58/89

SUPREME COURT OF VICTORIA

O'REILLY v ROONEY

Gobbo J

20 November 1989 — (1989) 10 MVR 19

MOTOR TRAFFIC – MOTOR VEHICLE INVOLVED IN ACCIDENT – OWNER REQUESTED TO PROVIDE INFORMATION ABOUT DRIVER – FAILURE TO PROVIDE INFORMATION – WHETHER CONDITION PRECEDENT TO OWNER'S LIABILITY THAT OWNER BE TOLD THAT OFFENCE COMMITTED OR THAT OWNER HAD KNOWLEDGE LINKED TO A DRIVING OFFENCE: *ROAD SAFETY ACT* 1986, S60.

O'R. was the owner of a motor vehicle which was said to be involved in an accident when driven by a bearded male person aged in his thirties. When questioned whether any member of her family fitted that description, O'R declined to answer, giving the reason that to her knowledge the vehicle had not been involved in an accident. O'R. was charged with an offence under s60 of the *Road Safety Act* 1986 ('Act'), and on the hearing, it was submitted that the prosecution had failed to prove that O'R. had been told that an offence had been committed and that O'R. had knowledge or information which was linked to a driving offence. The magistrate found the charge proved. Upon order nisi to review—

HELD: Order nisi discharged.
(1) Having regard to the width of the words in s60 of the Act, it is not necessary that the owner of the motor vehicle be informed that a driving offence by the driver is being alleged, much less has been committed.
***Coysh v Grimwade* [1926] VicLawRp 24; [1926] VLR 178; 32 ALR 104; 47 ALT 113, distinguished.**

(2) It was open to the magistrate to have found that if the owner of the motor vehicle (O'R.) had informed the police officer whether any member of her family was a bearded male in his thirties, it might have led to the identification of the driver of the vehicle on the relevant occasion. Accordingly, in view of the owner's failure to provide such information, it was open to the magistrate to have found the charge proved.

GOBBO J: **[1]** This is the return of an order nisi to review a decision of a Stipendiary Magistrate at Melbourne. The applicant, the defendant in the court below, was convicted of failing to give information to a police officer that might have led to the identification of the driver of a motor car owned by the defendant. A conviction was not in fact imposed but the matter was adjourned upon a good behaviour bond.

The evidence was that police officers interviewed the defendant at her home following a telephone conversation earlier that evening. The defendant admitted that she was the owner of motor car registered number CZA 696. There was evidence to the effect that such car had been involved in an accident on 19 February 1988. It was believed that at the relevant time and place the car was being driven by a man with a beard, aged in his thirties. The police officer said that after he told the defendant that her car had been involved in an accident, she said that the car had not been involved in any accident on the day in question but had been in the car park at her place of employment and that no-one had access to the vehicle. She agreed that someone might have been able to take the car without her knowing about it. When asked whether any member of her family had a beard, she declined to answer. When asked why she refused to supply "driver's details", the officer said that she replied that the vehicle was not involved in an accident.

After an unsuccessful submission of no case to answer, the defendant gave evidence. She described taking her car to work on 19 February 1988 and said that she had gone to the country for the day. She further said that she did not **[2]** know of her car being involved in any accident on that day. It is to be inferred, although it was not specified, that when she went to the country on that day, she did so by some means other than with her own car. It was to be inferred that the car remained parked, as far as she knew, in the car park while she was in the country.

The defendant said that her husband was in his thirties and had a beard. She said she was

told by her husband that to his knowledge he had not been involved in any accident on the day in question. The defendant further said that it was her belief that not having any knowledge of an accident involving the motor vehicle, she believed that she did not have to supply the police with information as to - 'Something of which,' she said, 'I did not know about, particularly involving my husband.'

The Stipendiary Magistrate found the charge proved but adjourned the matter upon the basis of a good behaviour bond. The arguments put forward in support of the application to set aside the learned Stipendiary Magistrate's decision were essentially the same as those which had been argued in the court below.

It was first of all submitted to me that the Prosecution had to prove that the defendant had been told that an offence had been committed. Secondly it was argued that there had to be evidence that the defendant had knowledge or information which was linked to a driving offence. Thirdly it was submitted that s60 of the *Road Safety Act* 1986 had to be read down in the light of s26 of the *Evidence Act* and accordingly a wife could not, in **[3]** effect, be compelled to provide evidence against her husband.

It is convenient to take the first two arguments together. These were founded on a number of decisions on comparable legislation. There was first the decision of *R v Hankey* (1905) 2 KB 687. The relevant section was s1(3) of the *Motor Car Act* 1903, which read:

> "If the driver of any car who commits an offence under this section and refuses to give his name and address or gives a false name and address he shall be guilty of an offence under this Act and it shall be the duty of the owner of the car if required to give any information which it is within his power to give and which may lead to the identification and apprehension of the driver and if the owner fails to do so he also shall be guilty of an offence under this Act."

It was contended by the defendant owner in that case that there was no obligation on an owner to give the information unless the driver of the car had himself previously been asked for, and refused to provide, his name and address. Lord Alverstone CJ, said of this argument at p689-690:

> "I do not construe the section in that way; the section deals with separate offences by different persons. By the earlier part it is enacted that if a driver who commits an offence under the section refuses to give his name and address, that refusal shall in itself constitute an offence under the Act. Then the latter part of the section provides that it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he shall also be guilty of an offence under this Act. That part of the section creates a distinct offence on the part of the owner, and to say that the owner is only bound to give the required information after a refusal by the driver would be to defeat the whole object of the latter part of the section, which is to meet the difficulty, and event impossibility, which frequently arises of getting the name and address from the driver himself. On this point, therefore, I should have decided against the defendant."

[4] His Lordship then went on to deal with a different argument which has less relevance to this case and on that basis to set aside the conviction. In *Coysh v Grimwade* [1926] VicLawRp 24; [1926] VLR 178; 32 ALR 104; 47 ALT 113, the Full Court was concerned with an alleged offence under s10(3) of the *Motor Car Act* 1915, a provision that was in similar terms to its equivalent in the English *Motor Car Act* of 1903. The successful ground of review in that case was that the owner had not been told that it was alleged that the driver of the car had committed an offence against the section. Sub-section (3) read as follows:

> "If the driver of a car commits an offence against this section and refuses to give his name or address or gives a false name or address or refuses or fails to stop his car when called upon to do so by any member of the police force he shall be guilty of an offence under this Act and it shall be the duty of the owner of the car if required to give any information which is within his power to give and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he shall also be guilty of an offence against this Act."

Mr Justice Schutt said at pp181-182, as follows:

> "The sub-section does not in so many words require that any such communication should be made to the owner of a car, but I think it is to be implied from its language. It would, I should say, be a remarkable state of affairs if that were not so, because then the owner of the car would be practically compelled to give information such as is suggested without knowing the purpose for which the information would be required. The sub-section says that the owner must give information 'if required'. I think those words imply that the information must, to his knowledge, be required for the purpose of the identification and apprehension of a driver who has committed an offence against the section. If the owner of the car is not told the purpose of the inquiry, if he is not informed that the driver is alleged to have committed an offence, he would then be placed in this position: He would be under an obligation to give information likely to lead to the identification and apprehension of the **[5]** driver, although he would have no opportunity to decide in his own mind whether he was in possession of any such information or not. In these circumstances it is, in my opinion, clear that the fact that it is alleged that the driver has committed an offence against s10 must be communicated to the owner of the car."

Finally, there is the decision of the Full Court of New South Wales in *Roser v Fagg* (1929) 29 SR (NSW) 429; 46 WN (NSW) 144. Here again it was held that the conviction could not be sustained in the absence of communication of the allegation to the owner being interviewed. The defendant had merely been handed a form with the name being sought of the driver of a vehicle at a specific time and on a specific date and had been told that an accident had occurred but the owner had not been told that it was alleged that an offence had been committed.

Section 60(1) and (2) of the *Road Safety Act* 1986 reads as follows:

> "(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 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:
> **[6]** (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—
> and on conviction the court must cancel all driver licences and permits held by that person and, whether or not that person holds a driver licence, disqualify him or her from obtaining one for, in the case of a first offence, 2 years and, in the case of a subsequent offence, 4 years."

It is clear that this section is in quite different terms to the legislation that was considered in the three cases that I have just referred to. Section 60(1) does not contain any reference to any offence being alleged to have been committed by the driver. By contrast, its predecessor, s10(3) of the *Motor Car Act* of 1915, begins by referring to the driver committing an offence and refers to the owner of the car, being the car earlier referred to. In *Roser v Fagg*, the section under which the owner was charged expressly refers to identification of a person driving such vehicle:

> "when an offence under this Act or any regulation is alleged to have been committed and if such owner fails to do so, he shall be guilty of an offence under this Act." [p432, *supra*]

It was submitted that there was a reference to an offence by the driver in s60(2)(a) of the *Road Safety Act* but that does not in my view assist the argument, for the language in sub-section (2)(b) namely: ".... any other case" is quite unlimited and does not restrict the case to an alleged driving offence. Further, it is clear on a study of the decision of the Full Court in *Coysh v Grimwade* that in that case the section contained explicit reference to the commission of an offence and it is in that context **[7]** that that decision should be viewed.

Moreover, in *Coysh v Grimwade* it could validly be said in that case that the owner being interviewed would be unaware of the purpose for which the information was being sought. Even if those *dicta* from that case were applied to the present case, it could not in my view be said that this owner, when given a description of the person said to be the driver of the vehicle at the

relevant time, and asked if such a person was part of her family, would have realised that the purpose of the inquiry was to ascertain whether the person so described was the driver of the vehicle and might be part of her family.

I am of the view that having regard to the width of the words in s60 of the *Road Safety Act*, it is not necessary that the owner be informed that a driving offence by the driver is being alleged, much less has been committed. The decisions referred to in argument do not assist, for the legislation there in question was in quite different terms. This makes it unnecessary to decide whether, if an allegation of a driving offence was necessary, this was able to be inferred from the evidence as the learned stipendiary magistrate in fact found was the case.

The next ground of review rested on s26 of the *Evidence Act* 1958 and postulated that the defendant was in effect in the same position as a wife being compelled to give evidence against her husband. In my view this argument is wholly misconceived for s26 relates to competence and compellability of one spouse in criminal proceedings against the other spouse. This was not such a proceeding. Plainly, s26 would have protected the defendant from being **[8]** compelled to give evidence against her own husband, had he been charged with a driving offence.

It is of course a matter of high principle that the courts should do all in their power to uphold the marriage relationship and that accordingly only clear words should compel a departure from such principle in the administration of justice, but as I have indicated, that issue does not arise here. I leave over the question as not having to be decided as to whether a spouse could under s60 of the *Road Safety Act* be made to give information if that could only be done by disclosing a matrimonial communication, an area of protection under s27 of the *Evidence Act* 1958.

It is necessary that I consider one further ground which, though it was not argued in terms, is contained amongst the grounds of the order nisi – namely, that there was no sufficient evidence to sustain the adverse finding that the offence had been proved. The ingredients of the offence in the present case necessary to be proved, given that the charge was directed to the first and not the second limb of s60(1), were as follows:

> "1. That a member of the police force required the relevant information. In my view it is necessary that the owner know that it is a police officer who makes the requirement.
>
> 2. That the police officer was acting in the execution of his duty.
>
> 3. That the police officer must identify the motor vehicle and the occasion, the subject of his requirement.
>
> 4. That the police officer must indicate that he or **[9]** she is seeking information as to the driver of such vehicle on such occasion.
>
> 5. That there was a failure to provide the information requested and that it was within the owner's power to provide such information.
>
> 6. That such information might have led to the identification of the driver of such vehicle on such occasion."

Here the only debate was whether there was evidence as to the 5th and 6th ingredients. There was evidence that the description of the driver of the relevant vehicle on the relevant occasion was as follows – namely, a male with a beard and in his 30's. The information required was whether anyone of that description was a member of the owner's family. That was plainly information which it was within the defendant's power to give. Moreover it was open to the learned stipendiary magistrate to find as he did that such information might have led to the identification of the driver. It follows, in my opinion, that there was evidence capable of sustaining the charge and accordingly, the order nisi must be discharged.

It would appear the defendant's stand as emerges from the text of the affidavit was that she acted out of a genuine belief that her car had not been involved in an accident and that accordingly she did not believe that the information had anything to do with the identification of the driver of her motor car. There may well be cases where the information can properly be declined – for example, where the owner actually knows that the car was never driven at all. But

presumably **[10]** in such a situation the information could not lead to identification in the way that the section postulates.

In the present case, the matter of belief was not the subject of any argument put before me on this order to review. Even if it had been, it was, in my view, open to the learned stipendiary magistrate not to treat the defendant's belief as decisive for on her own account, she could not exclude the possibility of her car being used by someone else on the day in question.

I have some doubt whether in the context of s60 a subjective intent has to be proved, but the present case does not call for a final decision on this matter. In view of the way the case proceeded in the court below and before me and also in view of the limited effect that any belief on the defendant's part could have had, this question does not in the circumstances fall for decision.

It follows that the order nisi must be discharged with costs.

APPEARANCES: For the applicant O'Reilly: Mr P Billings, counsel. McMahon & Treby, solicitors. For the respondent Rooney: Mr P Bick, counsel. Victorian Government Solicitor.
