

01/72

SUPREME COURT OF VICTORIA

WILSON v CLARK

Pape J

4 February 1972

EVIDENCE – DEFENDANT CHARGED WITH BEING THE OWNER OF A COW WHICH WAS ON A ROADWAY UNATTENDED – CHARGE DENIED – JUSTICES DISMISSED THE CASE ON THE GROUND OF "INSUFFICIENT EVIDENCE" – WHETHER JUSTICES IN ERROR: COUNTRY ROADS ACT 1958, S73(3)(a).

HELD: Order nisi discharged.

1. The crucial point in this case was the identification of the cow which was observed by the informant on the roadway with the cow in respect of which the admissions were made a couple of hours later on the defendant's property. It was not a question whether the Justices disbelieved the informant, but the question was whether it was reasonable for them to say that they had not been satisfied beyond reasonable doubt that the identification of the cow in the paddock with that given by the informant as being the cow he had seen on the road conveyed such conviction to them that they were satisfied beyond reasonable doubt that that was so.

2. There was no evidence in this case that the cow that was seen in the paddock had ever been out of it. There was no evidence which would lead to the view that it was in any respect possessed of such unusual attributes as to make it more readily recognisable than any other animal of the same kind. And even if it had been the same cow, there was obviously further evidence which would have established beyond a peradventure if in fact evidence had been called as to what had happened to this cow between the time it was seen by the inspector and the time that the animal was observed in the paddock an hour and a half later. It would appear that the pound-keeper knew something about this, because the evidence showed that the pound-keeper told the informant that it was the defendant's cow, and although he denied that his belief was mere hearsay, one would have thought that the information that he got must have coloured his view of the identification.

3. In the circumstances, it was reasonable for the Justices to have taken the view that the identification evidence was such that they would not feel satisfied beyond reasonable doubt to record a conviction.

PAPE J: On 28 June 1971 at the Magistrates' Court at Warrnambool the defendant, Neil McDonald Clark, of Cudgee, was charged under s75(3)(a) of the *Country Roads Act* with being the owner of cattle, to wit one cow, which was on the Princes Highway within the municipal district of Warrnambool, such cow was without some person in attendance contrary to the provisions of the section that I have mentioned.

The section provides that:

"The owner of any cattle which are on any portion of any State highway within any municipal district without the consent (given with the permission in writing of the Board) under the said Division 6 of the Council of the municipality of that district or (whether or not such consent has been given as aforesaid) without some person in attendance shall be liable to a penalty."

It would thus appear that since the defendant was charged with being the owner of a cow which was on the highway without some person being in attendance, the question of the consent of the Board or the Council was irrelevant.

The evidence that was presented before the Justices is very short, and it is set out in para. 6 of the informant's affidavit in a way which is substantially correct but which is altered somewhat by the answering affidavit which I am prepared, in accordance with the usual practice, to act upon.

The informant's evidence was: "I was on duty on the Princes Highway at Cudgee on Saturday,

13 March, and at 5:15pm, I found one silver jersey cow with a turned-in horn without some person in attendance. From information received I drove to the defendant's cow shed. He was aggressive and unco-operative. I left his property and returned at 6.35 pm in company with First Constable O'Brien of the Allansford Police. After some conversation between First Constable O'Brien, myself and the defendant, the defendant accompanied First Constable O'Brien and myself to a paddock where this cow was. I said to the defendant: 'Are you the owner of this silver jersey cow with the turned in horn?' He replied: 'Yes, she is my cow.' I said, 'What is your excuse for this cow being on the Princes Highway at 5.15 p.m. without some person in attendance?' The defendant replied, 'A drunk came here annoying me and I drove him home and apparently the milk tanker came in and left the gate open and allowed the cow to escape'".

The cross-examination which appears in the informant's affidavit is corrected in the answering affidavit, and according to the answering affidavit the cross-examination was in these terms: 'I asked the Informant: 'Under your Act which you have charged me, is it not necessary for the owner to identify his cattle on the roadway?' The informant answered, 'No'. I then asked the informant, 'Did you make yourself known to me?' The informant answered: 'I thought you knew who I was.' I then asked the informant, 'Where was the cow on the roadway?' The informant answered, 'It was the south side of the Cudgee Highway bridge and then moved to the north side.' I then asked the informant: 'Did you pass a pound on the north side of the bridge?' The informant answered, 'Yes'. I then asked the informant, 'Why did you not put it in the pound?' The informant answered, 'I knew the cow was yours.' I then asked the informant, 'Who told you the cow was mine?' The informant answered, 'Mrs Morris, the pound-keeper, told me.' I then asked the informant, 'Did you not act on somebody else's hearsay that the cow was mine?' and the informant answered 'No'."

That then completed the evidence for the prosecution, and the defendant then elected to give evidence and according to para. 7 of the informant's affidavit this is what he said: "Mr Wilson had been at my cow shed and told me that he had no intention of arguing with me. He then left and returned later with First Constable O'Brien. Mr Wilson asked me did I have a silver jersey cow with a cocked horn. Mr Wilson told me I could be fined \$100 or 6 months gaol under this Act. I went to a paddock about 450 yards from my cow shed and when we were about 40 feet" — which is corrected in the answering affidavit to 40 yards — "when we were about 40 yards away from this cow Mr Wilson asked me if I was the owner of that silver jersey cow and I told him that I was and that I owned all the cows on the highway."

Then there was some cross-examination which I do not find it necessary to refer to except what the defendant's affidavit says, that the informant asked him a question in these terms: "Mr Clark, is it not a fact that where this cow was there is only one single barbed wire fence and on the hill where you have formed the road, it was down and there was nothing to prevent your cow from leaving the paddock?" He denied that in answer to that question he said, "That is so" and swore that to the best of his recollection his answer was that "the fence at the dairy is quite good."

When that evidence was completed the Magistrates have a commendably short judgment but one which has perhaps caused some difficulty, because the Chairman of the Bench, Mr Elliot JP said: "Case dismissed, insufficient evidence." And at that stage the informant asked him to define the grounds for the dismissal, and Mr Elliot replied, "Insufficient evidence that it was Mr Clark's cow."

An order nisi to review this decision was obtained on two grounds. Firstly, that the Justices were wrong in law in rejecting the evidence of Arthur Cornelius Wilson that the defendant's cow was the cow found on the Princes Highway at Cudgee on 13 March 1971 in that it was unreasonable to reject the said evidence, and two, that on the whole of the evidence and in particular upon the evidence of Arthur Cornelius Wilson and the admission of the defendant in his evidence-in-chief before the two Justices that he was the owner of the said cow, the said Justices were wrong in law in dismissing the information.

If we go to the first ground, it is, I think, desirable to deal with this now because it rather illustrates the fundamental misconception that has occurred in this case. The ground is that the Justices were wrong in rejecting the evidence of Arthur Cornelius Wilson, and my view they did nothing of the sort. They did not say that they rejected his evidence; they did not say that

they disbelieved him. What they did say was that accepting his evidence (as I assume that they did) it was insufficient to justify them in being satisfied beyond reasonable doubt, that the cow in question in respect of which the prosecution was taken was the defendant's cow. Therefore, I could not uphold ground 1 of the order nisi.

When you come to the second ground, the same misconception becomes evident. That ground is that on the whole of the evidence and in particular upon the evidence of Arthur Cornelius Wilson and the admission of the defendant in his evidence-in-chief before the Justices that he was the owner of the cow, the Justices were wrong in law in dismissing the information. Now the criticism I have to make of that ground is that it seems to misconceive the situation. The defendant in his evidence-in-chief did not, as I understand the evidence, admit that he was the owner of the "said" cow, and by "the said cow" I mean the cow which was the subject-matter of the information.

What he did admit in his evidence was that the cow which was identified by him when it was in the paddock was his cow, and the whole point in this case was that the informant had seen a silver jersey cow with a crumpled horn upon the road and he had to establish that the cow as seen was identical with the cow which was in the paddock. There is no evidence as to what happened to that cow after he saw it on the highway.

The next step is that an hour and a half later he goes to a paddock on that property and he there sees a silver jersey cow with a crumpled horn. Now, it is true enough that he does not say in his evidence-in-chief that he went with First Constable O'Brien to a paddock where this cow was — this cow. That is the only identification that he makes of the cow in that paddock with the cow that he saw upon the road, and the whole of the defendant's evidence is consistent with the view that when he was talking about the cow he was talking about the cow which was in the paddock when the Constable and the informant spoke to him.

Now, undoubtedly the authorities show that it is for the Justices to make up their minds whether they are satisfied to accept evidence and they also show that where you have uncontradicted evidence the Justices' decision to reject that evidence may be set aside if it is manifestly unreasonable for them to come to that conclusion. The best statement of the principle, I think, may be found in *Young v Paddle Brothers Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38 at p41; [1956] ALR 301, where Herring CJ said:

"The principle that has to be applied is that applicable to the verdict of a jury: *Wilson v Jones* [1915] VicLawRp 94; [1915] VLR 636 at p638; 21 ALR 490; 37 ALT 198, per Hood J. And so one has to consider in what cases the verdict of a jury against a party on an issue, the burden of proof of which lies upon him, can properly be set aside and the contrary verdict substituted. Here the burden lay upon the defendant of satisfying the Court that it did not know and could not with reasonable diligence have ascertained the name and address of the person who was in charge of the vehicle at the relevant time. The Court having heard the evidence was not satisfied. What I am asked to do is to say that the Court should have been satisfied and to deal with the matter on this basis. This I can only do if it appears that there is no reasonable view of the evidence that is consistent with the Court's decision. If on any reasonable view of the evidence that decision can be supported, then the party who complains of that decision cannot have it set aside and the contrary decision that he desires substituted for it. It is a question of what he is entitled to as a matter of law, and he is only entitled to a contrary decision when that decision is the only possible decision that the evidence on any reasonable view can support."

Now, I admit that on reading this affidavit in the perhaps unenlightened state that judges are in before they have heard the argument, I was disposed to take the view that in this case the evidence of the defendant's ownership of the cow was cogent enough. I had not then fully appreciated that the only evidence of identification of the cow seen in the paddock with the cow earlier seen on the highway was the informant's statement that this cow was in the paddock and should have been accepted. But, having heard what Mr Crossley had to say, I must say that I have come to a contrary view.

It seems to me — and this was in substance what Mr Crossley argued — that the crucial point in this case was the identification of the cow which was observed by the informant on the roadway with the cow in respect of which the admissions were made a couple of hours later on the defendant's property. It is not a question whether the Justices disbelieved the informant,

but the question is whether it was reasonable for them to say that they had not been satisfied beyond reasonable doubt that the identification of the cow in the paddock with that given by the informant as being the cow he had seen on the road conveyed such conviction to them that they were satisfied beyond reasonable doubt that that was so.

Now there was no evidence in this case that the cow that was seen in the paddock had ever been out of it. There was no evidence which would lead to the view that it was in any respect possessed of such unusual attributes as to make it more readily recognisable than any other animal of the same kind. And even if it had been the same cow, there was obviously further evidence which would have established beyond a peradventure if in fact evidence had been called as to what had happened to this cow between the time it was seen by the inspector and the time that the animal was observed in the paddock an hour and a half later. It would appear that the pound-keeper knew something about this, because the evidence showed that the pound-keeper told the informant that it was the defendant's cow, and although he denied that his belief was mere hearsay, one would have thought that the information that he got must have coloured his view of the identification.

Now, these questions of identification in criminal trials have raised very serious problems, so much so that many convictions have been set aside because judges have not pointed out adequately to juries the dangers and difficulties inherent in snap identifications. In this case I find it difficult to say that Justices, local Justices, knowing the area and knowing something, I presume, of the activities that are carried on there, would not be entitled to say in this case, – 'well, the only thing to connect this cow that was seen in the paddock with the cow that was on the road is that they are both silver jersey cows with crumpled horns and the fact that the Country Roads Inspector says that the cow that he saw in the paddock was this cow that he saw on the road.'

Now, they may say, well, if that had been so, we would have thought that he would have called in support of his case the pound-keeper who would have been able to say on what basis her information that it was the defendant's cow was given and what happened to it, and if the cow that had been seen on the roadway had subsequently been delivered to the pound and subsequently had been returned to the defendant's property, there could not have been any doubt, one would have thought, that it was his cow.

I do not know that the Justices did in fact take that view, and I am not inhibited from taking the view that I do because I cannot be sure of that. The point about it is, would it have been reasonable for them to have taken the view that this identification was in all the circumstances such that they would not feel satisfied beyond reasonable doubt to record a conviction?

In these circumstances, I think this order nisi must be discharged with costs to be taxed not exceeding \$200.

APPEARANCES: For the informant Wilson: Mr D Meagher, counsel. State Crown Solicitor. For the defendant Clark: Mr GRG Crossley, counsel. Messrs Maddock, Lonie & Chisholm, solicitors.