24/12; [2012] VSC 297

SUPREME COURT OF VICTORIA

DPP v GIBSON

Emerton J

26 June, 9 July 2012

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER GAVE EVIDENCE OF POST-DRIVING CONSUMPTION OF ALCOHOL – SUCH EVIDENCE NOT CORROBORATED – CHARGE DISMISSED BY MAGISTRATE – MAGISTRATE ACCEPTED THE RESPONDENT'S UNCORROBORATED EVIDENCE ABOUT THE TIMING OF HER DRINKING – WHETHER THE REQUIREMENT IN S48(1A) OF THE *ROAD SAFETY ACT* 1986 (VIC) THAT EVIDENCE BE CORROBORATED BY THE MATERIAL EVIDENCE OF ANOTHER PERSON HAD BEEN DISPLACED BY S164(1) OF THE *EVIDENCE ACT* 2008 (VIC) – WHETHER S164(1) OF THE *EVIDENCE ACT* 2008 (VIC) IMPLIEDLY REPEALED PART OF S48(1A) OF THE *ROAD SAFETY ACT* 1986 (VIC) – WHETHER S8 OF THE *EVIDENCE ACT* 2008 (VIC) PRESERVED THE OPERATION OF CORROBORATION REQUIREMENTS IN THE *ROAD SAFETY ACT* 1986 (VIC) – APPLICATION OF THE MAXIM *GENERALIA SPECIALIBUS NON DEROGANT* – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986 (VIC), S49(1)(f); *EVIDENCE ACT* 2008 (VIC), SS8, 164(1).

G. was charged with driving a motor vehicle with a concentration of alcohol above the prescribed limit (0.182%BAC). Whilst driving her motor vehicle, G. was involved in an accident with another vehicle and then returned to her home. Later, when police officers attended her home, G. underwent a PBT and subsequently a breath test. At the hearing of the charges, G. gave evidence that she had had half a glass of wine before the accident and had consumed four or five glasses of wine at her home after the accident. In accepting the evidence given by G, the Magistrate dismissed the charges stating that it was not necessary for G. to prove that the post-driving consumption of alcohol had to be corroborated by the material evidence of another person as required by s48(1A) of the *Road Safety Act* 1986. The Magistrate was satisfied that as a result of s164 of the *Evidence Act* 2008, the requirement for corroboration had been displaced. Upon appeal—

HELD: Appeal allowed. Dismissal quashed. Remitted to the Magistrates' Court for hearing and determination according to law.

1. Section 48(1A) of the *Road Safety Act* 1986 as a whole applied to proof of the charge brought against the defendant, with the effect that her evidence as to the timing of her consumption of alcohol was required to be corroborated by the material evidence of another person in order to displace the presumption in s48(1A) that the concentration of alcohol in her breath was not due solely to her consumption of alcohol after driving.

2. Section 8 of the *Evidence Act* 2008 requires s164(1) to be read down so that the provision does not affect other statutory provisions requiring the corroboration of evidence. Statutory requirements for the corroboration of evidence are unaffected by s164(1). As a result, s164(1) must be construed to be confined to abolishing common law requirements for the corroboration of evidence and not to requirements imposed by statute to deal with specific situations.

3. This is not a case where the rule about the implied repeal of an earlier provision by a later one should apply. The provisions in question are an earlier provision imposing a very specific requirement for corroboration in the context of complex legislation containing highly specific evidentiary provisions (including in respect of drug and alcohol related offences) and a later general provision dealing with evidence on which a party relies. Any inconsistency would be between a specific provision that was enacted to deal with a particular mischief and a provision dealing with the corroboration of evidence generally. Where there is a general provision that would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, so far as it is inconsistent with the special provision, must be deemed not to apply. The general does not detract from the specific: *generalia specialibus non derogant.*

4. All of s48(1A) of the *Road Safety Act*, including the corroboration requirement, remained operative. The Magistrate erred in basing her decision to dismiss the charge on the uncorroborated evidence of the respondent.

EMERTON J:
Introduction

1. On 17 February 2011, the respondent, Ms Gibson, was charged with offences under s49(1)(b) and s49(1)(f) the *Road Safety Act* 1986 (Vic) (the 'Road Safety Act'). The offences related to the concentration of alcohol in her breath while driving or within three hours of driving a car. The alleged concentration was 0.182 per cent, well above the prescribed limit of 0.05 per cent.

2. The charge under s49(1)(f) is the subject of this appeal. Section 49(1) provides that a person is guilty of an offence if he or she—

> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
>
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;

3. Section 49(1)(f) must be read in conjunction with s48(1A). Section 48(1A) provides:

> For the purposes of an alleged offence against paragraph (f) or (g) of section 49(1) it must be presumed that the concentration of alcohol indicated by an analysis to be present in the breath of the person charged or found by the analyst to be present in the sample of blood taken from the person charged (as the case requires) was not due solely to the consumption of alcohol after driving or being in charge of a motor vehicle unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person.

4. In combination, ss49(1)(f) and 48(1A) provide that while an offence under s49(1)(f) is not committed unless it is established that the concentration of alcohol was not due solely to the consumption of alcohol after driving, there is a presumption that the concentration was not due solely to the consumption of alcohol after driving unless the contrary is proved by the person charged. Proof is on the balance of probabilities by sworn evidence given by the person charged. Although s48(1A) provides on its face that such evidence be 'corroborated by the material evidence of another person', one of the critical questions on appeal is whether that requirement has been displaced by s164(1) of the *Evidence Act* 2008 (Vic) (the '*Evidence Act*'), which provides simply that it is not necessary that evidence on which a party relies be corroborated.

5. For the reasons that follow, s48(1A) as a whole applies to proof of the charge brought against the respondent, with the effect that her evidence as to the timing of her consumption of alcohol was required to be corroborated by the material evidence of another person in order to displace the presumption in s48(1A) that the concentration of alcohol in her breath was not due solely to her consumption of alcohol after driving.

Background

6. The uncontested facts underlying the charges are as follows.

7. On 23 January 2011, at about 6.15pm or 6.20pm, the respondent was involved in a collision between a car driven by her and another car at the intersection of Booyan Crescent and Kariboo Grove, Greensborough. The accident was a minor one. There is no suggestion that the respondent was at fault. The respondent and the other driver exchanged details. However, the other driver[1] thought that the respondent smelled of alcohol and suggested that the police be called. The respondent said it was not necessary and drove away. The other driver contacted the police.

8. At about 7.30pm, the informant and another police officer attended the respondent's home. The respondent underwent a preliminary breath test and, as a result, was required to accompany the informant to Diamond Valley Police Station where she underwent a further breath test at 8.12 pm. This test produced a reading of 0.182 per cent.

9. The respondent told the police, and later gave evidence, that she had consumed four or five glasses of wine at her home after the accident. She said that she had had just half a glass of wine before the accident.

The decision below

10. The respondent was acquitted of both charges in the Heidelberg Magistrates' Court. In relation to the charge laid pursuant to s49(1)(f) of the *Road Safety Act*, the learned magistrate found that the evidence that was available was inadequate for the purpose of proving beyond reasonable doubt that the reading of 0.182 per cent obtained at 8.12 pm was not due solely to the consumption of alcohol after driving. Her Honour said:

> ... what must be proven by the prosecution is that the concentration of alcohol indicated by the analysis to be present in Miss Gibson was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle. I have indicated that I accepted the evidence of the accused that she had consumed half a glass of chardonnay prior to the driving or being in charge of a motor vehicle. ... I'm not satisfied beyond reasonable doubt that the pre-incident half glass of champagne contributed to the reading of 0.182 per cent obtained at 8.12pm. The evidence before me with respect to the contribution of alcohol and elimination rates renders the evidence with respect to contribution of the pre-driving alcohol use uncertain, and where there is uncertainty I must exercise my judgment to the benefit of the accused and dismiss the charge.

11. Although the relevant part of the transcript is not available, it appears that the respondent's counsel submitted that as a result of the enactment s164 of the *Evidence Act*, the need for the respondent's evidence to be corroborated had been abolished. The learned magistrate considered the effect of s164 and observed that it operated to exclude the requirement for the corroboration of the evidence which is provided by the person charged. Her Honour said:

> The person charged, Miss Gibson, has provided evidence that she indeed did consume half a glass of chardonnay prior to driving, and the evidence available to me is unable ... The fact of that consumption is accepted by me. The evidence ... available to me is unsatisfactory to prove that that did not contribute to the blood alcohol reading, and accordingly I am satisfied that the evidence of the person charged satisfies me on the balance of probabilities that there was a contribution to the reading arising from the pre-driving consumption of alcohol.

12. It is tolerably clear that the learned magistrate accepted the respondent's uncorroborated evidence about the timing of her drinking in dismissing the charge under s49(1)(f).

Grounds of appeal

13. The Director appeals the finding on the charge under s49(1)(f) on the grounds that the learned magistrate erred in law:

> (a) in finding that the general provision in s164(1) of the *Evidence Act* dealing with uncorroborated evidence overrode the specific provision in s48(1A) of the *Road Safety Act*; and
>
> (b) in failing to have regard to the effect of s8 of the *Evidence Act*.

14. It is convenient to consider the grounds of appeal together. The central question on appeal is whether s164(1) abolishes the requirement for corroboration in s48(1A), having regard to s8, which limits the operation of the *Evidence Act*. Sections 8 and 164 of the *Evidence Act* must be construed in order to determine whether they effect an implied repeal of the requirement for corroboration in s48(1A).

15. Section 164 of the *Evidence Act* provides:

> **164 Corroboration requirements abolished**
> (1) It is not necessary that evidence on which a party relies be corroborated.
>
> (2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence.
>
> (3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge—
> (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
> (b) give a direction relating to the absence of corroboration.

16. However, s8 of the *Evidence Act* provides:

> This Act does not affect the operation of the provisions of any other Act.

17. It is the Director's submission that s8 preserves the corroboration requirement in s48(1A). The respondent submits that s8 does no more than to clarify that the *Evidence Act* is not a code.

18. The Director relies on the decision of the New South Wales Court of Criminal Appeal in *R v Gover*,[2] in which the court was required to determine whether s409 of the *Crimes Act* 1900 (NSW) had been impliedly repealed by the provisions of the *Evidence Act* 1995 (NSW), particularly s65. Section 409 of the *Crimes Act* dealt with the admissibility of depositions and statements by witnesses at committal who had died by the time of trial, and s65 of the *Evidence Act* 1995 (NSW) dealt with the exceptions to the hearsay rule, rendering prior representations admissible in criminal proceedings where the maker of the representation was not available to give evidence. Referring to the operation of s8 of the *Evidence Act* 1995 (NSW),[3] Dunford J (with whom Stein JA and Simpson J agreed) said:

> There is no room for implied repeal where there is an express provision such as s 8 to the effect that there shall not be any such implied repeal. The effect of that section is that the *Evidence Act* is not intended to, and does not affect other mechanisms which are provided in State or federal legislation for the admission of evidence.[4]

19. The Director also relies on the Full Federal Court decision in *Commissioner of Patents v Sherman*.[5] In that case, the Court was asked to determine whether evidence that would be inadmissible under the *Evidence Act* 1995 (Cth) would nonetheless be admissible under s160(a) of the *Patents Act* 1990 (Cth). The Full Court said:

> Section 8(1) of the *Evidence Act* is one of a number of provisions in Pt 1.2 of the *Evidence Act* that concern the application of that Act. Section 8(1) relevantly provides that the *Evidence Act* 'does not affect the operation of the provisions of any other Act'. Thus, where a provision of the *Evidence Act* is expressly and directly inconsistent with the provision of some other enactment, the provision of the other enactment will prevail.[6]

20. By contrast, in *McNeill v R*,[7] the Full Federal Court treated s8 as having narrower application, holding that s138 of the *Evidence Act* 2004 (NI) impliedly repealed s410(1)(a) of the *Criminal Law Act* 1960 (NI). Their Honours considered in detail how the *Evidence Act* provisions sat with the Criminal Law Act provisions, concluding that they dealt with the same subject matter but provided for different consequences.[8] As a result, the two provisions were irreconcilable. Applying the principle that an earlier enactment will be impliedly repealed where a later enactment is so inconsistent with it that the two enactments cannot stand together,[9] the Court held that s138 of the *Evidence Act* impliedly repealed s410(1)(a) of the *Criminal Law Act*.

21. Their Honours observed that it could not be said that any of the *Evidence Act*s of Norfolk Island, the Commonwealth or New South Wales were codes. They did not purport to deal with all aspects of evidence. For example, they did not purport to regulate the burden of proof or the gathering of evidence, leaving those topics to be dealt with by the substantive law.[10] The *Evidence Act* was not a code in the sense that it did not purport to affect the provisions of any other Act.[11] However, the fact that it was not a code in that wide sense did not mean that it had not impliedly repealed the *Criminal Law Act* provisions.[12]

22. The respondent draws from *McNeill* that s8 of the *Evidence Act* is not an impediment to a finding that a provision of the *Evidence Act* may impliedly repeal a provision of another Act. The respondent submits that s164(1) of the *Evidence Act* unambiguously removes any requirement for evidence to be corroborated, whereas s48(1A) imposes such a requirement. The two provisions are in direct conflict and the *Evidence Act* provision must prevail, being the later enactment.

23. I do not accept this submission for a number of reasons.

24. As senior counsel for the respondent pointed out, the Court is required to construe the terms of the *Evidence Act* using accepted principles of statutory interpretation. The starting point is to consider the words in the statute to ascertain their meaning.[13] The words in s164(1) appear to effect a blanket abolition of any requirement for the corroboration of any evidence. However, s164(1) must be read in context, that is, having regard to the *Evidence Act* as a whole. It must be interpreted in the light of s8. Section 8 provides that the *Evidence Act* does not affect the operation of the provisions of any other Act. Section 48(1A) of the *Road Safety Act* is a provision of another

Act. As a result, on the plain meaning of the words in ss8 and 164(1), s164(1) does not affect the operation of s48(1A) of the *Road Safety Act*.

25. In my view, s8 requires s164(1) to be read down so that the provision does not affect other statutory provisions requiring the corroboration of evidence. Statutory requirements for the corroboration of evidence are unaffected by s164(1). As a result, s164(1) must be construed to be confined to abolishing common law requirements for the corroboration of evidence.

26. Such a construction is consistent with the approach taken to the equivalent provisions in New South Wales and the Commonwealth *Evidence Act*s by the Court of Criminal Appeal in New South Wales in *R v Gover*,[14] and the full Federal Court in *Commissioner of Patents v Sherman*[15] respectively.

27. Moreover, support for this construction can be found in the reports of the law reform bodies[16] that resulted in the preparation of the Uniform *Evidence Act* and its subsequent enactment[17] in Victoria in 2008. The *Uniform Evidence Act* was based on reports on evidence prepared by the Australian Law Reform Commission ('ALRC') in 1985 and 1987: ALRC Report 26 (interim)[18] and ALRC Report 38 (final).[19] These reports criticised the technical and arbitrary nature of the rules for the corroboration of evidence and proposed that the 'requirements of law and practice' be abolished, other than in relation to perjury. However, the ALRC observed that many of the existing requirements for corroboration were imposed by legislation in respect of specific offences or causes of action. Those requirements were contained in legislation which dealt with the substantive law, not the laws of evidence. It stated:

> It is not proposed to effect such requirements. If changes to those requirements are necessary, they should be made by amendments to the legislation which imposes them.[20]

28. The recommended abolition of requirements for corroboration was therefore limited to the 'existing requirements of law and practice'[21] and was not intended to apply to specific statutory requirements for corroboration.

29. In my view, this makes it plain that the mischief that s164 was intended to remedy was the technical and arbitrary nature of the rules for the corroboration of evidence in the common law. Legislated corroboration requirements were intended to be dealt with separately.

30. It follows that on its proper construction, s164(1) of the *Evidence Act* applies to common law requirements for corroboration, not to requirements imposed by statute to deal with specific situations.[22]

31. On this construction, there is no inconsistency between s48(1A) of the *Road Safety Act* and s164(1) of the *Evidence Act*.

32. If I am wrong and there is an inconsistency between s164(1) of the *Evidence Act* and s48(1A) of the *Road Safety Act*, this is not in any event a case where the rule about the implied repeal of an earlier provision by a later one should apply. The provisions in question are an earlier provision imposing a very specific requirement for corroboration in the context of complex legislation containing highly specific evidentiary provisions (including in respect of drug and alcohol related offences) and a later general provision dealing with 'evidence on which a party relies'. Any inconsistency would be between a specific provision that was enacted to deal with a particular mischief and a provision dealing with the corroboration of evidence generally. As O'Connor J said in *Goodwin v Phillips*,[23] where there is a general provision that would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, so far as it is inconsistent with the special provision, must be deemed not to apply. The general does not detract from the specific: *generalia specialibus non derogant*.

33. In *Manly Council v Michael Malouf t/as Fusion Point*,[24] the New South Wales Court of Appeal considered s3 of the *Retail Leases Act* 1994 (NSW) and s125 of the *Roads Act* 1993 (NSW), which gave rise to apparently conflicting rights in relation to the use of footways. Although it was strictly unnecessary to decide whether the maxim *generalia specialibus non derogant* applied, Tobias JA, with whom Mason P agreed, said that it would,[25] and referred to *Maybury v Ploughman*,[26] in

which Barton ACJ endorsed the following rationale for that approach:

> ... In passing the special Act, the legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and having so done, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated.[27]

34. I consider it to be unlikely that the legislature, in enacting a general provision in the *Evidence Act* abolishing the requirement for evidence to be corroborated, intended to undo or abandon a requirement that it had specifically enacted to deal with evidence given by a person charged with drink driving about the timing of their alcohol consumption. Section 49(1)(f), which describes the elements of the offence, and s48(1A) which is directed to the proof of the offence, operate together. The party charged with proving the offence is given the benefit of a presumption, which may be rebutted by evidence given by the person charged. The corroboration requirement in s48(1A) forms an integral part of this regime. It is not difficult to identify the purpose of the requirement given the ease with which the presumption in s48(1A) could be displaced. Drink driving is a matter of great community concern. Had the legislature intended to make it harder to prosecute a person charged with drink driving by removing the requirement for the corroboration of evidence given by the person charged about when the drinking took place, it would have done so expressly and by reference to the provision in question.

35. I therefore reject the respondent's submissions that s164(1) of the *Evidence Act* effects an implied repeal of that part of s48(1A) of the *Road Safety Act* requiring the corroboration of evidence and that the 'clear words' of s164(1) 'make it plain that any legislative rule requiring corroboration is no longer to stand'.

36. All of s48(1A) of the *Road Safety Act*, including the corroboration requirement, remains operative. The learned magistrate erred in basing her decision to dismiss Charge 2 on the uncorroborated evidence of the respondent.

Conclusion

37. The grounds of appeal are made out.

38. The appeal must be allowed and the order made on 28 October 2010 by the Magistrates' Court at Heidelberg in case number B10523211 dismissing Charge 2 must be quashed.

39. Charge 2 must be remitted to the Magistrates' Court at Heidelberg for hearing and determination according to law.

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[1] And the other driver's friend who attended the scene of the accident.
[2] [2000] NSWCCA 303; (2000) 118 A Crim R 8.
[3] Which is in the same form as its Victorian equivalent.
[4] *R v Gover* [2000] NSWCCA 303; (2000) 118 A Crim R 8 [21] (citation omitted).
[5] [2008] FCAFC 182; (2008) 172 FCR 394; (2009) 79 IPR 426.
[6] *Ibid* [16]. However, their Honours decided that because of the operation of s160(a) of the *Patents Act*, s 8(1) of the *Evidence Act* was inapplicable.
[7] [2008] FCAFC 80; (2008) 168 FCR 198; (2008) 248 ALR 710; 184 A Crim R 467.
[8] The *Criminal Law Act* provision precluded the admission of a confession, while the *Evidence Act* provision permitted the admission in the exercise of the statutory discretion.
[9] *McNeill v R* [2008] FCAFC 80 [66]; (2008) 168 FCR 198; (2008) 248 ALR 710]63]; 184 A Crim R 467 80.
[10] *Ibid* [60]; [57].
[11] *Ibid* [61]; [58].
[12] *Ibid* [62]; [59].
[13] *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 [31]; (2010) 241 CLR 252, 264-5 [31]; (2010) 267 ALR 204; (2010) 84 ALJR 507; (2010) 115 ALD 493.
[14] [2000] NSWCCA 303; (2000) 118 A Crim R 8.
[15] [2008] FCAFC 182; (2008) 172 FCR 394; (2009) 79 IPR 426.
[16] In *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCATrans 242; (1997) 141 ALR 618; (1997) 187 CLR 384, 408, the High Court observed that it was well settled at common law that the court may have regard to reports from law reform bodies to ascertain the mischief which the statute is intended to cure.
[17] Albeit in modified form.
[18] Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985).

[19] Australian Law Reform Commission, *Evidence*, Final Report No 38 (1987).
[20] Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [1022].
[21] *Ibid* [1016].
[22] See Odgers, S, *Uniform Evidence Law*, 8th ed, Lawbook Co, p782 [1.4.2500].
[23] [1908] HCA 55; (1908) 7 CLR 1, 14.
[24] [2004] NSWCA 299; (2004) 61 NSWLR 394; (2004) 135 LGERA 24; (2004) 12 BPR 22,519.
[25] *Ibid* [65].
[26] [1913] HCA 43; (1913) 16 CLR 468; (1913) 20 ALR 9.
[27] *Ibid* 473-74, citing *Re Smith's Estate; Clements v Ward* (1887) 35 Ch D 589, 595.

APPEARANCES: For the appellant DPP: Mr JD McArdle QC, counsel. Solicitor for Public Prosecutions. For the respondent Gibson: Mr PG Priest QC with Mr AG Burns, counsel. Michael Kelly & Co, solicitors.
