55/89

SUPREME COURT OF VICTORIA

KISLINSKY v SPENCE

Crockett J

25 October 1989 — (1989) 10 MVR 163

MOTOR TRAFFIC – CARELESS DRIVING – SINGLE VEHICLE COLLISION – NO RECOLLECTION BY DRIVER AS TO HOW COLLISION HAPPENED – EXPLANATION NOT ACCEPTED – WHETHER CARELESS DRIVING – DRINK/DRIVING – BLOOD SAMPLE TAKEN – CERTIFICATE TENDERED IN EVIDENCE – WRONG NAME AND DATE IN CERTIFICATE – OTHER EVIDENCE ESTABLISHING DEFENDANT WAS PERSON TESTED ON A CERTAIN DATE – WHETHER CERTIFICATE "IN THE PRESCRIBED FORM" – WHETHER SUFFICIENT EVIDENCE TO PROVE ELEMENTS OF CHARGE: *ROAD SAFETY ACT* 1986, SS49(1)(g), 57(3), 65.

At about 3 a.m. on 29 September 1987, S., a police officer, attended the scene of a single vehicle accident where she saw on the roadway a motor car lying on its roof. S. spoke to the driver who gave his name as "Serge Kislinsky" ('K.'), and when asked how the accident happened, K. said "I don't know." K. was conveyed to hospital where, at 4 a.m., had a blood sample taken from him which when analysed was found to contain a blood/alcohol concentration of .144%. K. said that he had had a few beers at a social function, and when later interviewed by S., agreed that he was involved in the accident at about 2.45 a.m., that he attended hospital on that date when a blood sample was taken from him and that he was the person referred to in the certificate made out by the medical practitioner. K. was charged, *inter alia*, with careless driving and an offence under s49(1)(g) of the *Road Safety Act* 1986 ('Act'). At the hearing, the medical practitioner's certificate was tendered which stated that the name of the person from whom the blood sample was taken was "Serg Kisminsky" and that such sample was taken on "29.9.89". A submission of 'no case' was rejected. K. chose not to give evidence or to call evidence on his own behalf and was convicted. Upon order nisi to review—

HELD: Order nisi dismissed.
(1)(a) Where a prosecution case depends on facts which unexplained, indicate guilt, the failure by the defendant to offer an innocent explanation may give rise to the inference that there is, in fact, no innocent explanation.
***Sanders v Hill* (1964) SASR 327, applied.**
(See also *Waldie v Cook* (1988) 91 FLR 413; (1988) 8 MVR 191; MC 47/1989. Ed.).
(b) Having regard to the nature of the collision and the extent of the defendant's consumption of alcohol, a conclusion that amnesia was induced or the defendant suffered memory loss could not be supported. Further, the defendant's admission as to driving and to consuming alcohol could lead a court to reject the defendant's explanation as being untrue. Accordingly, as the defendant failed to offer an innocent explanation, it was open to the court to find the charge proved.

(2)(a) Given the times of the accident and the taking of the blood sample, it was open to conclude that the blood sample was taken from the defendant within 3 hours of driving.

(b) The certificate referred to in s57(3) of the Act is concerned with the nature of the matters set out and its form and not the accuracy of what is set out.
***Houston v Harwood* [1975] VicRp 69; (1975) VR 698, applied.**

(c) The errors in the certificate as to name and date are not matters as to which the truth or accuracy of what is set out is guaranteed. Accordingly, it was open to treat the certificate as being in the prescribed form.

(d) Whilst the errors in the certificate may have raised a reasonable doubt as to whether the elements of the offence had been established, the certificate when looked at in conjunction with the police officer's evidence concerning the defendant's answers made it plain that it was that certificate which related to the defendant, and accordingly it was open to the court to find the charge proved.

CROCKETT J: [1] At about 3.00 a.m. on 29th September 1987 the respondent to the Order to Review of which this is the return attended the scene of an accident in Burwood Road, Hawthorn in her capacity as a policewoman. In evidence which she was later to give in the Magistrates' Court at Prahran she said that on arrival at the scene she saw a Holden car lying on its roof

on the northern side of Burwood Road about a metre from the kerb. The vehicle had received extensive damage to the entire front and top. An ambulance and fire brigade unit were already in attendance. When she arrived at the scene the respondent saw the driver of the vehicle being treated for minor injuries. She asked him what was his name and he replied "Serge Kislinsky". In the proceedings subsequently to be instituted against him that was the name by which he was cited by the informant as the defendant to these proceedings. When asked if he could tell the policewoman what had happened Kislinsky replied, "I don't know". He was then taken to St. Vincent's Hospital for further treatment for his injuries.

The respondent said she observed about fifty metres west of the car a tramways concrete barrier separating the eastbound lane from the tram tracks. She said in her evidence that she saw an amount of glass and debris on the left hand side of the road beginning at the concrete barrier and extending to where the vehicle was lying on its roof. As informant she instituted proceedings in the Magistrates' Court against the present applicant in which he was charged in the one information with a number of offences. At the conclusion of the case for the prosecution, counsel for the applicant made a submission **[2]** that the prosecution had failed to prove each of the offences on which the applicant had been charged. The Magistrate accepted these submissions in all but two of the alleged offences. Although in respect of those two the Magistrate, as I say, held that there was a case to answer, the applicant chose not to give evidence or to call evidence on his own behalf. The result was that he was convicted on each of those two offences.

Those offences were, firstly, careless driving; and, secondly, the offence created by s49(1)(g) of the *Road Safety Act* 1986. That offence is described in these terms:

> "A person is guilty of an offence if he or she—
> (g) has had a sample of blood taken from him or her in accordance with Section 56 within 3 hours after driving or being in charge of a motor vehicle and the sample has been analysed within 12 months after it was taken by a properly qualified analyst within the meaning of Section 57 and the analyst has found that at the time of analysis more than the prescribed concentration of alcohol was present in that sample."

The case for the prosecution with respect to the latter offence was that at St. Vincent's Hospital the applicant, at 4.00 a.m., had taken from him by a Dr Flanagan a sample of blood which was on 29th October 1987 analysed and found to contain more than the prescribed concentration of alcohol.

By this Order to Review the applicant now seeks to have each of those convictions reviewed on grounds which, generally speaking, amount to an allegation of insufficiency of evidence to support the convictions. It is to be noted that with respect to the conviction for careless driving the Magistrate gave no **[3]** reasons for his having rejected the submissions made by the applicant's counsel in connection with this charge or for his determination that the charge had, in fact, been proved. The contention in support of the review of that particular conviction is to this effect. Admittedly the evidence would permit the inference to be drawn that the car driven by the applicant at the material time struck the tram rail divider and, as a result, overturned. But that was an event which could be as consistent with a lack of carelessness as it could with carelessness.

It was submitted that the conclusion that what had occurred was the product of careless driving could be come to only if the Magistrate drew an adverse inference from the fact that the only person who could say what had occurred, namely, the applicant, failed to proffer any explanation for what had happened. The argument then proceeded to the next step, which was that the applicant had not so declined to give an explanation. He had said to the respondent at the time of the accident and each of two other police officers at two subsequent interviews, merely that he had no memory of what had occurred. It was said that, although this was not the subject of sworn evidence by the applicant himself, nevertheless it was an explanation given by him and it was not, therefore, left open to the Magistrate to draw an adverse inference on the basis of a failure to give evidence as to how the accident had occurred leading to the overturning of the vehicle. Without such inference, as I have already said, the argument is to the effect there is insufficient direct evidence, or evidence that may be established otherwise by inference, of careless driving.

[4] A number of authorities were referred to, all with a view to establishing what I think was encapsulated in this passage from the judgment of Chamberlain J in *Sanders v Hill* [1964]

SASR 327 at 329, where his Honour said:

> "Where the prosecution's case depends on facts which, unexplained, indicate guilt, the failure of the defendant to offer an innocent explanation, which if one exists, could only be known to him, may well be treated as sufficient evidence that there is, in fact, no such innocent explanation."

Thus, I think in the present case, in the absence of reasons for his decision, it must be taken that the Magistrate did take the view that there was a failure on the part of the applicant to offer an innocent explanation and, accordingly, that that failure could give rise to the inference that there was, in fact, no such innocent explanation. As I have said, the applicant himself elected not to give evidence and it was open to the Magistrate to find that the proffered explanation of having no recollection of what had occurred was not a correct one; that is to say, it was open to the Magistrate to conclude that he did not believe that the applicant was telling the truth when, according to the police evidence, he told each of the police witnesses that he had no such recollection.

If the Magistrate rejected the explanation as being untrue, then he was left with no explanation. On my view, it was perfectly open to the Magistrate to reject the explanation. In the first instance, the evidence as to the nature of the injuries suffered by the applicant would not support the conclusion that they were of such a nature as to induce amnesia, nor was there evidence of such a consumption of alcohol as to cause memory loss. Indeed, of course, the applicant was **[5]** constrained during his interrogations not to make any admission in relation to any significant consumption of alcohol. On one of such interrogations he did, however, admit that, "I had a few beers at a social function".

The Magistrate may well have thought that the evidence of alcohol consumption contained in that admission constituted a motive to fabricate an account of having no memory of the relevant events. There was evidence that the applicant admitted having driven the car in question and, for the reasons that I have indicated, it was in my view open to the Court to have found the charge of careless driving established. I think the order to review with respect to that particular offence should, in consequence, be discharged.

With regard to the ground that there was insufficient evidence to support the offence charged pursuant to s49(1)(g) of the Act, two points were made on behalf of the applicant. In the first place, it was contended that the evidence fell short of establishing that a sample of blood had been taken within three hours after the driving of the motor vehicle by the applicant, as the section requires. In the second place it was said that the evidence, as it stood at the close of the prosecution case, was insufficient to allow it to be established beyond reasonable doubt that the blood which was the subject of analysis was, in fact, that of the applicant. With regard to the first of the limbs upon which that general argument is founded, it was maintained that there was not sufficient evidence to support a finding as to the starting point of a three hour period. As the **[6]** prosecution case was that the sample was taken at 4 a.m., that meant that the prosecution had to prove that the applicant had been driving his car at 1 a.m. or later. The respondent arrived at the scene at five minutes to three. There was no direct evidence from her as to what the time of the accident was, but the submission was made on behalf of the applicant that it was not at all inconceivable that the accident may have happened before one o'clock in the morning, that it had taken all of the period of two hours for the overturned vehicle to be observed and steps taken to have it reported to the authorities, and, in due course, for the police to attend. That submission would, I think, tend to strain credulity somewhat, despite various circumstances which were pointed to which would suggest there would be nothing untoward in a delay of two hours between the happening of such an accident, at the time and place that it did, and the attendance of the police at the scene and the subsequent taking of the sample an hour later.

However, counsel for the respondent directed attention to a passage in the evidence of the respondent given at the prosecution, in which she said to the applicant, "You were the driver of a motor car registered No. DDY239 which was involved in an accident in Burwood Road, Hawthorn, at about 2.45 a.m. on Tuesday, 29th September, 1987?" Answer, "Yes." Question, "As a result of that you attended at St. Vincent's Hospital for medical Treatment?" Answer, "Yes." In my opinion that piece of testimony affords perfectly adequate evidence on which the Magistrate could act to conclude that the accident occurred at about 2.45 a.m. On that basis it must follow **[7]** that that evidence taken in conjunction with the doctor's certificate and evidence given as to the time

at which the prosecution maintained the sample was taken, it was open to be found that it was taken within the requisite three hour period.

The legislation provides that in certain circumstances a medical practitioner is obliged to take from persons falling within a legislatively defined class a sample of blood for analysis. That legislation also provides with respect to a blood sample so taken that the medical practitioner shall provide a certificate in the prescribed form. By Regulation 316 made under the *Road Safety Act* it is provided (insofar as here relevant) that -

> "A certificate for the purposes of section 57(3) of the Act is in the prescribed form if it includes—
> (a) A statement that the requirements of these Regulations as to the taking of blood samples have been complied with; and
> (b) the name of the person from whom the blood sample was taken; and
> (c) the time and date it was taken; and
> (d) the name and signature of the medical practitioner."

A certificate was received in evidence and it has the name of the person from whom the sample was taken stated as "Serg Kisminsky", which, of course, is different from that which the evidence otherwise establishes is the name of the applicant. The certificate states also that the sample was taken at "0400" on "29/9/89". Some confusion leading to the mis-spelling of the name is understandable enough. However, the giving of the date as that two years after the date on which the prosecution contends was, in fact, the date of the **[8]** taking of the sample is both strange and unexplained. It is those considerations which form the foundation for the second submission; that is to say, the evidence did not allow it to be established that it was the applicant's blood that was the subject of analysis. That submission overlaps with the earlier submission with which I have been dealing inasmuch as it is relied upon to establish that the Magistrate could not have been satisfied that the relevant three-hour period was the period within which the blood sample had been taken because the reference to the time of 4.00 a.m. was unreliable inasmuch as it could not be taken as being referable to the present applicant.

It is unnecessary to deal with that submission as a discrete argument. It really is subsumed by the primary submission that the errors which the prosecution have to concede are to be found in the certificate show not only that the name was wrong and the date was wrong, but that the maker of the certificate, who was called to give oral evidence, conceded when cross-examined that he had no independent recollection of having taken the sample some two years earlier and that there were no records available at St Vincent's Hospital to allow the matter to be further investigated. These matters were of such a nature that it was said it would not be possible to be satisfied that the blood which was analysed and was said to be that of the applicant was, in fact, his. Having regard to the two matters which it is stated amount to errors, the certificate could not have any probative force. It was said that that is so because, with the errors that it contained, it could not be found to have been in the prescribed form as the **[9]** legislation requires because it did not contain the name of the person from whom the blood sample was taken and the date on which it was taken if the prosecution case were to be accepted.

To rely on this submission it was necessary for the applicant's counsel to seek to distinguish the decision of Gowans J in *Houston v Harwood* [1975] VicRp 69; [1975] VR 698. He sought to do so on the basis that there had been a change in the legislation since that case was decided. At the time of that decision the relevant certificate, if received in evidence, was able to be treated as "*prima facie* evidence" of what is stated. The legislation on which it so relied was subsequently amended, so that at the time of the hearing of the present charges a certificate in the prescribed form could be treated as "proof" of the matters to which that form referred.

I am not satisfied that any such amendment to the legislation affects the relevant reasoning of his Honour in *Houston's* case. The passage from his Honour's judgment and which I think has relevance in the present proceedings is at p702 and is in these terms:

> "After careful consideration during which my mind has vacillated at times, I have come to the conclusion there is not to be found in [the relevant section] or elsewhere a requirement that the name attributed to the person referred to in the certificate as the subject of the analysis must coincide with some particular established name, or any implication that a certificate which states a name which does not so coincide is not "in or to the effect of" the schedule. In regard to this matter, it is

> with the nature of the matter set out and its form, and not the truth or accuracy of what is set out, that the requirement is concerned."

Accepting and applying what his Honour there said, it is in my view clear that the certificate remains one which is in **[10]** the prescribed form, even though it may have mistakenly stated the name of the person from whom the blood sample was taken and mistakenly stated the date on which it was taken. They are not matters as to which the truth or accuracy of what is set out is guaranteed. A name having been supplied and a date having been supplied, the document is one which is in the prescribed form.

If the matter had stood there, I think the conviction would have been unsustainable, because the errors to which I have referred in the certificate would have created such a doubt as to the prosecution's having established the elements of the charge, that it would not have been possible to feel the necessary degree of satisfaction that the case had been made out. The matter, however, does not rest there. The prosecution called the evidence of the respondent, as I have already said, and there is also the evidence of admissions made by the applicant to a Constable Eade.

The affidavit material presently before me shows, among other things, that Eade testified to his having asked the applicant the following questions and received the following answers thereto:

> "(f) He asked whether Mr Kislinsky was taken to St. Vincent's Hospital, and Mr Kislinsky replied 'Yes'.
> (g) He asked whether Mr Kislinsky had a blood sample taken, and Mr Kislinsky replied `Yes'.
> (h) He showed Mr Kislinsky a certificate of analysis of the blood sample and asked whether this certificate was a certificate that related to him, and he said 'Yes'.
> (i) He asked whether the blood sample was taken at 4 a.m. Mr Kislinsky said that was the time shown on the certificate.
> (j) He asked Mr Kislinsky whether the certificate showed a reading of .144, and showed Mr Kislinsky a certificate of a medical practitioner of the taking of a blood sample, and asked whether the certificate, which bore (1) Damien Flanagan's name as a legally qualified medical practitioner; (2) the name Kisminsky (sic); (3) of 22 Bogong Road, Mount Waverley; (4) E13728, showing the time at 0400 on 29/9/89 (sic), was the certificate that related to him, and Mr Kislinsky replied that it was.
> (k) He asked whether Mr Kislinsky had attended St. Vincent's Hospital on 29th September, 1987, and he stated that he had. (1) He asked Mr Kislinsky in relation to the certificate whether the name on the certificate was different to his name, and Mr Kislinsky replied 'Yes, that would be me.'"

The certificate, being in my view in the prescribed form, was admissible. It was capable of being looked at and used as evidence. When used in conjunction with the passages in the evidence to which I have just referred, it becomes perfectly plain, I think, that the Magistrate was able to conclude that there were two inaccuracies, namely, in relation to the name and the date in the certificate. Nonetheless, in conjunction with the other evidence, it was plain that it was that certificate which related to the applicant. It would thus follow that it would be open to the Magistrate to find that it was the applicant's blood sample which was taken within the statutory period and which was subject to the analysis about which evidence was given by the analyst. I think, therefore, that in respect of that particular offence also, it was open to the Magistrate to have reached the conclusion that he did and in that respect also the order nisi must be dismissed with costs.

APPEARANCES: For the applicant Kislinsky: Mr G Hardy, counsel. Molomby & Molomby, solicitors. For the respondent Spence: Mr AJ Lopes, counsel. Victorian Government Solicitor.
