2/96

SUPREME COURT OF VICTORIA

YATES v EBERT

Byrne J

28-29 August, 11 September 1995

PROCEDURE – WHERE CHARGE TO BE FILED – "PLACE OF RESIDENCE" – MEANING OF – MOTOR TRAFFIC – DRINK/DRIVING – OPERATOR CALLED AS WITNESS – EVIDENCE GIVEN AS PER CERTIFICATE – CERTIFICATE ADMITTED – WHETHER OPEN TO CONVICT NOTWITHSTANDING THAT CERTIFICATE MAY HAVE BEEN INADMISSIBLE: *MAGISTRATES' COURT ACT* 1989, SS3, 26(1)(a); *ROAD SAFETY ACT* 1986, SS49(1)(f), 58(2).

1. To determine the meaning of "place of residence" in s26(1)(a) of the *Magistrates' Court Act* 1989, it is necessary to look beyond the place where a defendant may sleep or eat. Intention and state of mind are relevant as is the address for correspondence and in official records.

2. Where a breathalyser operator was called as a witness in a drink/driving charge and gave evidence of the matters required by s58 of the *Road Safety Act* 1986, the evidence was sufficient to sustain a conviction notwithstanding the fact that the certificate (which had been admitted into evidence) may have been inadmissible or ineffective.

BYRNE J: [1] At 10p.m. on 11 August 1994, the appellant, Michael Patrick Yates, was driving a Range Rover in Boundary Road, Dingley. When intercepted by a police officer for a licence check, he appeared to have consumed intoxicating liquor. A preliminary breath test showed a positive result and he was required to furnish a further sample of his breath at the Mordialloc Police Station. The breath analysis instrument used for the purpose was an apparatus known as the ALCOTEST 7110 which had become a breath analysing instrument within the meaning of s3 of the *Road Safety Act* 1986 by an amendment to that Act, the *Road Safety (Amendment) Act* 1994, which had come into operation a few days earlier, on 1 August 1994. The results of the breath analysis showed that the concentration of alcohol present in Mr Yates' blood was 0.16 grams per 100 millilitres of blood. He was duly charged on summons with an offence against the *Road Safety Act* 1986 s49(1)(f) in that within three hours of driving his breath, when analysed, showed more than the prescribed concentration of alcohol in his blood; and an offence against s49(1)(b) in that he was driving whilst more than the prescribed concentration of alcohol was present in his blood. In each case the applicable prescribed concentration was 0.05 grams per 100 millilitres.

Following a hearing before the Magistrates' Court of Victoria at Frankston on 14, 15, 16, and 17 March 1995 the appellant was, on 17 March 1995, convicted of an offence against s49(1)(b) and fined $250.00. In addition, his driver's licence was cancelled and he was disqualified from driving for a period of 16 months. The charge for an offence against s49(1)(f) was withdrawn.

[2] The appellant appeals against the order for conviction pursuant to the *Magistrates' Court Act* 1989 s92 on the following questions of law:

> "3.1 (a) Whether the learned Magistrate erred in holding that the proceeding was properly filed in accordance with Section 26(1) of the *Magistrates' Court Act* 1989?
> (b) Was it open to the Magistrate, on the evidence, to hold that the Appellant's residence, at the material time, was at Mt. Eliza rather than at Aspendale?
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> 3.2 Whether the learned Magistrate erred in holding that the Governor in Council could validly make the *Road Safety (Procedures) (Breath & Blood Tests) Regulations* 1994 (SR 110/1994) ("Regulations") on 26 July 1994 being a date prior to the coming into operation of the relevant provisions of the *Road Safety (Amendment) Act* 1994 (No. 17/1994)?
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> 3.3 Assuming the Regulations were valid, did the Certificate of Analysis tendered in evidence comply with the Regulations and was it in the prescribed form?

3.4 Whether the 'ALCOTEST' Breath Analysing Instrument was within a class of Instruments whose accuracy is presumed at Common Law or whether a reading from which was admissible in evidence pursuant to *Road Safety Act* 1986?

3.5 (a) Whether the learned Magistrate erred in holding that the Appellant herein had failed to prove that at the relevant time the Regulations could not be purchased or inspected notwithstanding the Appellant had tendered in evidence page 2157 of the Victoria *Government Gazette* No. G31 dated 4 August 1994?

(b) Whether the learned Magistrate erred in holding that he could take into account the contents of page 2227 of the Victoria *Government Gazette* No. 32 dated 11 August 1994 ('Gazette') notwithstanding that the Gazette had not been tendered in evidence to the **[3]** Court by either the Appellant or the Respondent?

3.6 Whether the learned Magistrate erred in finding the charges proven and convicted the Appellant of having more than the prescribed concentration of alcohol in his blood contrary to Section 49(1)(f) of the Act?

Ground 3.4 was not argued before me and it was accepted that Ground 3.6 added nothing to those preceding it. The remaining grounds may be conveniently dealt with under three headings: first, whether the proceeding was a nullity because the charge was filed in the wrong court; second, whether the *Road Safety (Procedures) (Breath & Blood Tests) Regulations* 1994 were invalid or might not be used to the prejudice of the appellant; and third, whether the certificate of breath analysis tendered was in the prescribed form.

In August 1994 a criminal proceeding might be commenced by filing a charge with "the appropriate registrar: *Magistrates' Court Act* 1989 s26(1)(a). "Appropriate registrar" means the registrar at the proper venue of the Magistrates' Court: s3(1). "Proper venue" for present purposes is defined in s3(1) to mean:

"... the mention court that is nearest to—
(i) the place where the offence is alleged to have been committed; or

(ii) the place of residence of the defendant..."

The informant in this case filed the charge with the Registrar of the Court at Frankston. The mention court nearest the place of the offence was not Frankston. This registry was selected because it was thought to be the court nearest the place of residence of the appellant which was said by the **[4]** informant to be at 32 Jacksons Road, Mount Eliza. The appellant, however, maintains that his place of residence on 4 August 1994 was at the Shore Inn Motel, 31 Nepean Highway, Aspendale. It was accepted, by all parties before me, that the Frankston Registry was nearest to Mount Eliza but not nearest to Aspendale. Accordingly, it was submitted that the charge had not been filed with the appropriate registrar as required by s26 and the proceeding was, therefore, a nullity. The debate therefore focussed on the expression "place of residence" in s3(1) and to the evidence as to this. Counsel for the appellant submitted that the expression means the place where the person sleeps and lives. He accepted, however, that if the appellant was to sleep and eat on a temporary or transient basis at a place different from that where he normally slept and ate, this would not mean that the normal place had ceased to be his place of residence. To my mind this concession was properly made.

The expression "place of residence" must be construed in the context of the legislation where it is found*: The Australasian Temperance and General Mutual Life Assurance Society Ltd. v Howe* [1922] HCA 50; (1922) 31 CLR 290; 29 ALR 46. That was a case where it was necessary to determine whether a corporation was a resident of a State for the purpose of suing in the diversity jurisdiction of the High Court. Obviously enough, the characteristics of residence were subjected to considerable scrutiny. Reference was made to the standard dictionaries then available which gave as the meaning of "residence", "the place or house where one resides, domicile, abode, habitation, home". The current *Macquarie Dictionary* is **[5]** to the same effect (p1470).

The provisions of s26 reflect the intent of its statutory predecessors, the *Justices Act* 1958 s89 and the *Magistrates (Summary Proceedings) Act* 1975 s76(1), that a summary criminal proceeding should be dealt with at the place which is nearest to or easiest of access to the place

of the subject matter of the proceeding or the place of residence of the defendant. These earlier provisions referred to the venue for trial; the appellant here submits that, in the legislation applicable to this proceeding, it is rather a matter of jurisdiction. It is not necessary that I determine this question because I am clearly of the view that the Magistrate did not fall into error of law in concluding that the charge had been filed in the appropriate Registry. In my opinion, it is relevant for the determination of the place of residence of an appellant charged with an offence, for the purposes of s26, to look beyond the place where he laid his head and took his meals at the time. Intention and state of mind are relevant, as are matters such as where his official correspondence was directed and what he recorded as his residence in official records. The appellant's place of residence is, for present purposes, where he sees his home to be, notwithstanding that he may, on a temporary basis, not be living there at the time. There was abundant evidence upon which the Magistrate might have found that the place of residence of the appellant on 4 August 1994 was at Mount Eliza.

The appellant's next submission was that the regulations were invalid or might not be used, and in **[6]** particular, Regulation 11 which substituted new formal requirements in Regulation 314 of the *Road Safety (Procedures) Regulations* 1988 for Breathalyser Certificates given under the *Road Safety Act* 1986 s55(4). The attack was put on two alternative bases:

> (a) Since on 4 August 1994 the Regulations could not be purchased or inspected as provided by the *Subordinate Legislation Act* 1962 s9B(1), the appellant could not be prejudicially affected by them: *Subordinate Legislation Act* 1962 s9B(2)(b).
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> (b) Since the Regulations were made on 26 July 1994, five days before the commencement of *the Road Safety (Amendment) Act* 1994, they were *ultra vires*.

The consequence of these submissions, if accepted, was said to be that the certificate of breath analysis tendered in evidence before the Magistrate was inadmissible or ineffective. A third broad submission, that this certificate was not in the prescribed form, was to the same effect. All of these submissions assume that a failure by the informant to tender a valid certificate of breath analysis was fatal to the prosecution. I do not make this assumption. The appellant gave notice under the *Road Safety Act* s58(2) requiring the breathalyser operator to be called as a witness. The operator gave evidence of the matters required by s58. This evidence was admitted despite objection and not challenged or contradicted. No point is taken before me that the evidence ought not to have been received or that this evidence was not, of itself, sufficient to sustain the **[7]** conviction. To my mind the evidence is sufficient for that purpose.

Accordingly, it is not necessary for me to consider whether the certificate without such oral evidence would have supported the conviction. The appeal will be dismissed with costs.

APPEARANCES: For the Appellant: Mr J Hammond, counsel. Solicitors: Purves Clarke Richards. For the Respondent: Mr A Tinney, counsel. Solicitor: Director of Public Prosecutions.
