

30/11; [2011] VSC 437

SUPREME COURT OF VICTORIA

FALDON v NEWBURY

Osborn J — 29 August 2011

MOTOR TRAFFIC – TRAFFIC INFRINGEMENT – OPERATOR ONUS PROVISIONS – ORAL EVIDENCE OF RECEIPT OF NOMINATION DOCUMENT COUPLED WITH PRODUCTION OF SUCH DOCUMENT – PRIMA FACIE EVIDENCE APPELLANT DRIVER AT TIME OF ALLEGED OFFENCE – NO ERROR OF LAW: ROAD SAFETY ACT 1986, SS84B, 84BC, 84BE, 84BI.

F. was convicted on a charge of exceeding the speed limit. The evidence was based on speed camera evidence and the provisions of the *Road Safety Act 1986* ('Act') in relation to the operator onus provisions. At the hearing, the camera operator gave evidence that a motor vehicle was detected travelling at an excessive speed and a photograph of the vehicle with the registration number was tendered. The owner of the vehicle had nominated F. as the driver at the relevant time. Upon appeal—

HELD: Appeal dismissed.

1. The camera operator gave evidence first that a nomination had occurred. This evidence was not hearsay; it was evidence of a procedural fact. Further, the camera operator was also entitled to produce the known user statement received in respect of the incidents of which he gave evidence. The known user statement constituted hearsay evidence of the identity of the driver but this was precisely what the Act contemplated and permitted.

2. The initial oral evidence of the camera operator that the appellant was nominated as driver, coupled with the known user statement, constituted *prima facie* evidence that F. was the driver. Indeed, because of the provisions of s84BG(2), it was in the absence of evidence to the contrary, proof of the matters stated in it. The known user statement contained the information prescribed by the Act. No cross-examination was directed to displacing the *prima facie* case put forward on behalf of the respondent. Once F. was nominated, it fell upon him to displace the *prima facie* proof that he was the driver at the relevant time.

3. The statement contained the particulars prescribed by the Act for a known user statement. As such it was capable of constituting such a statement in the terms of the Act.

4. The statement contained reference to an obligation number and vehicle owner which on their face referred to a particular incident although that incident was not otherwise particularised. In other words, it disclosed on its face particulars which sensibly might have enabled the camera operator to state that it related to the incident in question.

5. The combination of the oral evidence of the camera operator and the production of the statement constituted evidence of the nomination of F. as the driver at the time of the offence before the court. No lack of nexus between the document and the offence was suggested or established in cross-examination. There was no evidence to the contrary of the *prima facie* evidence constituted by the operator's evidence and the production of the document. Accordingly, no error of law was shown in the Magistrate's decision.

OSBORN J:

1. This is an appeal on questions of law from the Magistrates' Court at Sale in respect of a conviction under r20 of the *Road Safety Rules 2009*.

2. The basis of the conviction was speed camera evidence that the appellant had exceeded 100 kilometres per hour.

3. The appellant was convicted as the deemed driver of the vehicle pursuant to provisions of the *Road Safety Act 1986* ('the Act'). Part 6AA of that Act deals with 'operator onus'. The purpose of this part of the Act is stated in s84BA.

The purpose of this Part is to establish an 'operator onus' system for certain offences arising out of the operation of motor vehicles or trailers based on the principle that, if the identity of the driver or person in charge is not established at the time the offence is detected, the person last known to

have possession or control of the vehicle or trailer should generally be liable for the offence unless that person can establish that they were not responsible for the vehicle or trailer at the time of the offence and provide information sufficient to identify and locate who was.^[1]

4. Section 84BB further gives as the first meaning of operator:
operator, in relation to a motor vehicle or trailer at the time of an offence, means each of the following—
 (a) the registered operator of the motor vehicle or trailer at that time or the person recorded at that time on a register of vehicles maintained under a corresponding law as the person responsible for the motor vehicle or trailer; ...^[2]
5. In turn the first meaning of 'responsible person' is defined by s84BB as the 'operator' of the motor vehicle.
6. Section 84BC(1) provides:
 (1) If the Act or legislative instrument that creates an offence that may be committed by the driver or person in charge of a motor vehicle or trailer, or any other Act or legislative instrument, expressly states that the offence is an operator onus offence for the purposes of this Part, then (except as otherwise provided by this Part) the person who at the time of the offence is the responsible person in relation to the motor vehicle or trailer is guilty of the offence as if that person were the driver or person in charge (as the case requires) of the motor vehicle or trailer at that time.^[3]
7. By virtue of s66 of the Act, road rule 20 is an operator onus offence falling within the ambit of s 84BC(1).
8. Section 84BE provides that a person is not guilty of an offence by reason of s84BC if within the prescribed period the person gives to an enforcement official a known user statement.
9. Section 84BB provides the following relevant definition of 'known user statement':
known user statement, in relation to an offence involving a motor vehicle or trailer, means a statement in writing made by a person—
 (a) to the effect that the person was not at the time of the offence driving, or had not at that time possession or control of, the motor vehicle or trailer or the motor vehicle to which the trailer was attached; and
 (b) containing sufficient information to identify and locate the person who the person making the statement last knew to have, before the offence, possession or control of the motor vehicle or trailer or of the motor vehicle to which the trailer was attached;^[4]
10. Section 84BE(2) provides that information contained in a known user statement is sufficient for the purposes of this part if it contains –
 (a) in the case of an individual, his or her full name and current home address and either his or her date of birth or the number of the licence or permit authorising him or her to drive and, if that licence or permit is issued by a corresponding Authority, the name of that Authority; ...^[5]
11. Section 84BG provides that a proceeding against a person nominated in an effective known user statement may be commenced not later than 12 months after the day on which the statement was given to the enforcement official.
12. Section 84BG(2) provides:
 (2) In a proceeding referred to in subsection (1) the known user statement, sold vehicle statement or tolling nomination statement is evidence and, in the absence of evidence to the contrary, proof of the matters stated in it.^[6]
13. Section 84BI makes it an offence to provide false or misleading information in a known user statement.
14. Section 84BF provides for cancellation of acceptance of nomination statements.
 (a) if in the case of a known user statement, a sold vehicle statement or a tolling nomination statement, the person nominated in the statement as being the responsible person gives to an enforcement official within the prescribed period a nomination rejection statement and the enforcement official is satisfied, having regard to the matters stated in the nomination rejection statement, that the nomination was incorrect; or
Note
 It is an offence to provide false or misleading information in a statement: see section 84BI.^[7]
15. Section 84BI further provides that is an offence to provide false information in a nomination rejection statement.

16. In the present case, the camera operator gave evidence that the speed camera photographed a 2008 white Ford station wagon travelling at a detected speed of 136 kilometres per hour at the time of the alleged offence. A photograph of the vehicle with the registration number MBZ478 was tendered. The camera operator then stated, 'The owner of the vehicle nominated the defendant as the driver.'

17. As I read the transcript there was no objection to this evidence. It was, on its face, evidence of a nomination in accordance with the Act. Section 84BI reinforces the significance of such statements.

18. The camera operator then produced the document comprising the nomination. Objection was taken to the production of the known user statement but it was received in evidence. The camera operator was not thereafter cross-examined with respect to the identity or content of the statement.

19. The appellant's wife subsequently gave evidence confirming that the motor vehicle in issue was in fact part of the fleet used by Marine Safety Victoria of which she was the Deputy Director Operations. Such evidence was confirmatory of the description contained in the known user statement of 'Government fleet vehicle'. Further, the records of drivers of the vehicle at particular times were dependent for their accuracy on staff 'doing what they are required to do'. The identification of the driver at a particular time depended on the accurate completion of the log sheet by employees of Marine Safety Victoria. The basis of the nomination was thus put before the Court, presumably in an attempt to cast doubt on the evidentiary effect of the statement.

20. The appellant now raises two questions of law:

- (1) Did the learned Magistrate err in accepting hearsay evidence from the prosecution witness Mr Ernie Mackie despite the objections from the accused's counsel?
- (2) Was there sufficient admissible evidence before the Court to enable a Magistrate to find that the appellant was the actual deemed driver of motor vehicle MBZ478 at the time of the alleged offence?

21. Insofar as the first question is concerned, the camera operator gave evidence first that a nomination had occurred. This evidence was not, in my view, hearsay; it was evidence of a procedural fact. Further, I accept the respondent's submission that the camera operator was also entitled to produce the known user statement received in respect of the incidents of which he gave evidence. There is, in my view, nothing in this first point. The known user statement constituted hearsay evidence of the identity of the driver but this is precisely what the Act contemplates and permits. It also provides for the pre-trial rejection of such a statement but there is no suggestion that this occurred in the present case.

22. Insofar as the second question is concerned, I accept the respondent's submission that the initial oral evidence of the camera operator that the appellant was nominated as driver, coupled with the known user statement, constituted *prima facie* evidence the appellant was the driver. Indeed, because of the provisions of s84BG(2), it was in the absence of evidence to the contrary, proof of the matters stated in it. The known user statement contained the information prescribed by the Act. No cross-examination was directed to displacing the *prima facie* case put forward on behalf of the respondent.

23. I accept the submission made on behalf of the respondent that the camera operator's evidence as to the known user statement was in substance evidence of production from proper custody of the document made on behalf of the owner nominating the appellant as the driver at the relevant time. It was not evidence as to the truth of the matters asserted in the document. Once the appellant was so nominated it fell upon him to displace the *prima facie* proof that he was the driver at the time resulting from the provisions of s84BG.

24. Mr Hardy drew the Court's attention to the statement in the known user statement that, 'I state that at the time of the offence set out in this notice, I/the corporation was not in possession or control of the vehicle. And I further state: The driver or the person/corporation in possession or control of the vehicle at the time of the offence was.' Immediately following this statement the appellant is identified by name, address and driver licence number.

25. The 'reasons' section of the nomination statement then simply states, 'Government fleet

vehicle'. Mr Hardy submitted the document did not itself adequately particularise and identify the offence in respect of which the statement was made.

26. Ordinarily, Mr Gyorffy submits, the nomination statement is contained on the reverse side of an infringement notice. There is however no evidence before me that the nomination statement produced to the Magistrates' Court had an infringement notice on its face; that is, on the obverse side from the nomination statement, as distinct from simply comprising a copy document showing the nomination statement alone.

27. There are, however, in my view, three answers to Mr Hardy's submission.

28. First, the statement contains the particulars prescribed by the Act for a known user statement. As such it is capable of constituting such a statement in the terms of the Act.

29. Secondly, the statement contains reference to an obligation number and vehicle owner which on their face refer to a particular incident although that incident is not otherwise particularised. In other words, it discloses on its face particulars which sensibly might enable the camera operator to state that it related to the incident in question. As I have said, the basis of the camera operator's evidence was not attacked in cross-examination.

30. Thirdly, the combination of the oral evidence of the camera operator and the production of the statement constituted evidence of the nomination of the appellant as the driver at the time of the offence before the court. No lack of nexus between the document and the offence was suggested or established in cross-examination. There was no evidence to the contrary of the *prima facie* evidence constituted by the operator's evidence and the production of the document.

31. The evidence must be understood in the context of the 'operator onus' contemplated by s 84BA. The prosecution was entitled to rely upon the evidence of the camera operator and the nomination statement as establishing *prima facie* that the appellant was the driver at the time of the alleged offence. No error of law has been shown in the Magistrate's decision.

32. Accordingly, the appeal will be dismissed.

^[1] Road Safety Act 1986, s84BA.

^[2] Road Safety Act 1986, s84BB.

^[3] Road Safety Act 1986, s84BC(1).

^[4] Road Safety Act 1986, s84BB.

^[5] Road Safety Act 1986, s84BE(2)(a).

^[6] Road Safety Act 1986, s84BG(2).

^[7] Road Safety Act 1986, s84BF(1)(a).

APPEARANCES: For the appellant Faldon: Mr S Hardy, counsel. Thexton Lawyers. For the respondent Newbury: Mr T Gyorffy, counsel. Director of Public Prosecutions.
