44/87

SUPREME COURT OF WESTERN AUSTRALIA

DI ROSSO v WEARY

Burt CJ

12 August 1986 — (1986) 4 MVR 141

MOTOR TRAFFIC – FAILURE TO REPORT ACCIDENT – REPORT MADE TO POLICE BY OTHER MOTORIST – STATEMENT MADE BY OTHER MOTORIST TO POLICE – REQUEST DENIED FOR PRODUCTION OF REPORT AND STATEMENT AT HEARING – WHETHER DOCUMENTS SHOULD HAVE BEEN PRODUCED.

Where a motorist is involved in a motor car collision (in respect of which the other motorist does not stop) and makes a report and statement to the Police, the Prosecutor at the hearing of the charge should produce the report and statement upon request being made by counsel for the defendant motorist.

BURT CJ: [141] This is an application to review two decisions in Petty Sessions whereby the appellant was convicted upon each of two charges laid against him under the *Road Traffic Act* 1974 (WA). The first was that on 5 March 1985 at Dianella he was the driver of a motor vehicle, in the course of the use of which an accident occurred and property was damaged, and that he failed to stop. That was a charge laid under s54(1) of the *Road Traffic Act*. The second is – and it was arising out of the same incident or accident – that, the accident having occurred, he failed to make a report of it as required by s55(1) of the *Road Traffic Act*.

The accident itself was extremely trivial, although no doubt to the persons involved in it – particularly to Mrs Hollins to whom I will refer in a moment – it did not so appear, and I can understand that from her point of view it was a matter of considerable irritation; not only because of the damage which was done to her car but rather more so, I would have thought, by reason of the manner in which it was done. The accident occurred in this way: Mrs Hollins was approaching a roundabout in The Strand, Dianella. There was an argument as to which way she was travelling but for the moment it does not matter. Her course was substantially to go across the round-about, but to enter upon it, of course, she had to give way to traffic approaching on her right. There was a good deal of traffic and in the result she was stationary for some time before she could enter the roundabout.

[142] Her evidence was that there was a car behind her – a blue Holden – driven by a person whom she described in general terms as being of Italian extraction and aged about fifty, and smoking, if that matters. He apparently became impatient; he tooted her and then bumped into the back of her car. When she was able to, she got around the roundabout and stopped at the first offshoot from it, and as she did so her evidence is that she saw the vehicle drive away and she took the registration number of it. The registration number was said to be XMD 530. She reported that accident on the day on which it occurred and in that accident report form she gave the number XMD 530, and somebody has written underneath it in pencil "508?". In that form it is said by her, describing the happening of the accident, that she was facing, stationary, northwest in The Strand, waiting to turn into Morley Drive. The words "north-west" have been crossed out and "south" has been substituted, and that statement is one which she signed. One cannot tell when the alteration was made. On the face of the document it appears to have been made, or likely to have been made, by some person other than the original person who wrote it out – but that is only speculation on my part; one simply does not know, but it has in any event been changed.

Later she made a statement, upon which I think nothing turns, it being consistent in all respects with the evidence which she gave at the hearing. The hearing became quite "court drama"; such a little thing really to be tried, as it must have appeared to the magistrate when he started sitting, and he started to sit on 29 August 1985. He sat for most of that day. Mrs Hollins gave evidence and she was still in the box at the end of the day, and it was then adjourned until the 8 November 1985, whereupon her cross-examination was resumed, she, in the meantime – being only a typographical error one would suppose – having changed her Christian name.

The hearing on 8 November 1985 went on for the whole of that day. It was further adjourned and it came on again on 14 March 1986. The decision of the magistrate was given on 14 March 1986. It was given therefore just over a year after the accident happened. During the course of the cross-examination of Mrs Hollins counsel for the defendant called for the prosecuting sergeant to produce first the report of Road Traffic Accident form, which had been signed, and secondly, the statement which the witness subsequently gave. The prosecutor was quite clear in his own mind that those documents ought not to be produced and he was not prepared to produce them and the magistrate ruled that they could not be produced.

Counsel had information which led him to suppose that the accident report form in particular stated that Mrs Hollins was not – as she said in evidence – travelling in a generally southerly direction to enter the roundabout, but that on the contrary, she was travelling in a generally northerly direction to enter the roundabout. Counsel wanted the document, being her statement, so that if she persisted in saying that she was travelling south, the document could be put to her to contradict her upon it – a well known use of a prior inconsistent statement. However, it was ruled that the document need not be produced and it was not produced and although Mrs Hollins was cross-examined along those general lines, the document was not put to her.

[143] Another use to which the document would have been put, I am told, is that it would have been put to the police officer who made the initial investigations. The purpose of that would be to confirm that it was the fact that originally Mrs Hollins had stated that she was travelling in a north-west direction and not in a southerly direction.

As the matter was heard before me today, counsel for the prosecutor, being the respondent to the appeal, now concedes that the document should have been produced and one can see the use to which it could have been put. The only doubt that I had in the course of the hearing of this appeal was as to whether, had the document been produced, it would in the end have made any difference. No doubt Mrs Hollins would have persisted in her evidence that she was travelling in a southerly direction. What impact it would have had on the mind of the magistrate I do not know. For myself, I would not have thought it would have a great deal of impact upon anything and that being so I was initially minded to merely dismiss the appeal upon the ground that no miscarriage of justice had been shown to have occurred. On reflection, I think I would be wrong to do that. It is not really for me definitively to hold whether it would have made a difference or not. I think unless I can satisfy myself that it would not have made a difference, then I should allow the appeal. I do that merely because it reflects, I think, the proper onus of proof in these things and because it could be that the defendant was prejudiced in the conduct of his defence by his counsel not being able to use this document.

I say that specifically because the case in essence was a front-on conflict between two witnesses – the lady who was hit and the appellant who was said to have hit her. The appellant at all times denied that he was in any way involved in the happening and one cannot simply ignore his evidence; it is there. I did not hear the case, of course, but there is no reason why either it ought not to have been believed or that it ought not have created a reasonable doubt. It could well be that if the mind was neatly balanced upon that issue then a cross-examination with the use of this document may have tipped the scales – I do not know; it could have, because it was a contemporary document and what weight the magistrate may have attached to it I do not know.

Because I am in that doubt I am unable to say that one should apply to this appeal the so-called proviso as it has become now enacted in the *Justices Act* 1902 (WA). I do not think that I should. I think one needs to be fairly confident that the result would have been the same before you apply the proviso, whether it be in the *Justices Act* or extracted from the *Criminal Code* (WA). For those reasons I think on that ground alone the appeal should be allowed and these two convictions quashed.

I pass no judgment upon the other ground because it was not argued. If anyone would be concerned to know, my impression would be that there is nothing in the ground – my reason for that being that if it had been the appellant who had run into the back of this lady then he did not stop and if he did not stop then I do not think he can get the benefit of the proviso to the section dealing with the failure to report.

What other orders should I make? As I have already said, this was a small, insignificant accident really. Whoever was responsible for it, one could not describe it as much more than a tip and run – not that that means it ought **[144]** not to have been prosecuted; of course it should have been; but it is nevertheless a trivial thing. It happened a long time ago; it has now occupied a magistrate for three days of hearing and it has generated enough paper to fill out a very substantial appeal book. I would think that the time has come at which it ought not go back for a retrial. I think it would be over-reacting to it to continue it any further. Hence I think my order should simply be that the appeal should be allowed and the convictions ought to be quashed and there ought to be no retrial of either of the two complaints.
