31/01; [2001] VSC 298

SUPREME COURT OF VICTORIA

KYMANTAS v COUNTY COURT of VICTORIA & JENNINGS

Eames J

13, 20 August 2001 — (2001) 34 MVR 280

MOTOR TRAFFIC – MOTOR VEHICLE INVOLVED IN HIT-RUN ACCIDENT – OWNER OF MOTOR VEHICLE LATER INTERVIEWED – TOLD BY POLICE OFFICER THAT ACCIDENT OCCURRED AT 12 NOON RATHER THAN 1:30PM ON SAME DAY – OWNER REQUESTED TO SUPPLY DETAILS OF DRIVER – REQUEST DENIED – OWNER CHARGED – SUBMISSION THAT CHARGE NOT PROVED DUE TO INCORRECT REFERENCE TO TIME OF DAY – CHARGE FOUND PROVED – WHETHER COURT IN ERROR: *ROAD SAFETY ACT* 1986, S60.

K. was the owner of a motor vehicle when it was involved in a hit-run accident and a person was injured. When K. was later interviewed by a police officer, K. was told that the accident occurred at 12.00pm rather than at about 1.30pm on the same day. K. said he did not know who was driving the motor vehicle. K. was subsequently charged with a breach of the *Road Safety Act* 1986 ('Act'), s60. At the hearing K. submitted that he could not be convicted unless it was proved that the vehicle was in fact being driven on the occasion of driving which was specified in the request. The Court rejected this submission and convicted K. Upon application for relief in the nature of *certiorari*—

HELD: Application dismissed.
To sustain the charge under s60 of the Act, the prosecution had to prove beyond reasonable doubt that the owner's vehicle had been driven on the occasion about which the request had been made for information. S60 does not state in terms that the police officer was obliged to specify the occasion of driving with any particularity at all. In the present case, the occasion inquired of pursuant to s60(1) of the Act was the occasion of the incident in which the pedestrian had been injured. Whether that occasion happened at noon or 1.30pm on that day was a mere detail which might or might not raise a reasonable doubt as to whether the owner had failed to comply with the request made of him. No error was made by the Court in finding the charge proved.

EAMES J:

1. The plaintiff was convicted by a magistrate of an offence under s60 of the *Road Safety Act* 1986. The charge and summons asserted that the plaintiff, being the owner of a motor vehicle, when required by a police officer to do so, failed to make all reasonable inquiries in order to obtain the identity of the driver of the vehicle. He pleaded not guilty and was convicted and fined $500, with costs of $33. His licence was cancelled and he was disqualified from driving for two years. He appealed that decision and on 26 October 2000 a Judge of the County Court, sitting in Geelong, dismissed his appeal and confirmed the penalty imposed by the magistrate. The plaintiff now applies to this Court for relief in the nature of *certiorari*, pursuant to Order 56 of the Rules of the Supreme Court.

2. The charge arose out of events which took place at the Geelong Mall on 24th September 1999. On that day a Ford sedan was observed to be driven erratically by a young man who was performing "burnouts" in the middle of the mall. The vehicle suddenly braked heavily and skidded into a pedestrian, who told police that she believed the manoeuvre was deliberate. The pedestrian called on the driver to stop but he fled the scene. Several people took down the registration number of the vehicle. There is no dispute that the vehicle was the same one as had been lent to the plaintiff the previous day by the owner of a motor car yard. The plaintiff returned the car to the car yard at 4.30pm on the day of the accident. Statements given to police by eye witnesses indicated that the driving episode occurred at about 1.30pm that day. The informant, the second defendant, attended the scene about five minutes after the accident.

3. It was conceded by the prosecution that there was no evidence that the vehicle was being driven, at the time, by the plaintiff. After making inquiries, the informant made a number of attempts to contact the plaintiff, finally seeing him at his home on 22 October 1999. The informant then had the following exchange with the plaintiff:

Q: Are you Charlie Kymantas?
A: Yeah.
Q: I'm Samantha Jennings from the Geelong Police Station, I need to speak with you in relation to a car accident on the 24th September 1999.
A: I don't know what you are talking about.
Q: Can you open the fly wire door for me please?
A: No.
Q: Can you recall borrowing a Ford Falcon sedan from Campana car sales on that day?
A: No.
Q: I have a signed statement to say you were loaned this car, you are required by law to admit to driving or supply me with details of the person who was driving this car.
A: Yeah.
Q: Can you recall?
A: Yeah I got a loan.
Q: Can you recall driving this car in the mall and hitting a pedestrian?
A: I can't remember that far back.
Q: Had any other person driven the car on that day?
A: No or not really.
Q: A person attended hospital as a result of being hit by the car you had loaned.
A: I can't remember that day.
Q: Just to jot your memory it was the day your son was sentenced to prison, this is the day the accident occurred.
A: I don't know.
Q: You are required under section 60(1) of the *Road Safety Act* to supply me with information regarding the driver of the car on 24th September 1999 at 12.00pm.
A: I don't know.
Q: Here is my card please contact me before 2.00pm today with the name of who was driving the car on 24th September 1999. If you fail to admit to driving or supplying me with who was driving you may be charged.
A: Well I don't know.

4. In the following weeks the informant attended the plaintiff's home on numerous occasions, leaving cards requesting that he contact her when he had the information. He did nothing. On 17 December 1999 she attended his home again and had the following conversation:

Q: Charlie, I have returned to ascertain if you can nominate the driver of the Ford Falcon regarding the car accident in the mall on the 24th September 1999.

A: I've had brain surgery.

Q: I have spoken to you previously about this, if you fail to assist in my enquiries you will receive a summons.

5. In her evidence before the Judge the informant agreed that her accident report form had stated that the accident took place at 1.30pm, and she agreed that she had no evidence that the vehicle was being driven by anyone at 12 noon, nor where it was then located. Her reference to 12 noon was an error. A number of witness statements were tendered by consent in support of the police case.

6. Counsel for the plaintiff submitted to the Judge that there was no case to answer, which submission was rejected. The plaintiff elected not to give or call evidence and the Judge then convicted the plaintiff.

7. The grounds upon which relief is sought assert that the decision of the Judge contained errors on the face of the record or, alternatively, that the decision constituted a denial of procedural fairness. The substance of the contentions on both bases was identical. It was agreed between the parties that the "record" included the charge and information, the entry in the County Court records as to the decision, and the reasons for decision of the learned Judge as deposed to in an affidavit of the plaintiff.

8. Two issues are raised in the proceedings and, in effect, identify alternative errors in the decision making of the Judge, either of which, if established, would be sufficient to impugn the decision and cause it to be quashed, so it is contended.

9. The first contention is that it was not open to convict the plaintiff because the obligation imposed on a person under s60 of the *Road Safety Act* did not arise in the present case, by virtue of the fact that, so it was submitted, the "occasion" of driving which was specified by the informant, when making the request pursuant to s60(1), was 12 noon on 24th September 1999, and there was no evidence that the vehicle was being driven, at all, on that occasion.

10. Mr Mellas, counsel for the plaintiff, submitted that it was a pre-condition for the exercise of power under s60 that the occasion inquired of was an occasion when the vehicle was being driven, but the informant had conceded that she had no evidence that it was being driven at that time, namely, at 12 noon. Counsel relied on the decision of Nathan J in *Loges v Martin*[1] as supporting his contention.

11. This contention was first advanced in a submission of no case to answer. When that application was rejected the learned Judge gave reasons for its rejection, and upon the plaintiff closing his case without calling evidence then gave her decision, announcing that she was satisfied beyond reasonable doubt that the charge was proved, and adopted the same reasons earlier given. The learned Judge held that in specifying the time of the accident to have been 12 noon the informant was in error, but held that that error did not invalidate the request for information which was made under s60.

12. Section 60 reads as follows:

> "**60.** ***Duty of owner of motor vehicle to give information about driver***
> (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.
>
> (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—
> 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, at least 2 years and, in the case of a subsequent offence, at least 4 years.
>
> (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 or any person who had possession or control of the vehicle at either of those times."

13. There is no contention before me that the plaintiff was not the "owner" as defined by s60(3) of the Act.

14. Mr Mellas submitted that s60 abrogates the citizen's right to silence and, being a criminal offence carrying potentially a sentence of imprisonment, should be strictly construed. That general proposition was accepted by Nathan J in *Loges v Martin*[2], and accords with well established authority, but it does not follow that the section must be so narrowly construed as to deny its efficacy in situations where it was intended by the legislature that it should apply, and where its terms so permit its application[3].

15. Mr Mellas, counsel for the plaintiff, conceded that the section did not impose an obligation on the police officer to specify precisely the occasion of driving, by nominating the time of day at which it occurred. Mr Mellas submitted, however, that what was required to be specified and proved was an occasion on which driving of the vehicle had occurred, and unless an occasion was specified when the vehicle had, in fact, been driven then no obligation was imposed on the person to whom the request for information was made. What occurred in this case, so it was submitted, was that whilst there was no obligation on the informant to identify the occasion of driving by

reference to a specific time of day, the informant chose to do so, and the time of day which she specified made that precise time the occasion of driving about which inquiry was being made. Having chosen to be so specific, therefore, the prosecution was obliged to prove that at that precise occasion of driving the vehicle was, in fact, being driven. Counsel submitted that there was no evidence that the vehicle was being driven at that precise occasion of driving, and it was not open to the Judge to have been satisfied that that element had been proved. If the contention of counsel for the plaintiff as to the interpretation of s60 is correct, it would not have been necessary for the defence to have established any positive proposition, but counsel, at times, seemed to suggest that there was positive evidence, contained either in the answers of the plaintiff in the record of interview or in the evidence of the informant, that the vehicle was not being driven at 12 noon. That however, was not so. There was no positive evidence to that effect. The plaintiff's answers to questions did not assert that the plaintiff knew or, even, believed that the vehicle was not being driven at 12 noon. The highest his answers went was that he did not know whether it was being driven at noon or at any other time on the day in question. The primary contention of counsel for the plaintiff, however, was not based on the assertion that there was positive evidence from the plaintiff's answers that the vehicle was not being driven at noon, but that there was an absence of evidence on the question and that it was the Crown which was obliged to prove that the vehicle had been driven at that time.

16. The case, as argued before me with respect to the first of the two broad bases on which the decision was challenged, postulated two distinct circumstances which provided a rationale for the interpretation of s60 which was being urged upon me: one situation focussed attention on the state of mind of the owner, and one was based on objective considerations.

17. As I have said, it was contended that at the time of the request for information the obligation to respond to the request only arose, at all, if it was the case that the vehicle was being driven on "the occasion of driving" which the police officer nominated in making the request. Thus, if the owner knew that the vehicle was not in fact being driven on that occasion, he was entitled to ignore the request, which was beyond power for the police officer to make under s60. If charged, he could not be convicted unless it was proved that the vehicle was in fact being driven on the occasion of driving which was the subject of the request.

18. The alternative situation was that, whatever the owner knew or believed at the time that the request was made, the prosecution had to prove at the hearing of the charge that the vehicle had, in fact, been driven on the occasion of driving which had been nominated to the owner. A conclusion that there was such a deficiency in the police case might be characterised either as reflecting that there had been an absence of power to make any request under s60 at the time when the request was made, or else, merely, as a want of proof of an essential element for the offence to be established at the conclusion of the prosecution case. The precise characterisation of the suggested deficiency which was identified by counsel, and the question whether it should be regarded as reflecting an absence of power rather than an absence of proof of the elements of the offence, would have no bearing on the outcome of the present case, although it could be relevant in some circumstances.

19. In the course of submissions counsel used the expression "occasion of driving" and while it is convenient to discuss the requirement of s60 in that way, it is important to note that that phrase is not used in the section.

20. The rationale of the suggested interpretation of s60 – which restricted the occasion of driving to that precise time of day of the incident of driving which was nominated by the informant – was said to be that a person should only be obliged to answer potentially self incriminating questions to the limited extent which was compelled by the framing of the question. If the question was framed incorrectly, so as to identify a time when the vehicle was not being driven, then the owner's statutory obligation did not arise. Once the police officer nominated the occasion of driving the owner was then in a position to determine whether he was obliged to comply with the request. But even if the owner had no belief as to whether or not the vehicle was being driven on the nominated occasion, the prosecution had to prove that it had been, if it was to establish guilt beyond reasonable doubt, and, so it was submitted, strict construction of the section appropriately obliged the prosecution to prove its case by reference to the precise time stipulated in the request for information.

21. The possibility that the owner would be under no obligation to provide any information pursuant to s60 if the owner knew that the vehicle was not being driven by anyone on the occasion about which he was asked was considered, *obiter*, by Gobbo J in *O'Reilly v Rooney*[4].

22. In that case the owner was asked for information concerning use of her vehicle throughout a day on which it had been involved in an accident, she having said it had been parked by her in a car park throughout the day. Gobbo J opined, *obiter*, that whilst the owner might be entitled to refuse to provide information when she "actually knows" that the car had not been driven, at all, on the occasion (which in that case was not identified by reference to a specific time of day), any possible entitlement to decline to co-operate would not have applied had it only been a question of the owner's belief as to whether the vehicle had been driven on the occasion. His Honour doubted, without deciding, that the owner's belief was relevant to the operation of the section. However, even if belief had been relevant, Gobbo J observed that the magistrate did not have to treat the owner's state of belief as being decisive of the question whether in fact the vehicle was being driven on that day. The belief that it was not being driven that day could be held to be mistaken.

23. The situation in *O'Reilly v Rooney* was not similar to that before me. Here, counsel primarily asserts that there was no obligation to respond to the request under s60, and/or that the charge was not made out, not because the owner had any knowledge or belief as to whether the car had been driven on the occasion being inquired about, but because, so it was asserted, there was no evidence that the vehicle was being driven at 12 noon. Thus, the submission of no case to answer did not raise the question of the state of mind of the plaintiff, but asserted that there could be no case to answer because there was no evidence, at all, that the vehicle was being driven on the occasion nominated by the informant.

24. If "the occasion of driving" was confined to the situation at 12 noon then there was no positive evidence that the vehicle was being driven at that precise time. The learned Judge held, however, that the "occasion of driving" was not to be so narrowly confined. If it was more broadly described, then there was clear evidence that the vehicle was being driven on the occasion of the incident on 24th September 1999.

25. I do not doubt that to sustain a charge the prosecution had to prove beyond reasonable doubt that the owner's vehicle had been driven on the occasion about which the request had been made for information. However, was the occasion of driving in this case confined to the situation at 12 noon on 24th September 1999, by virtue of the terms of the request made by the informant? As may be seen, the challenge to the Judge's decision, on this ground, is predicated on the contention that the "occasion of driving", of which the s60 inquiry was made, was the occasion of driving at 12 noon, rather than the occasion of driving when an accident occurred in Geelong Mall on 24th September.

26. There is good reason why the section does not state, in terms, that the police officer was obliged to specify the occasion of driving with any particularity, at all. If, for example, a body was found lying beside a remote road with evidence suggesting that the deceased had been struck by a particular motor vehicle, but at any time over several weeks, the section would entitle an inquiry to be made relevant to identifying the driver at any time over a period of weeks. The "occasion" about which inquiry was then being made, therefore, would be the occasion of the accident that occurred within that period of weeks when the motor vehicle came into collision with the pedestrian. (A quite distinct situation would be one where there is no evidence pointing to the involvement of the particular vehicle, rather than towards vehicles of a type and make of which the owner's identified vehicle was one. That was the situation under consideration in *Loges v Martin*).

27. In *Loges v Martin* a hit and run accident had occurred, leaving debris which was consistent with having come from a Toyota Hi-Lux van. The defendant owned such a vehicle. When questioned as to who was driving it "in the early hours of the 13 January", the defendant expressly denied that his vehicle had been present at that place on that occasion. The decision of the magistrate which was subject to review was characterised by Nathan J, at 407, as being a decision that he had a reasonable doubt as to whether the vehicle "was involved in an occasion which entitled Loges to require answers to his questions". This was purely a question of fact. Nathan J held that there was evidence on which the magistrate could have entertained that doubt, and that being the case his decision as to the facts was not open to review. The prosecution had to prove that

the vehicle was being driven, by someone, on the occasion of which inquiry was made. In that case the prosecution failed to prove that fact; in the present case the prosecution did not fail to satisfy the magistrate or the Judge.

28. Counsel for the plaintiff submitted that because the police officer couched her request as to information concerning a driver of the vehicle at 12 noon, the occasion of driving which had to be established was as at 12 noon. The finding of fact made by the Judge that the informant was in error in nominating 12 noon meant that the Judge accepted, or should have, that the occasion of driving inquired about was as at that time of day, so it was submitted. The admission of the informant that she could not say if it was being driven at that precise time must have meant that the charge was not proved, so counsel contended.

29. The learned Judge held that the occasion of driving about which the inquiry was being made should not be so narrowly identified as counsel sought. Her Honour held that although the time of the accident was incorrectly stated it was proximate to the correct time and, in any event, the occasion of driving in this case meant the occasion of the incident in which the pedestrian was injured, on 24th September 1999.

30. In my opinion, her Honour was plainly right to regard the "occasion" inquired of pursuant to s60(1) as being the occasion of the incident in which a pedestrian had been injured on 24th September 1999. Whether that occasion happened at noon or 1.30pm on that day was a mere detail which might or might not raise a reasonable doubt, in the circumstances of a given case, as to whether the owner had failed to comply with the request made of him or her. The section is concerned, primarily if not wholly, with the investigation of hit-run incidents. It is inevitable that there will often be limited information available to the investigating police when the occasion arises to use s60. It is quite likely that such information as may then be held by the investigators will be sketchy, and that details which are then held may later prove to have been wrong. In my opinion, it is significant that the section simply speaks of the driver of the motor vehicle on any "occasion", and does not use words which might suggest, at all, that the inquiry need be precisely identified. In my opinion, the whole scheme of s60 is concerned with incidents in which unidentified drivers have been involved, and as to which information is limited. To give the section the interpretation for which counsel contends would be artificial in the extreme. That is not to say that the manner in which the request is couched is unimportant. It may be couched in a way which causes there to be reasonable doubt as to whether the owner committed an offence by failing to respond to the request. The occasion, in this case, was properly identified by the learned Judge, however, as being the occasion of the incident in Geelong Mall on 24th September 1999. Just as was the case in *Loges v Martin*, the question whether the vehicle had been driven on <u>that</u> occasion was one of fact. The inquiry in *Loges v Martin* was about an occasion which had occurred within a period of some hours on a given date when an accident occurred; the magistrate had a reasonable doubt as to that, in that case.

31. Given the Judge's finding that the occasion of driving was to be more broadly identified, the question whether there was evidence on which an inference could have been drawn as to the vehicle being driven at 12 noon was not relevant to her decision, and, since – for reasons which I will discuss – I agree with her finding, it does not fall to be considered by me, either.

32. Thus, the question which the learned Judge had to decide was whether she was satisfied beyond reasonable doubt that the vehicle was being driven on 24th September, 1999, when the incident occurred at Geelong Mall. The Judge held that she was satisfied beyond reasonable doubt that this and all other elements of the offence had been proved. Whether she could have been so satisfied is the basis of the second broad category of complaint in these proceedings.

33. The alternative error which was identified in the plaintiff's application for relief, by way of *certiorari*, related to the Judge's finding that the plaintiff knew that the inquiry was being made not as to the precise time of 12 noon but as to the occasion when a pedestrian had been injured on 24th September, and that he was not misled by the fact that a precise and incorrect time was given for the incident. Ground 3 of the five grounds (one of which was abandoned, and none of which need to be precisely stated) asserts that there was no evidence that the plaintiff knew the occasion of driving about which he was being asked.

34. If there was reasonable doubt as to whether the owner knew the occasion about which enquiry was being made then the court might not be satisfied beyond reasonable doubt that the owner had failed to provide information which was within his power to give, or to take any step which was required of him or her. The Judge was satisfied beyond reasonable doubt, however, that the plaintiff knew the occasion about which he was being questioned, and failed to meet the requirements imposed on him to make inquiries as to that occasion. Counsel contends that there was no evidence upon which a reasonable judge could have reached that decision.

35. Her Honour, in reaching her conclusion, noted that the terms of the request, which identified the time as 12pm, had to be taken in context of the whole of the questioning, and that when regard was had to the evasive answers, and the manner of the responses of the plaintiff, she was satisfied beyond reasonable doubt that the offence was committed. Counsel for the plaintiff submitted that an inference of such knowledge could not be drawn from the material before the court. At the highest, he submitted, the material might have supported an inference that the plaintiff was being evasive, but it could not support the positive conclusion that he knew the occasion about which inquiry was being made. Counsel contended that there were alternative possibilities to explain the answers of the plaintiff, and to explain his evasiveness. That may be so, but the Judge was not bound to conclude that the alternative explanations were to be preferred to the inference that the plaintiff knew the occasion about which he was being questioned. In my opinion, the inference was plainly open to be drawn, beyond reasonable doubt, that the plaintiff did have the requisite knowledge to sustain the offence.

36. Given the fact that the plaintiff had taken possession of the vehicle only the day before, and returned it only hours after the accident, and that the date of 24th September was one which would have been significant to the plaintiff (by virtue of his son's imprisonment on that day), the inference was plainly open to be drawn from the plaintiff's responses to the informant's questions that not only did the plaintiff understand the occasion of driving to be in the broader terms I have described, but that he was able to obtain and provide useful information in identifying the driver on that occasion. The question whether the Crown has excluded every reasonable hypothesis consistent with innocence is a question of fact[5]. The Judge's confidence in drawing the adverse inference, and in being satisfied beyond reasonable doubt that all other reasonable hypotheses had been excluded, could have been strengthened by the failure of the plaintiff to give evidence in the case[6].

37. The decision of the Judge was plainly open to her. The complaint of denial of procedural fairness asserted that it was unfair to have reached the conclusion she did, having regard to the evidence in the case, and that complaint also fails.

38. I conclude, therefore, that the decision of the learned Judge has not been shown to involve errors on the face of the record, nor has the plaintiff identified any failure of the Judge to accord him procedural fairness.

39. The application for relief in the nature of *certiorari* should be dismissed. I will hear counsel as to costs.

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[1] *Loges v Martin* (1991) 13 MVR 405.
[2] *Loges v Martin, supra*, at page 410.
[3] As observed in *O'Reilly v Rooney* (1989) 10 MVR 19, by Gobbo J, s60 was couched in deliberately wide terms
[4] *O'Reilly v Rooney* (1989) 10 MVR 19, at 24.
[5] *Attorney General's Reference (No.1 of 1983)* [1983] VicRp 101; [1983] 2 VR 410, at 415.
[6] See *R v Weissensteiner* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23.

APPEARANCES: For the Plaintiff Kymantas: Mr P Mellas, counsel. Christopher Traill & Associates, solicitors. For the Defendant Jennings: Ms G Cannon, counsel. Office of Public Prosecutions.
