

Case No: CO/5814/2003
CO/5812/2003

Neutral Citation Number: [2004] EWHC 490 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 15th March 2004

Before :

THE HONOURABLE MR JUSTICE MOSES

Between :

(1)MEERA MOHINDRA

Appellant

- v -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

-and-

(2)JOANNE BROWNE

Appellant

- v -

THE CHIEF CONSTABLE OF GREATER MANCHESTER

Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mio Sylvester (instructed by Geoffrey Miller Solicitor) for the 1st & 2nd Appellant
Martin F. Walsh (instructed by Crown Prosecution Service) for the Respondent

Judgment

Mr Justice Moses :

INTRODUCTION

1. These are two appeals by way of Case Stated from the justices of the County of Greater Manchester in respect of two decisions. In the case of Meera Mohindra they made their decision on 21st July 2003. In the case of Joanne Browne their decision was made on 8th August 2003.
2. I have annexed the two Cases as Appendix 1 (Mohindra) and Appendix 2 (Browne).
3. Both cases concern the power of the chief officer of police to require information as to the identification of a driver suspected of a driving offence pursuant to section 172(3) of the Road Traffic Act 1988 (“the 1988 Act”). The ability of the police to obtain such information is of increasing importance in the era of “speed cameras”. The case of Mohindra raises the question whether section 172(3) of the Road Traffic Act 1988 creates one or two offences according to whether the recipient of the requirement was the keeper of the vehicle. Both cases raise the question as to whether the prosecution need prove that the requirement was made by or on behalf of the chief officer of police and if so, the nature of that proof.
4. I heard both cases together, as a single judge, pursuant to a direction given by the judge in charge of the Administrative Court list.

Section 172(3) of the 1988 Act

5. Section 172(3) of the 1988 Act provides:-

“172(1) This section applies –

- (a) to any offence under the preceding provisions of this Act except –
 - (i) an offence under Part V, or
 - (ii) an offence under section 13, 16, 51(2), 61(4), 67(9), 68(4), 96 or 120,and to an offence under section 178 of this Act
 - (b) to any offence under sections 25, 26 or 27 of the Road Traffic Offenders Act 1988,
 - (c) to any offence against any other enactment relating to the use of vehicles on roads, except an offence under paragraph 8 of Schedule 1 to the Road Traffic (Driver Licensing and Information Systems) Act 1989, and
 - (d) to manslaughter ... by the driver of a motor vehicle.
- (2) Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies –

- (a) the person keeping the vehicle shall give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police, and
- (b) any other person shall if required as stated above give any information which it is in his power to give and may lead to identification of the driver
- (3) Subject to the following provisions, a person who fails to comply with a requirement under subsection (2) above shall be guilty of an offence.
- (4) A person shall not be guilty of an offence by virtue of paragraph (a) of subsection (2) above if he shows that he did not know and could not with reasonable diligence have ascertained who the driver of the vehicle was.”

172(5)(6) apply to bodies corporate.

6. By section 172(7):-

“A requirement under subsection (2) may be made by written notice served by post; and where it is so made-

- (a) it shall have effect as a requirement to give the information within the period of 28 days beginning with the day on which the notice is served, and
- (b) the person on whom the notice is served shall not be guilty of an offence under this section if he shows either that he gave the information as soon as reasonably practicable after the end of that period or that it has not been reasonably practicable for him to give it.

(8)

- (9) For the purposes of section 7 of the Interpretation Act 1978 as it applies for the purposes of this section the proper address of any person in relation to the service on him of a notice under subsection (7) above is-

- (a) in the case of the secretary or clerk of a body corporate, that of the registered or principal office of that body or (if the body corporate is the registered keeper of the vehicle concerned) the registered address, and
- (b) in any other case, his last known address at the time of service.

- (10) In this section –

“*registered keeper*”, in relation to the registered keeper of a vehicle, means the address recorded in the record kept under [the Vehicle Excise and Registration Act 1994] with respect to that vehicle as being that person’s address, and

“*registered keeper*”, in relation to a vehicle, means the person in whose name the vehicle is registered under that Act;”

1st Question:-

The finding that the Appellant Meera Mohindra was a person other than a keeper within section 172(2)(b)

7. The question posed by the justices at 1 gives rise to two issues. Firstly, as noted by the justices in their first question, whether it was open to them to draw the inference that the appellant was other than the keeper of the vehicle to which the requirement related. Secondly, the case raises the logically prior question as to whether it was necessary for the justices to make any such finding at all. On the contrary, does section 172(3) require, in the circumstances of the instant case, any more than proof of a valid requirement pursuant to section 172(2) and proof of a failure to supply the information required? It seems sensible to deal first with that second question, which was not expressed in the questions posed by the justices.

The ingredients of an offence under section 172(3)

8. The offence of which the appellant Meera Mohindra was convicted is created by section 172(3). In order to prove guilt the prosecution must prove a valid requirement under section 172(2). A requirement is valid if:-
- (a) a driver of a vehicle is alleged to be guilty of an offence identified in section 172(1);
 - (b) the requirement is made of a person identified in section 172(2) i.e. that person is either the keeper of the vehicle or any other person;
 - (c) the information to which the requirement relates is either such information as to the identity of the driver as he is required to give (section 172(2)(a)) or any information which it is in the power of the addressee of the requirement to give and which may lead to the identification of the driver (section 172(2)(b)) and
 - (d) the requirement is made by or on behalf of a chief officer of police.
9. It is important to note that the obligation imposed by section 172(2) differs if the addressee of the requirement is not one who is keeping the vehicle. Under section 172(2)(a) it is an obligation to give the information required. Under section 172(b), if the person addressed is not the keeper, it is an obligation to give any information which it is in that person's power to give and which may lead to the identification of the driver.
10. The obligations identified in section 172(2) define what is meant by "fails" in section 172(3). If the addressee is a keeper, he fails to comply if he does not supply the information required. If the addressee is not the keeper, he fails to comply if he does not give information which it is in his power to give.

11. The obvious purpose of the legislation is to discover information about an alleged offending driver. It is plain that until an addressee responds to the requirement to give information, the enquirer cannot know whether the addressee is the keeper or not. The most that may be discovered is the identity of the registered keeper. Section 172 draws a distinction between one who keeps the vehicle and one who is merely the registered keeper (see section 172(10)). One who keeps the vehicle is presumed to know the information required unless he proves otherwise (section 172(4)). One who is merely a registered keeper is not presumed to have such information and the prosecution must prove that the information is in his power to give (see as to the different burdens of proof Blackstone 2004 C2.15).
12. It was argued by Mr Sylvester, on behalf of the Appellant Mohindra, that because the nature of the obligation varied, section 172(3) creates two different offences. Where the prosecution does not know whether the addressee is a person keeping the vehicle or not and that person makes no reply, two informations must be laid under section 172(3), one referring to the obligation identified in section 172(2(a)) and the other to the obligation under section 172(2)(b). Failure to do so will make an information, which merely refers to section 172(3), bad for duplicity.
13. I disagree. Although the obligation imposed by section 172(2) varies, only one offence is created by section 172(3). The offence under section 172(3) is of a failure to comply with the requirement. The section does not create two different offences. Section 172(2) merely defines the nature of the obligation which may be breached. It makes a nonsense of the statutory scheme to suggest that in two alternative informations, two alternative offences must be alleged. At the time of the making of the requirement it is an almost vanishing possibility that the enquirer will know whether the addressee is keeping the vehicle or not. If the appellant's contention were correct, the justices would be forced into the position of making an inference as to whether the silent addressee is the keeper or not. Such an inference is, in reality, impossible to draw. A registered keeper may either be the keeper or he may not, for the reasons given by the justices in their opinion in paragraph 8(iv). (I shall consider later whether those reasons support a factual conclusion that the registered keeper who remains silent is not the keeper of the vehicle.). If, as I think, it is not possible to draw any conclusion from the silence of a registered keeper, and, if two offences are created, the result would be an acquittal, since it could never properly be inferred which of the two alternative offences had been committed.
14. I conclude that section 172(3) creates only one offence and the information need do no more than allege an offence under section 172(3). Where a defendant asserts, in response to the information, that he is not the keeper of the vehicle at the time of the alleged offence, the prosecution will be required to prove that the information which he has failed to give was information which was in his power to give and which may lead to identification of the driver. Where the defendant asserts that he was the keeper, the prosecution need do no more than prove the failure to respond, leaving the defendant, if he wishes, to prove the defence under section 172(4). Where the defendant is silent the prosecution need do no more than prove the absence of any response. Whether the failure to comply with the requirement is a breach of an obligation under section 172(2)(a) or (2)(b) is not an issue unless and until the addressee asserts that he is not the keeper or, as a keeper, seeks to rely on the defence under (4). The precise nature of the obligation which it is alleged has been breached is simply not material in the case of one who remains silent.

15. The prosecution sought to rely on the decision of the Divisional Court in *Pulton v Leader* 1949 2 ALL ER 747. That case concerned a predecessor to section 172 namely section 113(3) of the Road Traffic Act 1930. That section distinguished between the owner of a vehicle and any other person. The appellant was summonsed as another person and sought to resist the summons on the basis that he was the owner. The court dismissed the objection on the basis that the matter ought to have been raised earlier, at a time when the summons could have been amended. The court did not consider the question whether it was necessary for the summons to identify whether the defendant was the owner or not.
16. *Pulton* is, therefore, some authority for the proposition that two offences are created by the section. The question whether section 172(3) or, in 1949, section 113(3) creates two offences does not appear to have been argued before the Divisional Court. Although the conclusion of the court that it was too late to raise the point provides an answer in the instant case, it is no solution to the significant question, of concern to prosecuting authorities, for the future. At the time of the request for information the police, as Lord Goddard CJ pointed out, did not know who the owner of the car was:-

“it may well be that the police do not know who the owner of the car is. They therefore served the notice under section 113(3) on the appellant as the owner or any other person.”

That ignorance will persist if the addressee makes no response. Serving alternative informations provides no solution since, as I have indicated, an inference might equally well be drawn that the silent registered keeper is the keeper or that he is not.

17. In those circumstances I prefer to decide this point on the basis that section 172(3) does not create two offences. The question whether a statutory provision creates two offences has long being a source of difficulty (see Professor Sir Glanville Williams 1966 Criminal Law Review 255). The purpose of the rule against duplicity is to ensure that a defendant knows of that of which he is accused and in order to enable him to raise the defence of autrefois acquit or convict. That purpose is not obstructed by concluding that section 172(3) creates only one offence. The defendant knows exactly the nature of the accusation when a requirement is made of him and he fails to respond.
18. The information need allege no more than the failure to give information, identifying the particulars of the vehicle, the date of the failure and referring to section 172(3) and Schedule 2 of the Road Traffic Act 1988. That basis avoids the problems which greater specificity appears to have caused in this case.
19. The information in the instant case is set out in paragraph 1. By referring to information which it was in the appellant's power to give and which might lead to identification of the driver, the information indicated that the defendant was not the owner of the vehicle. That is confirmed by the schedule of offence annexed, I assume, to the summons which I was shown but which was not part of the case. It is headed “Person other than the keeper”.
20. This information then led to the submission recorded at paragraph 4(i) of the case and the finding of fact at 7(i) supported by paragraph 8(iv). Question 1 at the end of the case

follows. Mr Sylvester contended that it was not open to the justices to infer that Meera Mohindra was not the keeper. He referred to the *Secretary of State for the Environment, Transport & the Region v Holt* (2002) RTR 309. It is important to note that the defendant in that case was alleged to have kept an unlicensed vehicle on a road. The court concluded that the justices were entitled to infer, in the light of the defendant's silence, and the fact that he was registered keeper, that he did keep the vehicle unlicensed on the road on the day in question. It was not enough to infer that he had kept the vehicle unlicensed on the road from the mere fact that he was a registered keeper but when coupled with his silence that inference was open to the justices (see page 313).

21. It was submitted in the instant case, the justices ought to have found that the defendant was the keeper and accordingly the information was incorrect in that it charged the wrong offence. But, as I have said, *Holt* was concerned with a different offence, namely keeping an unlicensed vehicle on the road and accordingly with a different question. Silence coupled with the fact that the defendant is a registered keeper does lead to the inference, in the context of the allegation that the defendant had kept an unlicensed vehicle on the road, that he was indeed the keeper. That is because, as the court pointed out, an adverse inference may be drawn from silence; if the defendant was not the keeper and therefore not guilty of the offence of keeping the vehicle unlicensed on the road, the court was entitled to ask why he had not responded to the requirement and merely said he was not the keeper. It makes no sense to ask that question in the context of an offence the crux of which is keeping silent. In that context no such adverse inference can be drawn or need be drawn. The question why the addressee of the requirement remained silent simply does not arise.
22. For those reasons I do not regard *Holt* as being of assistance. But I agree that the mere fact that someone is a registered keeper and thus may not be the keeper of the vehicle at the material time, does not lead to the inference that the defendant was a person "*other than the keeper*". There is no basis for such an inference. The possibilities to which the justices draw attention at 8(iv) do not justify a positive inference as to that fact.
23. But of greater consequence is my conclusion that the findings of fact at paragraph 7(i) of the case, namely that the defendant was a person other than the keeper, were, in the instant case, irrelevant. There was no need for any such finding at all and it should not have been made. The information ought merely to have alleged that the defendant was a person within section 172(2) who had been required to give information in relation to the vehicle specified and that she had failed to give that information. The findings of fact, then, ought to have been confined to whether she was that person, whether a valid requirement was made (an issue to which I shall return shortly) and whether she had failed to reply. Thus, while I agree with the submission on its face, that the justices incorrectly drew the inference impugned, it is immaterial to the correctness of their decision. If the defendant wished to contend that the information required was not in her power to give then she should have raised that issue by asserting that she was not the keeper. The prosecution would then have to disprove that she was not the keeper, if it challenged that fact and if it mattered. The prosecution would, also, have to prove the information was in her power to give. The issue would have had to be raised before the close of the prosecution case. Since it was not, the question whether she was the keeper or not did not matter. The first ground of this appeal fails.

Whether the Justices were entitled to find that a lawful requirement had been made by or on behalf of the chief officer of police? (both appeals).

24. The question arises in both appeals. It is contended that there was no evidence that a lawful requirement was made by or on behalf of the chief officer of police, in the instant cases the chief constable. There was no evidence of a Notice of Intended Prosecution to identify the alleged offence by the driver and no evidence that a requirement had been made by or on behalf of the chief officer. The only evidence was from a postal clerk, recorded inaccurately in paragraph 2(i) in Meera Mohindra but annexed to the Case Stated and in paragraph 2(i) of the appeal of Joanne Browne.
25. It is important to record that the Notice of Intended Prosecution combined with the requirement for information was not exhibited to the section 9 statements from the postal clerk, James Pimlott of Central Ticket Office, and was not therefore before the justices. It is equally important to recall that no reference was made to the point, until after the prosecuting case was closed and a submission of no case to answer was made.
26. In none of the many authorities relating to proof of authority of the chief officer of police has the principle being doubted that the prosecution must prove that the requirement was made by or on behalf of the chief officer of police. That principle was enunciated by Lord Parker CJ in *Osgerby v Walden* [1967] Crim LR 307 and cited with approval by the Divisional Court in *Pamplin v Gorman* 1980 RTR 54, 61K.
27. The most recent authority on the evidence required to prove the lawfulness of a requirement under section 172 is *Arnold v DPP* (1999) RTR 99. In that case a copy of the Notice under section 172 was annexed to a statement with a certificate of posting, disclosing the sender as “manager for the Chief Constable”.
28. That decision represented a development from an earlier decision of the Divisional Court in *Pamplin*. *Pamplin* was concerned with a statutory predecessor, section 168(2) of the Road Traffic Act 1972. The court reviewed earlier authorities to which I was also referred, *Record Tower Cranes Limited v. Gisby* (1961) 1 ALL ER 418 and *Nelms v Rowe* (1970) RTR 45. In *Pamplin* the argument that the signature must be proved and a copy was insufficient was rejected. Kilner Brown J said that the question whether the document was signed was a matter of utmost importance but in that case the document was signed although the signature was not authenticated. The justices were entitled to conclude that the document was authentic (see page 62 to 63 d).
29. In *Arnold* the notice was not actually signed. The signature was merely described. Secondly, the person whose signature was described was described only as a manager and thirdly, the notice merely said it was signed by “Brian H. W. Romaine, manager, for the Chief Constable”. Nevertheless Simon Brown LJ approved the justices’ comment that with modern day computer technology it was not reasonable to expect a specifically authorised person to sign every notice. The fact that the author of the notice whose name appeared on it was described as manager to the chief constable coupled with the fact that the notice emanated from the Central Ticket Office justified the justices conclusion that authority of the Chief Constable was proved. (see page 108(f)).

30. In the instant case, there was no material before the justices at all as to whether the requirement was by or on behalf of the chief constable. The justices were left with a mere statement from the postal clerk that a requirement under section 172 was served. The prosecutor accepts that it was unfortunate that copies of the requirement was not annexed to the statements of service and was, therefore, not before the justices. But he contends that the omission was not fatal. He submitted that the question of whether a valid requirement was made was merely a matter of procedure and not of substance. In those circumstances he argued that the point should have been raised before the close of the prosecutor's case so that the prosecution could have had the opportunity to produce copies.
31. In support of that submission he relied upon *Price v Humphries* (1958) 2 ALL ER 725. In that case it was contended at the close of the prosecution case that no consent had been given by the Minister to the launch of proceedings under the National Insurance Act 1946. The Divisional Court concluded that as the issue was a question of procedure and the issue had not been raised before close of the prosecution's case, the summons must be assumed to be properly authorised.
32. It is difficult to regard the issue as to the lawfulness of the requirement under section 172 as merely a matter of procedure rather than substance. As all the authorities to which I was referred accept, the lawfulness of the requirement was an issue which had to be proved, although for the reasons explained in *Arnold* this could be done merely by producing a copy of the notice. It seems to me that the question of authority for issue of proceedings is distinct from the question of whether a requirement has been made on or on behalf of the chief constable. Devlin J made clear, in *Price*, that the decision rested on the fact that the issue related to whether proceedings were properly authorised (see page 728). This was the issue to which *R v Waller* 1910 1 KB 364, on which Devlin J relied, was confined. Lord Goddard's dichotomy between merits and procedure at 728 must be understood in that context. True it is that neither in *Price* nor in this case did the argument go to the merits; the arguments in both cases are hardly dripping with merit. But in this case the argument did not go to procedure in the sense with which *Price* was concerned. The validity of the requirement was something which had to be proved. No decision has sought to do other than to follow *Osgerby* on the question of principle.
33. In the instant cases there was no evidence that a requirement was made by or on behalf of the chief constable at all. The evidence of the postal clerk did not prove that. Nor did the fact that the evidence was not challenged provide such proof. The evidence said nothing about it since copies of the requirement were not annexed to the statement. The silence of the recipient did not prove the authority of the chief officer. These cases differ from the circumstances in *Osgerby* where a defendant had been shown a copy of the notice by a police constable and had remained silent. Mr Walsh, on behalf of the prosecutor, did not contend otherwise.
34. Nonetheless, the point should have been taken before the close of the prosecution case. Once it was taken the justices ought to have permitted the prosecution to re-open the case so that copies of the notice and requirement could be produced and the authenticity of the notice, signature and authority of the person signing could be established. There could have been no objection to that course being taken; it is the one the justices ought to have taken. There could have been no possible prejudice to either defendant and fairness to the prosecution, who were not put on notice, required that it should be given the opportunity to

produce copies of the notices. If that had been done the justices could have followed *Arnold* in determining whether the requirements were lawful. Justices need do no more than bear in mind the report of the Criminal Courts Review (October 2001) in paragraph 154 Chapter 10 cited with approval in *R v Gleeson* (2003) EWCA CRIM 3357:-

“... a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game in which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecuting case offends neither of those principles.”

35. The defendant ought to have raised the point before the close of the prosecution case and the prosecution should have been given the opportunity of proving that the requirement was lawfully made. In future, the problem can easily be solved by ensuring that the section 9 Statement annexed a copy of the notice and requirement, with the signature and authority of the author of the signature as described in *Arnold*.
36. Since that did not happen in these cases I am compelled to answer Question 2 in Meera Mohindra and Question 1 in Joanne Browne in the negative. In neither case was there evidence that the requirement under section 172 had been made by or on behalf of the chief officer of police. I was concerned whether the appropriate course would be to remit both cases to the justices so that they could permit the prosecution to re-open their cases and adduce evidence of the lawfulness of the requirement. But having regard to the time and expense that this would involve I shall not do so but merely say, reluctantly, that the appeals should be allowed.

Conclusions

37. In order to avoid similar difficulties in the future it may be helpful if I reiterate my conclusions. Before doing so I shall formally answer no to all four questions posed in Meera Mohindra and to the two questions posed in Browne. I conclude:-
 1. Section 172(3) creates only one offence. Information under that section need only allege a failure to give information relating to the identification of the driver of an identified vehicle alleged to have been guilty of an offence contrary to section 172(3) of the Road Traffic Act 1988 Schedule 2 to the Road Traffic Offenders Act 1988;
 2. There should be annexed to section 9 Statements proving service, the notice of intended prosecution and the requirement to provide details;

3. Any defendant who wishes to contend that a requirement was not lawfully made should raise the issue before the close of the prosecution case. If he does not do so the justices should permit the prosecution to re-open his case and prove the lawfulness of the requirement, if it can.