that on the facts proved, personal service had been effected. Reference was made to *Hope v Hope* [1854] EngR 805; 43 ER 534; (1854) 4 De GM & GBy 328 at 342; 19 Beav 237 where the Lord Chancellor said:

> "The object of all service is of course only to give notice to the party to whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required."

His Honour also accepted a statement of Holroyd J in *Rudd v John Griffiths Cycle Co Ltd* [1898] VicLawRp 71; (1898) 23 VLR 350 which referred to the history of personal service. Holroyd J, delivering the judgment of the Full Court said:

> "Before the *Common Law Procedure Act* 1852 came into operation the Courts in England were in

> general very strict in their interpretation of what constituted personal service, but still on several occasions they declined to set aside the service where the copy of the writ had been delivered at the party's residence to a servant or relative of his and from the facts the Judges thought it fair to infer that it came into his hands or to his knowledge so that he did, or could, if he pleased, become acquainted with its contents".

What happened on 7th June is clear and uncontested. A police officer handed a number of documents, including a Schedule 6 and a Schedule 8 Certificate, to the respondent's housekeeper at the respondent's residence. The respondent was asleep and rather than disturb him, the police officer reasonably believed that the housekeeper would hand the documents over **[6]** to the respondent when he awoke. This in fact happened when the documents were shown to the respondent by Mrs Cook and he appeared to read them. In my opinion, personal service of the documents in question was effected as required by ss(5) and the learned Magistrate ought to have been so satisfied. The learned Magistrate was wrong in holding that personal service had not been proved.

Accordingly, the order made dismissing the information must be set aside. On 24th February I made the following orders in Court and announced that reasons for such orders would be published later: The order nisi was made absolute. The order made in the Court below on 27 October 1986 dismissing an information laid under s81A of the *Motor Car Act* 1958 wherein Phillip John Butterley was the Informant and Kenneth George Cain was defendant was set aside. A further order was made that the said information be referred back to the Magistrates' Court at Ferntree Gully for hearing by another Magistrate and be determined in accordance with law. I directed that this order be authenticated by the Judge. No order for costs was made.
