11/12; [2012] VSC 136

SUPREME COURT OF VICTORIA

EMIRHUSSEIN v RADOVANOVIC

Bell J

3 April 2012

CRIMINAL LAW – DRIVING OFFENCES – BEING INJURED, DRIVER LEFT SCENE OF BAD ACCIDENT – PASSENGER ALSO INJURED – VEHICLE DAMAGED – POLICE TOLD OF DRIVER'S IDENTITY – BY ALLEGED ARRANGEMENT WITH POLICE MADE THAT DAY, DRIVER REPORTED ACCIDENT THREE DAYS LATER – TRIAL JUDGE REFUSED TO CONSIDER EVIDENCE OF ARRANGEMENT – DRIVER CONVICTED OF FAILING TO REPORT ACCIDENT TO POLICE AS SOON AS POSSIBLE – WHETHER ERROR OF LAW ON FACE OF THE RECORD – PROPER INTERPRETATION OF 'AS SOON AS POSSIBLE' – WHETHER ARRANGEMENT FORMS PART OF CIRCUMSTANCES NECESSARILY TO BE CONSIDERED IN DETERMINING WHETHER REPORT MADE AS SOON AS POSSIBLE – WHETHER CHARGES AS PLEADED ENCOMPASS OFFENCES FOUND PROVEN: *ROAD SAFETY ACT* 1986 (VIC), S61(1)(e), (f); *SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES* 2005 (VIC), O56.

E. was driving his motor vehicle when it ran off the road causing serious injuries to E. and his passenger as well as extensive damage to the vehicle. E. left the scene shortly after the accident. A friend of E. (Mr Abdallah) who arrived at the scene of the accident soon after said that he telephoned the local Police Station and told a police officer that he wanted to report the accident on behalf of E. and was reportedly told that E. should come into the police station three days later which E. did. Subsequently, E. was charged with several offences including his failure to report the accident to the police station "as soon as possible". The charges were found proved in the Magistrates' Court and again on appeal to the County Court. The judge held that the offences were absolute liability offences. Upon appeal—

HELD: Appeal allowed. Orders of the judge quashed. Matter remitted for hearing and determination according to law.

1. Time was an element of the offence in that the obligation was to report as soon as possible after the accident (s61(1)(e) and (f) of the *Road Safety Act* 1986). That time was pleaded in the charge by reference to the date of the accident, 20 November 2006, and the requirement to report as soon as possible after that. The charge was properly pleaded in that way. Like all charges, it had to be interpreted and understood as a reasonable defendant would and in the context of the surrounding circumstances. The charge as pleaded gave E. everything he needed to be able to mount a defence, which he did.

2. The second ground on which the application for judicial review was made was that the trial judge erred in deciding the offences in s61(1)(e)and (f) were absolute in nature. Although His Honour used those words to describe the offences, he was not meaning to say that the offences were committed whatever the circumstances. After so describing the offences, His Honour went on to refer, correctly, to the need 'to take into account the surrounding circumstances, including time and the driver's physical and mental capacity' when considering the phrase 'as soon as possible'. What His Honour was meaning to say was that a person who consciously and voluntarily failed to report as soon as possible having regard to those considerations could be guilty of the offence without having any intention to breach the obligation to report. Taken as a whole, His Honour's reasoning was consistent with the correct legal position, which is that s61(1)(e) and (f) create strict liability offences of which intention to offend is not an element but to which the defence of honest and reasonable mistake of fact is applicable.

3. The difficulty with his Honour's finding of guilt was that, the circumstances being relevant to determining whether a report was made as soon as possible, it was necessary to take into account an arrangement with the police as to when the report should or could be made. An arrangement with the police to make a report at and to a specified time, station and investigating officer is just as relevant a circumstance as the physical or mental state of the accused. That follows from the proper interpretation of the words 'as soon as possible' in s61(1)(e) and (f).

4. The judge proceeded on the basis that the arrangement was an irrelevant consideration. His Honour decided E. could be convicted whether or not the arrangement had been made. As to whether the arrangement had been made, he made no express findings either way. This reasoning betrayed an error of law and not an error of fact. On the proper interpretation of the words 'as soon as possible'

in s61(1)(e) and (f), whether E. attended to report at the police station on 23 November pursuant to an arrangement with the police made by Mr Abdullah for Mr Emirhussein on the day of the accident or later adopted by E. was a relevant consideration in determining whether the report had been made as soon as possible.

5. In s61(1)(e) and (f), 'as soon as possible' means as quickly as the task in hand is capable of being done in the circumstances. In reaching a determination on this question, all of the circumstances have to be taken into account. The task in hand was reporting an accident to the police. On the evidence relied on by E., an arrangement was made for him as the driver with the police within hours of the accident, or at least adopted by him later that day, for the report to be made in three days to the investigating police officer (who was working night shift at the time) at a specified time and station. If established, those facts formed part of the circumstances which had to be taken into account in determining whether the report was made as soon as possible. It was an error of law for the trial judge to exclude this body of evidence from consideration when determining that question. In this regard, it was also necessary to consider whether E.'s report formed part of one continuing transaction beginning with Mr Abdullah's telephone call on 20 November and ending with E.'s attendance on the informant on 23 November. The question of what happened and whether there had or had not been a report as soon as possible was for the trial judge to consider and determine on the evidence.

6. There will be an order in the nature of *certiorari* quashing the orders of the trial judge and the matter will be remitted back to his Honour for hearing and determination in accordance with law.

BELL J:

1. Ismail Emirhussein was driving his motor vehicle at Tarletons Road, Plumpton at about 6 am on 20 November 2006 with a friend in the front passenger seat. The vehicle ran off the road, causing serious injuries to them both, the latter especially so, as well as extensive damage to the vehicle.

2. In these circumstances, it was Mr Emirhussein's obligation under s61(1) of the *Road Safety Act* 1986 (Vic) to do certain things. Under s61(1)(b), he immediately had to render such assistance as he could. Under s61(1)(c), he had to give his name and address and vehicle registration details to the injured person or their representative. Under s61(1)(e) and (f), as soon as possible he had to report in person full particulars of the accident at the nearest police station (if open) or the most accessible police station (if not). Section 61(1)(e) applied because a person was injured; s61(1)(f) applied because property was damaged.

3. Mr Emirhussein left the scene shortly after the accident. That raised the question whether he had complied with his obligations under s61(1)(b) and (c). He reported to a police station three days later. That raised the question whether he had complied with his obligations under s61(1)(e) and (f).

4. Jack Radovanovic, the informant, charged Mr Emirhussein with four summary offences of breaching s61(1)(b), (c), (e) and (f). The charges were heard in the Magistrates' Court of Victoria. After a contested hearing, the magistrate dismissed the charge of failing to give name, address and vehicle registration details to the injured person. His Honour found Mr Emirhussein guilty of the other three charges, for which heavy sentences were imposed. His Honour convicted Mr Emirhussein and sentenced him to five months' imprisonment, wholly suspended for two years. Mr Emirhussein was also fined $5000. His licences were cancelled and he was disqualified from obtaining others for four years.

5. Mr Emirhussein appealed to the County Court of Victoria. After another contested hearing before Judge O'Neill, his Honour dismissed the charge of failing to render assistance to the injured friend. His Honour found Mr Emirhussein guilty of the two charges of failing to report the accident to the police as soon as possible. A much lighter sentence was imposed. His Honour fined Mr Emirhussein without conviction the sum of $500, and cancelled his licences and disqualified him from obtaining others for two years.

6. Mr Emirhussein now seeks judicial review of the orders of the learned trial judge under O56 of the *Supreme Court (General Civil Procedure Rules)* 2005 (Vic). The jurisdiction of the court in such cases is supervisory not appellate. Relief is available where it is established the judge committed an error of law on the face of the record. That ground is relied on by Mr Emirhussein in this proceeding.

7. Under s10 of the *Administrative Law Act* 1978 (Vic), the record in this case includes the oral reasons of the trial judge, which were recorded in transcript. Those reasons have to be understood in the context of the evidence in the case, which was also recorded in transcript and to which his Honour made extensive reference in his reasons.

8. The trial judge dismissed the charge of breaching s61(1)(b) (failing to render assistance) because the medical evidence established Mr Emirhussein was severely injured in the accident. His Honour accepted that, by reason of his injuries, Mr Emirhussein was incapable of rendering assistance. His findings in this regard were:

> In considering this charge I bear in mind that the collision involved a significant impact; that the collision resulted in injuries to the appellant, including a significant head injury, with possible concussion, significant facial fractures, and a period of post traumatic amnesia. I accept that as a result of all of these matters it would have been difficult for the appellant to think clearly, and I accept that he would have been significantly disoriented.

Mr Emirhussein's obligation under s61(1)(b) was to render such assistance 'as he can'. On these findings, his Honour decided Mr Emirhussein could render no assistance.

9. In finding proven the two charges of failing to report the accident to the police as soon as possible, his Honour rejected Mr Emirhussein's defence that, by arrangement with the police, he had attended at the police station three days later and therefore had reported the accident as soon as possible.

10. In support of that defence, Mr Emirhussein's relied on evidence which was given in the trial by the informant and another friend of Mr Emirhussein, Ozkan Abdullah. Mr Abdullah told the judge he had arrived at the scene soon after the accident. He described how badly Mr Emirhussein had been injured. After doing various things, at about 11 am that morning he telephoned the Melton Police Station and spoke to a lady officer. He told her he wanted to report the accident on Mr Emirhussein's behalf. He said she told him the informant was working night-shift and they should come in after 11 pm on 23 November, three days later.

11. The evidence was that Mr Emirhussein attended at the Melton Police Station at about 11 pm on 23 November. He identified himself as the driver of the vehicle but otherwise made a no comment record of interview.

12. The informant gave evidence that he personally had no communication with Mr Emirhussein before 23 November. He agreed he had ascertained Mr Emirhussein was the driver of the vehicle on the morning of the accident. He was asked in cross-examination whether Mr Emirhussein's attendance on the evening of 23 November had been a consequence of an arrangement which had been made. He said 'Yeah, possibly the day before.' Asked whether this was the first opportunity that Mr Emirhussein was able to speak with him, he said 'Possibly, yes.' He agreed he would not have received a message from Mr Abdullah left at 11 am on 20 November until 11 pm that night.

13. It was on this evidence that Mr Emirhussein submitted he was not guilty of the failing to report charges.

14. After reviewing the evidence, the trial judge identified the elements of the offences in s61(1)(e) and (f) as being that the report must be made as soon as possible after the accident, in person by the driver and to the nearest police station unless it is not open. Following *Lindner v Wright*,[1] his Honour held 'as soon as possible' meant 'as quickly as the task in hand is capable of being done in the circumstances.' He accepted that a person's medical condition was a relevant consideration so that, in the case of a badly injured person, as soon as possible might be many months.

15. The judge then analysed the evidence making the following findings:

> I accept on the day of the incident, 20 November 2006, that the appellant may well not have been capable, because of his injuries, of making a report to the police station of what occurred. On the next day, 21 November, he went to the hospital for a further medical appointment, having been discharged from the Western Hospital the day before. He then subsequently went to The Alfred Hospital to visit Mr Murat Hasan. On the following day, 22

November, he went to the neighbour's house. It was not until the end of the day following that, that he went to the police station.

In my view, notwithstanding the answer of the informant to the question about whether the appellant attended at the first opportunity when he said, 'Possibly, yes', I am not satisfied from that evidence that the officer had a clear recollection of the circumstances under which the appellant attended on 23 November.

There is no medical evidence as to the state of the appellant's condition over the days subsequent to 20 November, but I note that he was able to go to a medical appointment, visit his friend in hospital, and return to the scene of the accident. In my view it would have been clear to the appellant that this collision was a matter of significance given the injuries to his friend Mr Murat Hasan.

There is no evidence in the case that he would have had any difficulty in communicating with the police officers had he intended to attend at the station. In my view it was clear and very important that a report to the police by him had to be made. I accept in the days following the incident that he would have, to some extent, been affected by the trauma of it. He suffered significant injuries, a period of post traumatic amnesia, and possibly concussion. He was described by various witnesses as not being in a good way.

However, in my view he did have the capacity to attend at the police station and report the matter on 22 November, if not 21 November. The report on 23 November at 11 pm was not "as soon as possible".

16. His Honour dealt specifically with Mr Emirhussein's defence that he had attended on 23 November in accordance with Mr Abdullah's arrangement with the police. On that subject he made the following remarks:

> I have reservations about whether Mr Ozkan Abdullah was told by the officer at the police station to reattend on 23 November. That is because the officers in fact were rostered to return to duty later that same day, 20 November, at ten or 11 o'clock in the evening. Further, he took no note of the person to whom he spoke, nor any precise details of the message that was conveyed to him. Even if I were to accept that that was conveyed to him in my view, the section still requires the driver, the appellant, to satisfy the onus that he report the matter to the police station at the earliest time. That onus is not discharged by any communication by a friend that an appointment has been made some days hence.

17. It can be seen that his Honour did not reject Mr Abdullah's evidence, despite the understandable reservations which he expressed. Neither did he make a firm finding that Mr Abdullah had made an arrangement with the police for Mr Emirhussein to attend on 23 November. His Honour's reasoning was that, even if Mr Emirhussein had attended on 23 November by arrangement with the police, this was not compliance with the obligation to report as soon as possible because he was physically capable of doing so the day before.

18. In this connection, his Honour did not accept s61(1)(e) and (f) had a mental element. The Court of Appeal has stated the offence in s61(3) does have a mental element.[2] His Honour held the offences in s61(1)(e) and (f) were different. In his words, the offences were 'absolute in nature'. However, his Honour also said the phrase 'a soon as possible' required 'all the surrounding circumstances' to be taken into account, and 'not only as to time but also as to the driver's physical and mental capacity'.

19. By amended grounds for which I gave leave today, Mr Emirhussein contends the trial judge erred in law on the face of the record in two respects:

> (1) convicting him of charges pleading that he failed to report on 20 November 2006 as soon as possible when His Honour found that Mr Emirhussein could not report on that day due to his injuries; and
> (2) finding the offences in s61(1)(e) and (f) were absolute liability offences.

20. As to the first ground, the charge under s61(1)(e) was expressed in the following terms:

> The defendant at Melton on 20/11/06 being the driver of a motor vehicle and where owing to the

> presence of such motor vehicle an accident occurred whereby a person was injured and no member of the police force was present at the scene of the accident, did fail as soon as possible to report full particulars of the accident at the police station most accessible from the scene of the accident.

The charge under s61(1)(f) was expressed in the same material terms, as follows:

> The defendant at Melton on 20/11/06 being the driver of a motor vehicle and where owing to the presence of such motor vehicle an accident occurred whereby property was damaged and neither the owner thereof nor any person representing the owner nor any member of the police force was present at the scene, did fail as soon as possible to report full particulars of the accident at the police station most accessible to the scene of the accident.

21. The submissions made for Mr Emirhussein in relation to the first ground were based on a premise which I do not accept, namely that Mr Emirhussein was charged with failing to report as soon as possible because he failed to do so on 20 November 2006. The charges plead that the obligation to report as soon as possible arose on 20 November 2006 because of the events which occurred on that day. Whether, to be as soon as possible, the report had to be made on that or some other day depended on the facts and circumstances to be established at the trial. Subject to the rules of natural justice, it was not necessary for the informant to specify exactly when Mr Emirhussein should have made the report. That was for the court to determine.

22. It was submitted for Mr Emirhussein that time was an element of the offence which had to be pleaded. I accept that submission with certain qualifications. Time was an element of the offence in that the obligation is to report as soon as possible after the accident (s61(1)(e) and (f)). That time was pleaded in the charge by reference to the date of the accident, 20 November 2006, and the requirement to report as soon as possible after that. In my view, the charge was properly pleaded in that way. Like all charges, it has to be interpreted and understood as a reasonable defendant would and in the context of the surrounding circumstances.[3] The charge as pleaded gave Mr Emirhussein everything he needed to be able to mount a defence, which he did.

23. It was also submitted for Mr Emirhussein that the case was fought before the magistrate and the trial judge on the basis that the question was whether he had failed to report as soon as possible, being on 20 November 2006, not on the basis of whether he had failed to report as soon as possible after that, as determined by his Honour. In my view, the terms of the charge leave it open for the accused to be convicted on the basis of his Honour's determination, if the evidence justifies this conclusion beyond reasonable doubt. It is not put before me that there had been a breach of the rules of natural justice in the way that the hearing was conducted and I do not think that there was.

24. For these reasons, I reject the first ground of the application. It is not necessary for me to address the other submissions which were made on behalf of the informant under this ground.

25. The second ground on which the application for judicial review has been made is that the trial judge erred in deciding the offences in s61(1)(e)and (f) were absolute in nature. Although His Honour used those words to describe the offences, I do not think he was meaning to say that the offences were committed whatever the circumstances, as in *Kearon v Grant*.[4] After so describing the offences, His Honour went on to refer, correctly, with respect, to the need 'to take into account the surrounding circumstances, including time and the driver's physical and mental capacity' when considering the phrase 'as soon as possible'. I think His Honour was meaning to say that a person who consciously and voluntarily failed to report as soon as possible having regard to those considerations could be guilty of the offence without having any intention to breach the obligation to report, with which I respectfully agree. Taken as a whole, I think His Honour's reasoning is consistent with the correct legal position, which is that s61(1)(e) and (f) create strict liability offences of which intention to offend is not an element but to which the defence of honest and reasonable mistake of fact is applicable.

26. The difficulty with his Honour's finding of guilt on these charges is that, the circumstances being relevant to determining whether a report was made as soon as possible, it is necessary to take into account an arrangement with the police as to when the report should or can be made. An arrangement with the police to make a report at and to a specified time, station and investigating officer is just as relevant a circumstance as the physical or mental state of the accused. That

follows from the proper interpretation of the words 'as soon as possible' in s61(1)(e) and (f).

27. Yet the trial judge proceeded on the basis that the arrangement was an irrelevant consideration. His Honour decided Mr Emirhussein could be convicted whether or not the arrangement had been made. As to whether the arrangement had been made, he made no express findings either way. This reasoning betrays an error of law and not an error of fact. On the proper interpretation of the words 'as soon as possible' in s61(1)(e) and (f), whether Mr Emirhussein attended to report at the police station on 23 November pursuant to an arrangement with the police made by Mr Abdullah for Mr Emirhussein on the day of the accident or later adopted by Mr Emirhussein was a relevant consideration in determining whether the report had been made as soon as possible.

28. There was argument before me about whether the defence of honest and reasonable mistake of fact was available in the circumstances. That debate was stimulated by the statement of the trial judge that the offence was absolute in nature. For Mr Emirhussein, it was put that he should have been acquitted because he honestly and reasonably believed he could report on 23 November pursuant to the arrangement even though the trial judge had found he could physically have done so a day earlier. For the informant, it was put that the trial judge had correctly found Mr Emirhussein to be guilty because the arrangement could be no defence to the charge of failing to report as soon as possible when he was physically able to report on the day before he actually did. Any mistake was one of law, being when as soon as possible was, not fact, being that compliance was satisfied by reporting in accordance with the arrangement.

29. In s61(1)(e) and (f), as soon as possible means as quickly as the task in hand is capable of being done in the circumstances. In reaching a determination on this question, all of the circumstances have to be taken into account. The task in hand was reporting an accident to the police. On the evidence relied on by Mr Emirhussein, an arrangement was made for him as the driver with the police within hours of the accident, or at least adopted by him later that day, for the report to be made in three days to the investigating police officer (who was working night shift at the time) at a specified time and station. If established, those facts form part of the circumstances which must be taken into account in determining whether the report was made as soon as possible. It was an error of law for the trial judge to exclude this body of evidence from consideration when determining that question. In this regard, it is also necessary to consider whether Mr Emirhussein's report formed part of one continuing transaction beginning with Mr Abdullah's telephone call on 20 November and ending with Mr Emirhussein's attendance on the informant on 23 November. I make no comment as to any of these matters. The question of what happened and whether there had or had not been a report as soon as possible is for the trial judge to consider and determine on the evidence.

30. I think the error of law on the face of the record which has been established is embraced by the second ground of the application, which I uphold.

31. There will be an order in the nature of *certiorari* quashing the orders of the trial judge and the matter will be remitted back to his Honour for hearing and determination in accordance with law.

---

[1] (1976) 14 ALR 105, 113. Muirhead J there held 'as soon as possible' meant 'as quickly as is capable of being done in the circumstances'.
[2] *R v Harding* [2008] VSCA 124; (2008) 50 MVR 413, [17] (Lasry AJA, Ashley and Dodds-Streeton JJA agreeing).
[3] *Director of Public Prosecutions v Kypri* (2011) 207 A Crim R 566, [61] (Nettle JA, Ashley and Tate JJA agreeing).
[4] [1991] 1 VR 321 (Brooking J).

APPEARANCES: For the plaintiff Emirhussein: Mr RL Fitzpatrick, counsel. McNamaras, Barristers and Solicitors. For the first defendant Radovanovic: Mr JD McArdle QC, counsel. Adrian Castle, Office of Public Prosecutions.
