45/94

SUPREME COURT OF VICTORIA

STAINSBY v MADDEN

Ashley J

11 August 1994 — (1994) 20 MVR 315

MOTOR TRAFFIC – DRINK/DRIVING – IDENTIFICATION OF DRIVER – DRIVER NOT IDENTIFIED IN COURT – BLOOD SAMPLE CERTIFICATES TENDERED – LINKED WITH DRIVER – NAME SIMILAR – EVIDENCE NOT CONTRADICTED BY DEFENDANT – DEFENDANT CONVICTED – WHETHER OPEN ON THE EVIDENCE: *ROAD SAFETY ACT* 1986, SS49(1)(b), 57(3)(4).

S. pleaded not guilty to a charge under S49(1)(b) of the *Road Safety Act* 1986. The prosecution witnesses did not identify S. as the driver of the motor car. However, certificates relating to a blood sample taken from the driver were tendered in evidence showing the same name and address of the defendant. No evidence was given by S. or on his behalf at the hearing. It was submitted that the magistrate could not be satisfied that S. was the driver of the motor car. This submission was rejected and S. was convicted. Upon appeal—

HELD: Appeal dismissed.
The evidence of identity which was sufficient to support the conviction included the—
- **certificates linking S. to his present address.**
- **similarity of name between person at the scene and the person served with the process.**
- **failure of S. to give evidence, which permitted an inference adverse to him to be the more readily drawn.**

***R v Neilan* [1992] VicRp 5; [1992] 1 VR 57; (1991) 52 A Crim R 303, applied.**

ASHLEY J: [1] This an appeal under s92 of the *Magistrates' Court Act* 1989 from orders of the Magistrates' Court at Oakleigh made on 4 February 1994, that court being constituted by Ms Spooner, Magistrate. The appellant is Jeffrey Stainsby. He was the defendant below. The respondent is Ian Madden, a Constable of Police. He was the informant below.

The appellant was charged with and convicted of a breach of s49(1)(b) of the *Road Safety Act* 1986 (the Act). The precise formulation of the charge was as follows:

> "The defendant at Moorabbin on 26th October, 1992 did drive a motor vehicle while more than the prescribed concentration of alcohol was present in your blood being .00 per 100 millilitres of blood".

The penalty imposed by the learned Magistrate was that the appellant be placed on a Community Based order to perform 120 hours of unpaid community work over a twelve-month period. In addition, all licences under the Act were cancelled and the appellant was disqualified from obtaining any licence for a five-year period.

The Master's order of 3 March 1994, made pursuant to R.58.09 of Ch.1 of the Rules, stated two questions of law for my determination. Only one of the two has been pursued before me. It has two sub-parts. Thus:

> "On the evidence was it open to the learned Magistrate to find that:
> (i) there was any or sufficient evidence of identity such as to find a case to answer on that element of the charge and/or;
> (ii) she was satisfied beyond a reasonable doubt that the issue of identity had been proven".

The two parts to this question deal with an issue of identity. It is critical to s49(1)(b) of the Act that **[2]** the person charged has driven or been in charge of a motor vehicle whilst his blood alcohol level has exceeded the prescribed concentration. The appellant by his affidavit sworn 28 February 1994 avers that four witnesses gave evidence in the proceedings before the Magistrate. In addition, certificates under s57(3) and (4) of the Act were tendered, as well as two statutory declarations purportedly made under s57(6) of the Act.

Certificates and declarations apart, the evidence called for the prosecution was that of three lay witnesses and of the respondent, Constable Madden. According to the appellant's affidavit, the three lay witnesses gave evidence of a collision that occurred in Prince Street, Moorabbin, at about 10 p.m. on 26 October 1992. The overall effect of the evidence of these witnesses was that in the collision a Ford Falcon had struck the stationary car of one of the witnesses, a Mr Peter Bainbridge. The stationary vehicle had, in turn, been "shunted" into the vehicle of one of Mr Bainbridge's neighbors. The driver of the Ford Falcon had emerged from that vehicle and had been seen to be staggering.

Further, according to the appellant's affidavit, none of the three lay witnesses identified him in court as the driver of the Falcon. One of the witnesses described the driver as a "young man", "bleeding from the face", "holding a green stubby holder"; and as "being upset about a number of things; including his girlfriend." Another witness, without describing the driver, referred to him as "a male mumbling and talking about his girlfriend and a fight at a hotel".

[3] The evidence of Constable Madden, as deposed to by the appellant, was that, on attending the scene, a male person admitted to being the driver of "this vehicle", admitted to drinking that evening, stated that his name and address was "Jeff Stainsby of 7 Highbury Avenue, Moorabbin", and gave his reason for driving as "I just wanted to find my girlfriend". His further evidence was that Jeffrey Stainsby was not licensed to drive a vehicle as at 26 October 1992. There was no objection to the admission into evidence of any of the statements to which I have just referred. This witness, as was the case with the lay witnesses, did not in court identify the appellant as the person with whom he had spoken on 26 October 1992.

Apart from the *viva-voce* evidence, two certificates were tendered, as I have already noted. One was a certificate of analyst given under s57(4) of the Act. The second was the certificate of a legally qualified medical practitioner under s57(3) of the Act. Leave of the court was not sought on the appellant's behalf under s57(7) that either the medical practitioner or the analyst attend for cross-examination.

The Certificate of Medical Practitioner certified that the doctor had collected a sample of the blood of Jeff Stainsby of 7 Highbury Avenue, Moorabbin. It is a requirement of Regulation 316 of the *Road Safety (Procedures) Regulations* 1988 that a certificate under S57(3) of the Act include the name of the person from whom a blood sample is taken.

A statutory declaration of service of a copy of the s57(3) certificate was, as I earlier said, also tendered **[4]** and admitted into evidence. It was incomplete, in that it was not witnessed. It should not have been admitted. The same fault infected a statutory declaration of service of a copy of the s57(4) certificate, which was nonetheless admitted into evidence. Concerning the admission into evidence of those declarations no point was taken below, or before me. I should add that, had any point been taken below, the declarations could have been put into proper form, and re-tendered.

At the close of the prosecution evidence a submission was made that the appellant did not have a case to answer. Two matters were raised. Only the first is now relevant. It was the matter of identification. In substance it was submitted, upon that matter, that there had been no identification of the appellant as the person at the scene of the accident; and that there was nothing to disprove the proposition that someone else had used the appellant's name at the scene. In rejecting this submission the learned Magistrate is reported as saying:

> "(a) As Ms Pullen had entered the court with the Defendant and announced her appearance on behalf of the Defendant she was satisfied that the defendant and the person at the scene of the accident were one and the same;
>
> (b) Ms Pullen had not cross-examined on the issue of identification;
>
> (c) that the age of the Defendant in Court was visually approximately the date of birth as stated on the Summons".

The appellant gave no evidence; nor was evidence called on his behalf. Submissions as to identity were pressed. The Magistrate, in convicting, is reported as -

"reaffirm(ing) her earlier comments and also stat(ing) words to the effect that she had **[5]** not heard any evidence from the Defendant".

I have set out the appellant's account of proceedings at length because, there being no answering affidavit, it is the only account of what transpired below. The resolution of questions of law (i) and (ii) does not depend upon the learned Magistrate's reasoning. It depends upon whether there was evidence of identity which would support the conviction.

Mr Gillespie-Jones of counsel for the appellant has submitted that there was no such evidence. He did not deny that the s57(3) certificate was evidence that a blood sample was taken from a Jeff Stainsby, and that the man from whom the sample was taken was one and the same as the man who had been interviewed at the accident scene, and who had there given that name and had admitted to driving the Ford Falcon. Neither did he deny that the s57(4) certificate was evidence that the blood sampled was that taken by the doctor from Jeff Stainsby, or that the blood contained a blood alcohol concentration of .252 grams per 100 millilitres of blood. But Mr Gillespie-Jones submitted that no evidence existed to link his client with the Jeff Stainsby involved in the events of 26 October 1992.

It might be said, and fairly, that the prosecution could have done a more thorough job in proving identity. There could have been evidence linking the address provided on 26 October 1992 and the address on the charge and summons, which were different. There could have been evidence of the make and model of the vehicle whose registration number was shown on the charge and summons, and of the person in whose name it was registered at the relevant time. There could have been invitations to **[6]** witnesses to identify the appellant in court. The statutory declarations should have been regularly made. But the fact that the prosecution case could have been better presented does not preclude a conclusion adverse to the appellant.

In my opinion the Magistrate was entitled to draw the inference that the man who appeared to answer the charge, that is, Jeff Stainsby of 10 Rose Street, Highett, was one and the same as the man who on 26 October 1992 had given his name as Jeff Stainsby of 7 Highbury Avenue, Moorabbin. That is so, in my opinion, for a number of reasons. First, the two statutory declarations, which despite their defects were admitted without objection, asserted that service had been effected upon the person whose blood had been sampled and analysed. Thus the s57(3) declaration asserted that a true copy of the certificate had been served -

"by delivering it to the patient mentioned overleaf personally at 10 Rose Street, Highett".

The person mentioned overleaf was the person described as Jeff Stainsby of 7 Highbury Avenue, Moorabbin. The s57(4) declaration relevantly asserted that Constable Madden had -

"served a copy of the certificate on 7/8/93 at 11:25 a.m. on above person at 10 Rose Street Highett".

The "above person" was described as -

"Jeff Stainsby, 0045, 27/10/1992 (indecipherable signature) MB.BS Moorabbin, G.28216".

That was enough to relate the sample analysed to that referred to in the s57(3) certificate. Not only was there an assertion that the person served with the s57(4) certificate, that is, the **[7]** appellant, was one and the same person as the person whose blood had been sampled and analysed, service upon that person, who had lived at Highbury Avenue, Moorabbin according to the certificates, was effected at Rose Street, Highett. I add, before going further, that the relevant assertions made in the declarations were not challenged by any cross-examination of Constable Madden.

Mr Gillespie-Jones submitted that s57(6) does not permit use of a declaration to prove anything more than service of a copy of a certificate upon an accused. I do not see that it is so limited. If an accused changes addresses between time of alleged offence and time of service, whereby the place of residence stated on a certificate and the place of service of a copy of that certificate vary, it seems to me sensible and within both the language and the spirit of s57(6) that the affidavit or statutory declaration identify the person served as the person referred to in the certificate. To do so may obviate uncertainty in matters dealt with *ex parte*. If an accused attends

court, any matter in dispute contained in the statutory declaration may be subject to evidence to the contrary.

Apart from what I have already said, there was identity of name between the person interviewed by Constable Madden (and relevantly examined by Dr Kaye on 26 October 1992) and the appellant, being the person served with process. The defendant's name is not a common one, and I think the magistrate was entitled to conclude, at least *prima facie*, that the two persons were one and the same. The submission made for the appellant, that there was nothing to disprove the proposition that someone else had used the appellant's **[8]** name at the scene (a submission not pursued before me) did not assist the appellant. It was, of course, not for the prosecution to disprove any such thing.

There is, I think, one further consideration. I do not doubt that there was evidence which entitled the learned Magistrate to reject the submission that there was no case to answer on the issue of identity. Thereafter the appellant stood mute. The analysis of the Court of Criminal Appeal in *R v Neilan* [1992] VicRp 5; [1992] 1 VR 57 at pp65-67; (1991) 52 A Crim R 303 shows that, in a limited way, the failure of a defendant to give evidence may assist in more ready acceptance of a case established against him at a *prima facie* level. In my opinion, upon the question of identity, the failure of the appellant to give evidence permitted an inference adverse to him to be the more readily drawn. But it is unnecessary to rest this judgment upon that consideration.

It follows, in my opinion, that the appeal should be dismissed. (Discussion ensued re costs.) There will be no order as to costs.

APPEARANCES: For the appellant/defendant Stainsby: Mr S Gillespie-Jones, counsel. Monash-Oakleigh Legal Service. For the respondent/informant Madden: Mr SP Gebhardt, counsel. Mr PC Wood, solicitor for Public Prosecutions.
