10/91

SUPREME COURT OF VICTORIA

LOGES v MARTIN

Nathan J

24 January 1991 — (1991) 13 MVR 405

MOTOR TRAFFIC – MOTOR VEHICLE COLLISION – OWNER OF VEHICLE REQUESTED TO NAME DRIVER – DENIAL BY OWNER THAT VEHICLE INVOLVED – INSUFFICIENT EVIDENCE TO PROVE INVOLVEMENT – WHETHER OWNER IN BREACH OF DUTY TO PROVIDE PARTICULARS – "ON ANY OCCASION" – SELF-INCRIMINATION – COMMON LAW PRIVILEGE AGAINST – WHETHER ABROGATED: *ROAD SAFETY ACT* 1986, S60.

Section 60(1) of the *Road Safety Act* 1986 ('Act') provides:

> "An owner of a motor vehicle is guilty of an offence if, when required to do so by a member of the police force who is acting in the execution of duty, he or she fails to give any information which it is within the power of the owner to give and which may lead to the identification of any person who was the driver of the motor vehicle on any occasion or fails to make all reasonable enquiries in order to obtain that information."

M. was alleged to have been the owner of a motor vehicle said to have been involved in a collision with another vehicle. When subsequently interviewed about the matter by L., a police officer, M. denied that his vehicle was involved in an accident. Later, M. was charged with an offence against s60 of the Act which was dismissed on the ground that the magistrate was not satisfied that M.'s vehicle was being driven on the occasion the subject of L.'s enquiry. Upon appeal on a question of law—

HELD: Appeal dismissed.
(1) The word "occasion" in s60(1) of the Act means the event at or during which a motor vehicle was driven. Accordingly, the owner of a motor vehicle is not in breach of s60(1) of the Act if there is no sufficient evidence to show that on a relevant occasion the owner's motor vehicle was being driven.
***O'Reilly v Rooney* (1989) 10 MVR 19; MC 58/1989, referred to.**

(2) Having regard to some of the purposes and provisions of the Act, the common law privilege against self-incrimination is necessarily abrogated by the Act. Accordingly, the owner of a motor vehicle registered in accordance with the Act has no entitlement to refuse to provide answers which may tend to incriminate.
***Police Service Board v Morris* [1985] HCA 9; (1985) 156 CLR 397; (1985) 58 ALR 1; 59 ALJR 259, applied.**

NATHAN J: [1] This appeal which raises the scope of the Common Law right to decline to incriminate oneself stems from s60 of the *Road Safety Act* 1986, (the Act). Martin, the respondent, is the owner of a blue Hi-Lux van. Loges, the appellant, is a policeman who asked him questions concerning the identity of the driver of the van after a collision involving a blue vehicle and a red car had been reported to him at Harrietville on the evening of 13th January, 1990. Martin refused to answer, and I shall turn to the verbal exchange shortly. I commence by reciting the provisions of s60.

> "(1) An owner of a motor vehicle is guilty of an offence if, when required to do so by a member of the police force who is acting in the execution of his duty, he or she fails to give any information which it is within the power of the owner to give and which may lead to the identification of any person who was the driver of the motor vehicle on any occasion or fails to make all reasonable enquiries in order to obtain that information.
> Penalty: 3 penalty units.
>
> (2) A person guilty of an offence under this section is liable:
> (a) if the requirement is made by a member of the police force who is investigating an accident involving a motor vehicle that resulted in a person being killed or suffering serious injury— to a penalty of not more than 20 penalty units or to imprisonment for a term of not more than 4 months or to both.
> (b) in any other case—

> to a penalty of not more than 10 penalty units or to imprisonment for a term of not more than 2 months or to both.
>
> (3) For the purpose of this section, "owner" means the owner or the person in whose name the motor vehicle was registered at the time when the vehicle was being driven by the person about whom the information is sought or at the time when the requirement is made on any person who had possession or control of the vehicle at either of those times."

[2] The appellant said he visited the scene of an apparent motor collision and found pieces of a wheel hub, a chrome strip, and pieces of clear plastic. He said that the strip had red paint left after an impact, on its inside there was dark blue paint. From other inquiries he conducted, he was informed that the parts appeared to have come from a blue Toyota four wheel drive vehicle of the Hi-Lux model. Loges said he went to where Martin was working and had the following conversation, "Good day, Craig, do you know why I'm here?" Martin said, "I'm not making any comment." "I require information about your car." The response was, "I spoke to a solicitor last week and I was advised to make no comment." I believe it has been in an accident; am I right?" "I'm not saying anything." Question, "Was your car involved in an accident on Saturday week ago?" "No comment." Question, "I have evidence that a vehicle involved in an accident in the early hours of 13th January, was a blue Toyota Hi-lux type vehicle, most likely a four-runner, which matches the description of your car; what do you say to that?" Reply, "Can you prove it?" "I also know that you were at a party in Harrietville that night." "No comment." "Under the circumstances I must ask you who was driving your car in the early hours of Saturday morning on 13th January, 1990, on Harrietville Road?" "No comment." "Do you know that you are required by law to supply me with details?" "No comment." Question, "It's true, and you may be charged with an offence; do you wish to assist me?" Answer, "I'll have to stick with what my solicitor advised me and make no comment."

The appellant in his affidavit as to the Magistrate's **[3-4]** decision, swore as follows:

> "The Magistrate found he could not be satisfied beyond reasonable doubt that the elements of the offence had been made out. He referred to s60(3) and in particular to the expression, 'At the time the vehicle was being driven.' He was not satisfied that the accused's vehicle was being driven at the time of the, 'Occasion which was the subject of the police inquiry.' He held that this was a necessary element to a charge under s60(1)."

[5] The respondent in his version of the events did not relate direct speech, but related a narrative in the following terms. Martin informed Loges that he had no comment in relation to the various allegations. He advised Loges that he had seen a solicitor who advised him to make no comment. Martin said that his car was not there, and he was not saying anything further, and that he had no comment to make.

It can be seen that this description of the narrative contains an important inconsistency. Martin said, insofar as he did reply, that his car was not there. I must accept Martin's version in preference to that of the appellant, that his car was not involved in "the occasion." The respondent went on the swear that at the Magistrates' Court hearing, Constable Loges was cross-examined and stated that he could not say how long the debris had been by the side of the road, and that he also gave evidence he had inspected one similar vehicle belonging to another. It is on these facts that the Magistrate pronounced his findings as I have reproduced them. The appellant appeals on the basis that the Magistrate erred in law in finding that it was necessary for the prosecution to prove pursuant to s60(1) of the Act that a motor vehicle owned by the respondent was at a particular place at a particular time 'on any occasion' before the charge could be made out. **[6]** For reasons I will subsequently go into, I am satisfied that the Magistrate was correct and had sufficient material before him to doubt whether the vehicle, admittedly owned by Martin, was involved in an occasion which entitled Loges to require answers to his questions.

Before I deal with that matter, I wish to dispose of a contention robustly put by Mr Hardy for Martin. Namely, he was entitled to decline to answer, because had he done so, he could have given material which would have incriminated him either under the Act or similar legislation. It was put that the common law privilege which entitles a person to refuse to provide answers such as would tend to incriminate him, is a paramount principle of the criminal law, not to be abrogated by statute unless its terms are specific and clear or otherwise by necessary intendment.

The authorities in support of that proposition are legion. I need only refer to the statement of the principle contained in the following texts, *Cross on Evidence*, Third Edition, paragraph 13.34, page 631. It reads:

> "Many modern statutes authorise officers to make inquiries or ask questions concerning certain subjects and further impose a penalty upon persons failing to furnish information. In a series of cases the Australian courts have been asked to consider whether this duty to answer is subject to the privilege against incrimination. The courts have recognised the power of Parliament to abrogate the privilege, but generally speaking, they have been reluctant to construe the enactment in wide terms so as to authorise such abrogation."

[7] For those propositions *Mortimer v Brown* [1970] HCA 4; (1970) 122 CLR 493; 44 ALJR 109 is cited. Recourse to that authority reveals in respect of a public examination under the *Companies Act* as it then was, an examinee might not decline to answer a question on the ground that it will tend to incriminate. In respect of the contention, the Chief Justice Sir Garfield Barwick said,

> "As appears from the reasons of my brothers, the language of the statute makes the answering of every question imperative. The Parliament has made it abundantly clear that the so-called right to be silent of which the common law sought to protect was not to be available to the examinee. And as both my Brother Kitto and my Brother Walsh observed, the very purpose of the inquiry makes such a course inevitable if that purpose is not frustrated and the inquiry rendered nugatory. The common law cannot maintain a right in the citizen to refuse to make incriminating answers in the face of a statute which by its expression clearly intends, as does the present, that all questions allowed to be put shall be answered."

Kitto J, said, p496:

> "The circumstance which I find compelling is that the evident purpose of the section primarily, if not wholly, is to enable a suggestion of fraud or concealment of a material fact, to be fully investigated by means of the public examination of certain classes of persons."

and went on to rule on that basis, the common law privilege had been abrogated. The other text to which I refer is *Statutory Interpretation in Australia* Pearce and Geddes, par. 5.13, it recites the principle:

> "The circumstances in which the presumption against alteration of the common law has most frequently been applied, has been where legislation has included a general requirement **[8]** to answer questions. This requirement has usually been read as subject to the common law doctrine that a person cannot be obliged to incriminate himself or herself.

Crafter v Kelly (1941) SASR 237, is cited in support of that proposition, and I interpolate in a very robust manner by Sir Mellis Napier. In that case power had been given to a Board to require persons to attend and give evidence and the Board was empowered to require answers. The court held that this provision did not take away the common law right to refuse to answer questions on the ground that it would incriminate the persons concerned. Extensive English authority was referred to, perhaps the most notable being *Leach v R* (1912) AC 305. But the learned authors went on to observe:

> "There is no doubt, however, that parliament may abrogate the privilege, against self-incrimination by necessary implication, as well as by express words."

The authors made reference to *PyneBoard Pty Ltd v The Trade Practices Commission* [1983] HCA 9; (1982) 152 CLR 328; 45 ALR 609; (1983) 57 ALJR 236; [1983] ATPR 40-341; 5 TPR 75, the reference in that authority to the *Trade Practices Act* requires the person to furnish to the Trade Practices Commission, material or answers. These provisions led the Acting Chief Justice, as he then was, Mason ACJ, with whom Justices Wilson and Dawson concurred, to observe:

> "The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure that the full investigation in the public interest of matters involving the possible **[9]** commission of offences, which lie peculiarly within the knowledge

> of persons who cannot reasonably be expected to make their knowledge available, otherwise than under a statutory obligation."

The principles of statutory interpretation are in my view settled and clear. The common law privilege against incriminating one's self can only be abrogated by statute where the terms are either express or must necessarily be implied. In my view this Act necessarily abrogates the privilege. I turn to it. By s1, its purposes are set out and for the purposes of this examination, may be paraphrased as follows: to ensure safety on the roads and to improve procedures for the registration of motor vehicles and their safe use.

[10] By s3, owner is defined in broad terms to include a person who has the possession and use of a car under or subject to a hire purchase agreement, or a bill of sale, or like instrument. I am led to the observation that the Act steps outside the concept of ownership as conceived by the ordinary man, and is an indication of the breadth and scope of this Act. In Part 2, s5, the purposes of registration, paraphrased by me are as follows – (b) to enable motor vehicles to be regulated for reasons of safety and law enforcement and (c) to provide a method of establishing the identity of each motor vehicle which is used on a highway and the person who is responsible for it. The Act makes it an offence to drive an unregistered vehicle or for an unlicensed person to drive either a registered or unregistered vehicle. It has established a comprehensive code to ensure, so far as possible, the safe use of public roads and highways. Accordingly, a person entitled by way of licence to use the roads accepts certain obligations and commitments, and in fact duties as set out in s59. Similarly, an owner who has a vehicle registered accepts certain duties and obligations by virtue of registration which carries with it permission to have the vehicle driven on public roads.

[11] Section 60 is entitled, "Duty of Owner of Motor Vehicle to Give Information About Driver." This Act is phrased in the very terms of duties and obligations. Accordingly, if a person submits to the registration of his ownership of a vehicle, he submits to the statutory obligations which are concomitant with it. In this case, s60 requires the owner of a vehicle to give information to a police officer inquiring about the vehicle itself and its driver on a particular occasion. The case is analogous to the fact situation in *Police Service Board v Morris* [1985] HCA 9; (1985) 156 CLR 397; (1985) 58 ALR 1; 59 ALJR 259. In that case, the High Court, by a substantial majority, held that:

> "The privilege a policeman sought to invoke against answering questions by a Police Disciplinary Tribunal on the grounds that to do so might incriminate him was abrogated by the terms of the *Police Regulation Act* which submitted policemen to duties and obligations to the force and their superior officers by virtue of membership."

The High Court there said it was applying *Pyneboard v Trade Practices*. Gibbs CJ said at CLR p404:

> The provisions of the Act itself are relevant only in so far as they show that the provision now directly in question is part of a statutory scheme which provides for the regulation and control of a police force, a body upon whose efficiency and probity the State must depend for the security of the lives and property of its citizens and a body which can operate effectively only under proper discipline."

In my view, the *Road Safety Act* imposes similar constraints upon those persons who obtain registration of a motor car pursuant to it. By virtue of registration, as owners they become entitled to have the vehicle driven upon the public roads, a privilege which would not ordinarily be **[12]** available, and they accept obligations to their fellow citizens regarding its use. In my view, a purpose of this Act is to ensure the safe use of roadways. The law compels the conclusion that the identity of the drivers of registered vehicles be made available to law enforcement officers. The privilege to decline to answer has necessarily been extinguished.

In most cases no question of self-incrimination will arise. Under s60 the inquiry made by the police member as to the driver will not involve the owner incriminating himself. Equally it would be churlish not to assume there would be few circumstances where the owner could provide material for his own prosecution. In my view a thorough reading of the section entrenches these conclusions: sub-s(2) escalates the penalty in respect of those persons who decline to answer where the driving has involved a person being killed or suffering serious injury. Even in

circumstances where the use of the motor vehicle may have involved murder, manslaughter or grievous bodily harm, the member investigating such an incident is entitled to ask the owner of the vehicle the identity of the driver and a response must be given. That response may involve the owner identifying himself. The Act is clear that even in such serious and grave circumstances the privilege has been expunged.

[13] I accept the admonitions in the authorities I have referred to, and to which I might add *Sorby v The Commonwealth* [1983] HCA 10; (1983) 152 CLR 281; (1983) 46 ALR 237; (1983) 57 ALJR 248. A court should be reluctant to conclude there is a necessary intendment to abrogate the common law privilege. I have approached this section accordingly. I am satisfied it should be strictly construed, as indeed was held by Sir James Gobbo of this court in *O'Reilly v Rooney* (1989) 10 MVR 19, where he set out the criteria which must be satisfied before a conviction under s60 ss(i) can be recorded. There is no need for me to repeat them except point 4 which he identified as follows: that the police officer must indicate that he or she is seeking information as to the driver of such vehicle on such occasion. This observation brings me back to s60 and the Magistrate's findings. I am satisfied that the use of the word "occasion" in this section is used to indicate an event at or during which a car was driven. The words "any" used in the context "any person who was the driver", necessarily associates the definite article "any" preceding "occasion" with driving and thus the term must be understood as applying only to a "driving occasion". The Magistrate having found the owner's car may not have been being driven on the occasion, he was entitled to dismiss the information. Without, I hope, being tautologous, I shall continue with a close examination of the section, and it may be paraphrased as follows: the owner of a car is guilty of an offence if, when required by a member of the police force, he or she fails to give any information which may **[14]** lead to the identification of "any person who was the driver of the car on any occasion". The noun "occasion" is adjectivally assisted by being an event in which there was a driver of a car. It also assumes that the driver was driving.

If a Magistrate doubts there was driving on the occasion referred to, then there can be no conviction. I am satisfied the Magistrate's findings, either because he accepted the defendant's narrative, or reasonable doubt was raised in his mind whether the defendant's car was actually present and being driven on the occasion enquired of, entitled him to dismiss the information. The Act is in substantially different terms from the companion NSW legislation considered by the Court of Criminal Appeal in *R v Davis* (1976) 1 NSWLR at 84. The legislation there referred to required an offence to have been established before the obligation to answer arose. With the legislation before me, it is not necessary that an offence, or indeed, an accident occurred, all that is required is that there be an occasion at which the car, owned by the person questioned, was being driven. It follows that the appeal will be dismissed.

APPEARANCES: For the appellant Loges: Mr RM Downing, counsel. Mr A Castle, solicitor. For the respondent Martin: Mr GA Hardy, counsel.
