

25/72

SUPREME COURT OF VICTORIA

NORRIS v PEAT

Newton J

29 August 1972

MOTOR TRAFFIC – DRINK/DRIVING – READING OF .140BAC – COPY CERTIFICATE TENDERED DURING THE HEARING – EVIDENCE BEFORE THE MAGISTRATE THAT THE CONSTABLE WAS A PERSON AUTHORISED BY THE CHIEF COMMISSIONER OF POLICE TO OPERATE A BREATH ANALYSING INSTRUMENT – INFORMATION DISMISSED BY MAGISTRATE ON GROUND THAT THERE WAS NO EVIDENCE THAT THE OPERATOR WAS DULY AUTHORISED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S80F(3).

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing in accordance with the law.

For the purposes of the present case it was sufficient to say that by reason of s80F(3) of the *Motor Car Act 1958* a copy certificate such as Exhibit B in the present case was *prima facie* evidence that the person who signed the certificate, was authorised by the Chief Commissioner of Police to operate a breath analysing instrument; that fact is stated in para 1 of the Certificate and is implied in the description "authorised operator" at the foot thereof, and s80F(3) made the copy certificate *prima facie* evidence of the facts and matters stated therein.

NEWTON J: This is the return of an Order nisi to review a decision of the Magistrates' Court at Northcote given on 14 March 1972, whereby an information against the defendant/respondent John Scott Peat, alleging an offence under s81A of the *Motor Car Act 1958* was dismissed. The Court was constituted by Mr A Vale Stipendiary Magistrate.

The evidence given on behalf of the informant was to the following effect, so far as presently material. At about 10pm on Saturday 4 March 1972 Peat was observed by Police Officers to be driving an unlighted Ford Falcon sedan in a peculiar and inefficient fashion in Bastings Street, Northcote near the Peacock Hotel. Peat was taken to the Northcote Police Station, where he was given a breathalyser test by Constable Martin at about 10.35p.m. This test showed a blood alcohol level of .140 percent. At the conclusion of the test Constable Martin completed and signed a certificate in the form of the 7th Schedule to the *Motor Car Act 1958* (as amended) with two carbon copies and gave the original to Peat.

At the hearing one of these carbon copies was tendered in evidence. It is Exhibit 'B' to the affidavit of William Edward Short, sworn on 10 April 1972 in support of the application for the Order Nisi. Save for the statement in para 1 of the certificate and the words 'Signature of Authorised Operator' under Constable Martin's signature at the foot thereof, there was no evidence before the Stipendiary Magistrate whether by way of a certificate under s80F(4) of the *Motor Car Act 1958* or otherwise that Constable Martin was a person authorised by the Chief Commissioner of Police to operate a breath analysing instrument: see s80F(1).

At the conclusion of the evidence for the informant counsel for Peat made a submission to the Stipendiary Magistrate that there was no case to answer on a ground, which the Stipendiary Magistrate rejected, and which it is unnecessary to specify. The Stipendiary Magistrate nevertheless dismissed the information for reasons which he stated in the following terms:

"I will not entertain that submission. However, even though the evidence of the breath analysis operator is not in dispute, it is up to the Prosecution to prove that the breath analysis operator was an authorised operator by virtue of his certificate of authorisation signed by the Chief Commissioner of Police. As this has not been produced nor has a photostat copy been produced I am dismissing the Information."

The grounds of the Order Nisi are as follows:—

"1. That the Magistrate was wrong in holding that it was necessary for the Informant to prove that the breath analysis operator was an authorised operator by producing his certificate of authorisation signed by the Chief Commissioner of Police.

2. That the Magistrate should have held that the copy certificate tendered in evidence at the trial (being exhibit "B" to the said Affidavit) purported to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments and was *prima facie* evidence of the statement contained therein that the person was so authorised."

In my opinion the Order Nisi should be made absolute on both these grounds.

This very point was recently decided by Gillard J in *Wiggins v Tainsh* [1973] VicRp 23; [1973] VR 245 judgment in which was delivered on 19th June 1972, i.e. after the hearing in the present case.

For the purposes of the present case it is sufficient to say that Gillard J held that by reason of s80F(3) of the *Motor Car Act* 1958 a copy certificate such as Exhibit B in the present case is *prima facie* evidence that the person who signed the certificate, was authorised by the Chief Commissioner of Police to operate a breath analysing instrument; that fact is stated in para 1 of the certificate and is implied in the description "authorised operator" at the foot thereof, and s80F(3) makes the copy certificate *prima facie* evidence of the facts and matters stated therein, subject only to a presently immaterial proviso.

In the course of his reasons for judgment Gillard J examined the whole question, if I may respectfully say so, in a most careful and comprehensive fashion, and I entirely agree with His Honour's conclusion. Mr Abraham, who appeared before me for Peat, submitted various criticisms of His Honour's reasons and conclusion, but in my opinion all those criticisms were without substance. His Honour's decision entirely covers the present case, and I shall follow it. Even if I had had any doubts as to the correctness of the decision, which I have not, I should be most reluctant to refuse to follow it since the question which it decided is of great practical importance to the conduct of prosecutions under s81A and other statutory provisions, and it would be most undesirable for there to be any controversy about it as between different Judges of first instance.

Subject to any comments which counsel may wish to make as to form, I propose to make orders in accordance with the following minutes:-

1. Order that the Order Nisi be made absolute.
2. Order that the Order of the Magistrates' Court at Northcote dismissing the information be set aside and that the matter be remitted to the Magistrates' Court at Northcote for further hearing and determination according to law.
3. Order that the costs of those proceedings of the Applicant/Informant Wayne Lindsay Norris be fixed at \$200 and be paid by the Respondent/Defendant, John Scott Peat.

These orders will of course be comprised in a single Court Order. I shall also grant an indemnity certificate to the Respondent pursuant to s13 of the *Appeal Costs Fund Act* 1964 as amended. This appears to me to be obviously a case where such a certificate ought to be granted. The form of the certificate is set out in Form 1 of the Schedule to the *Appeal Costs Fund Regulations* 1965 (Statutory Rules No. 35 of 1965), and the certificate has to be signed by myself.

I do not consider that it would be proper for me to seek to make any order about Peat's past or future costs in the Magistrates' Court, such as was sought by Mr Abraham. These costs will be a matter for the Magistrates' Court to decide.

APPEARANCES: For the applicant/informant Norris: Mr D Ryan, counsel. Crown Solicitor. For the respondent/defendant Peat: Mr IG Abraham, counsel. Mr Michael Saleeba, solicitor.