31/82

SUPREME COURT OF VICTORIA

FRANCIS v STEVENS

Crockett J

16 February 1982

MOTOR TRAFFIC - TESTING OFFICER A MEMBER OF THE POLICE FORCE - PROVISION THAT SUCH OFFICER MUST WEAR A UNIFORM - EVIDENCE GIVEN BY POLICE OFFICER THAT HE WAS WEARING A POLICE UNIFORM AT THE RELEVANT TIME - EVIDENCE NOT ACTED UPON BY MAGISTRATE - CHARGE DISMISSED - WHETHER MAGISTRATE IN ERROR - WHAT CONSTITUTES UNIFORM: *MOTOR CAR ACT* 1958, S80EA.

HELD: Order nisi absolute. Remitted for determination according to law.
The only evidence that the Magistrate had before him was that the garments which could be taken as indisputably making up the uniform were worn at the relevant time, and in consequence, in determining to hold the proof inadequate as he did for the reason that he did the Magistrate quite clearly mis-directed himself.

CROCKETT J: The applicant was the informant in an information preferred against the respondent in which he was charged with failing to comply with a signal to stop his motor car, such signal having been given by a testing officer within the meaning of s80EA of the *Motor Car Act*. That section provides that the Chief Commissioner may appoint a member of the Police Force as a testing officer. A testing officer may set up a preliminary breath-testing station which is to be capable of conducting preliminary breath tests in quick succession and must be readily identifiable by suitable signs, lights and other devices. It also provided that -

> "A testing officer shall not perform duties in connection with a preliminary breath testing station unless he is wearing a uniform."

The evidence given on the information was that a member of the Police Force, one Francis, who had been appointed a testing officer, had signalled the respondent to stop the motor car which he was driving. The signal was given with a view to the respondent's undergoing a preliminary breath test at the testing station which had been set up in the vicinity. The respondent did not stop when signalled to do so, was apprehended, it seems, a little later further down the roadway and, after his apprehension, was questioned by Francis and, in due course, charged with this offence.

Francis was cross-examined as to whether he had been wearing uniform at the relevant time. He said that he had been and that what he was wearing in court at the time that he was giving his evidence was exactly what he had been wearing at the time that he had called upon the respondent to stop. That clothing apparently consisted of breeches, black boots, a blue leather jacket with Police insignia, and blue shirt and tie. The cross-examiner suggested that such uniform was not being worn and, in particular, that a jumper without any Police insignia on it was in fact being worn. This suggestion was denied by the witness.

At the conclusion of the evidence for the prosecution the solicitor appearing for the respondent submitted that the information should be dismissed because it had not, or not sufficiently, been proved that at the relevant time the testing officer was wearing the uniform of a member of the Victoria Police Force. There was some discussion at the time of the submission as to whether or not regulations made by the Governor-in-Council existed which prescribed in detail the garments to be worn so as to constitute the official uniform of the Police Force.

It appears that such regulations had been in existence but that in 1979 they had been repealed and since that date no other regulations relating to police uniforms had been made. In the absence of prescription of garments by regulation it appears that the clothing to be worn so as to be in compliance with what is said to be the uniform of an officer of the Police Force is such clothing as is prescribed by direction of the Chief Commissioner. The power for him to give directions of such a nature would appear to be provided by s5 of the *Police Regulation Act* 1958.

This submission was upheld by the Magistrate. From the affidavit sworn by the prosecuting officer together with that sworn by the respondent (who, however, neither appeared nor was represented in the proceedings before me) it appears plain enough that the Magistrate concluded that the proof that the informant had been in uniform, as required by s80EA(4), was insufficient – not because he did not accept the evidence of the informant – but because there had not been produced to him in evidence any provision prescribing the garments that would be treated as constituting the uniform of a motor-cycle policeman.

The informant has obtained an order nisi to review the order of dismissal made consequent upon the Magistrate's so concluding. It is the return of that order nisi that is now before me. As there were no statutory provisions or regulations in existence at the relevant time prescribing the uniform of a motor-cycle policeman, the Magistrate was obviously wrong in requiring that they be produced in evidence. Nor do I think it was necessary as a matter of proof that the Chief Commissioner's directions in the matter be put in evidence. It is possible that proof of such a direction might be necessary in a case where, for example, dispute had arisen as to what particular garment did, or did not make up, the prescribed uniform. That, however, was not this case.

Here the informant himself had sworn that he was in uniform, and he had, in effect, described each garment that made up the uniform by swearing that the garments he was wearing in the witness box at the hearing were those he had on at the time of the respondent's interception. There was no dispute that those garments constituted the uniform of a member of the police force who was performing the duties of a motor-cycle officer. The Magistrate, accordingly, had no ground for not accepting that those garments did collectively constitute such a uniform. In those circumstances, as the question of whether the officer was in uniform or not is a question of fact, there was no justification for the Magistrate's rejection of that testimony.

The best source of identification of garments is a matter that can be considered when some dispute arises as to whether a garment claimed to form a part of the uniform is or is not part of the uniform, but it is of no relevance where the dispute is not of that kind but is as to whether the garment was being worn or not at the relevant time – and that was the dispute in the present case.

The only evidence that the Magistrate had before him was that the garments which could be taken as indisputably making up the uniform were worn at the relevant time, and in consequence, in determining to hold the proof inadequate as he did for the reason that he did the Magistrate quite clearly mis-directed himself. I have been referred to a number of authorities in relation to similar legislation in which the question of proof of the wearing of a police uniform at a particular time has been given judicial consideration. I do not think that those cases require examination for the purpose of disposing of the point presently before me. It is sufficient to say that not only is there nothing in any of them inconsistent with the conclusion to which I have come, but that their tenor provides substantial support for the approach to the problem in the manner that I have suggested was proper for the Magistrate.

Accordingly, the order nisi will be made absolute. The order of dismissal is set aside, and the information remitted to the Stipendiary Magistrate further to be dealt with according to law.
