21/98

SUPREME COURT OF VICTORIA

KASCHKE v HORNSBY and ANOR

Balmford J

14, 15 May, 5 June 1998 — (1998) 27 MVR 337

PROCEDURE – MOTOR TRAFFIC – DRINK-DRIVING – PRE-TRIAL DISCLOSURE – BREATH ANALYSING INSTRUMENT, SOFTWARE AND RELATED DOCUMENTS SOUGHT – ORDER MADE FOR UNCONTROLLED DELIVERY TO DEFENDANT'S SOLICITORS – WHETHER OPEN TO ORDER PRE-TRIAL DISCLOSURE OF SUCH OBJECTS – WHETHER EXTENT OF ORDER FOR DELIVERY TOO WIDE: *MAGISTRATES' COURT ACT* 1989 S136; *MAGISTRATES' COURT CIVIL PROCEDURE RULES* 1989, R37.01.

At the contest mention hearing of a drink-driving charge, the magistrate ordered that the police informant make available and deliver to the defendant's solicitors the breath analysing instrument, related software and associated operating manual and documents. Upon appeal—

HELD: Appeal allowed. Order quashed.
1. The statutory scheme for proof of the blood alcohol content of a driver leaves to the driver the right to challenge the alleged alcohol content. Accordingly, the magistrate had power to order pre-trial disclosure of the relevant testing equipment, relevant software and documents.
***Gaffee v Johnson* (1996) 90 A Crim R 157, applied.**

2. However, the magistrate had no power to order that the breath analysing instrument be handed over to someone else, out of the control of the owner and with no restrictions on what could be done with it.

BALMFORD J: [1] 1. On 18 May 1996 at 11.58 pm a vehicle driven by the first defendant ("the defendant") was intercepted in Melbourne Road Sorrento by the plaintiff, who is a Senior Constable of Police. The plaintiff conducted a preliminary breath test on the defendant using a Lion Alcolmeter. The test indicated that alcohol was present in the defendant's blood. The plaintiff informed the defendant that he would be requesting him to return to the Rosebud Police Station for a breathalyser test.

2. At Rosebud Police Station breath samples provided by the defendant were tested by Sergeant Seakins, a breathalyser operator. Three tests were conducted, with the following results:

Time of test	Result
12.35 am	alcohol in mouth
12.53 am	alcohol in mouth
1.12 am	blood alcohol concentration of 0.110 %

The machine used was a Drager Alcotest 7110 Serial No. MRFK-0014 ("the machine").

3. The defendant was charged by the plaintiff with offences against paragraphs 49(1)(b) and (f) of *the Road Safety* Act 1986 ("the Road Safety Act"); that is, in summary, driving a motor vehicle whilst more than the prescribed concentration of alcohol (0.05 grams per 100 millilitres) was present in his blood (paragraph (b)); and furnishing a sample of breath within three hours after driving a vehicle which on analysis by a breath analysing instrument indicated that more than the prescribed concentration of alcohol was present in his blood (paragraph (f)).

4. Section 49(3) provides that the maximum penalty for a first offence under either of paragraphs (b) and (f) is a fine of not more than $1200 and for a second offence a fine of not more than $2,500 or imprisonment for a term of not more than three months. There is no evidence before me as to whether the defendant has or has not any relevant (or irrelevant, for that matter) prior conviction. However, there is, on these charges, a potential risk to the liberty of the accused in either case, either on the instant proceedings **[2]** or because the result of the instant proceedings may affect the penalty in subsequent proceedings for a similar offence.

5. A contest mention was held at Frankston Magistrates' Court on 2 April 1997. On 21 May 1997 at the Magistrates' Court at Frankston, on the application of the defendant filed on 2 May 1997, the Magistrate made the following order ("the magistrate's order"):

> That the Informant forthwith makes available and delivers to the Defendants solicitors:
> 1. Drager Alcotest 7110 serial number MRFK-0014.
>
> 2. The software and/or any other apparatus or device used in connection with the Drager Alcotest 7110.
>
> 3. Any technical data, operators or users manual and/or manufacturers instructions in relation to the use and operation of the Drager Alcotest 7110 and any software used in connection therewith.
>
> The question of costs is reserved.

The magistrate's order thus affects the machine, software and other apparatus, and documents.

6. On 18 July 1997 this matter was commenced by originating motion under Order 56 of Chapter 1 of the *General Rules of Procedure in Civil Proceedings*, seeking judicial review of the magistrate's order. Briefly, the plaintiff seeks an order in the nature of certiorari quashing or setting aside the magistrate's order; a declaration that the second defendant erred in law in making that order on the basis that it demonstrates an error on the face of the record, or that there was no power under the *Magistrates' Court Act* 1989 ("the Act") to make that order; a declaration that neither the inherent power of the Magistrates' Court nor section 136 of the Act authorised the making of that order; and an order in the nature of mandamus requiring the second defendant to hear and determine the proceeding according to law.

7. Mr Dennis for the plaintiff submitted that the magistrate had no power, either under section 136 of the Act or otherwise to make an order for pre-trial disclosure.

[3] 8. In *Gaffee v Johnson* (1996) 90 ACrimR 157 the defendant had elected to contest a charge of riding a motor vehicle at 134 kmh in a 100 kmh zone contrary to the *Road Safety Act*. A magistrate had made an order compelling the prosecution to supply to the defendant documents relating to the modification of a mobile radar device by which the alleged offence had been detected, and the plaintiff informant challenged that order. Smith J said at 163:

> It seems to me, that the legislation and regulations while drafted to facilitate proof of the speed of the driver also leaves to the driver the right to challenge the alleged speed. It would not be contrary to the intention of the statutory scheme for a magistrate to have the power to require documentary information to be made available to a defendant for the purpose of that defendant's defence.

After careful consideration, His Honour concluded at 165:

> The inherent power (or implied power) which a court possesses, including a magistrates court, is concerned with adjectival law which includes pre-trial procedures and I do not have any difficulty with the proposition that the inherent power of the court would extend in the absence of any other power to requiring the informant to produce documents. That power is to be exercised to achieve justice according to law in the particular case....
>
> It seems to me that the same consequence flows for the plaintiff in relation to the second basis advanced — s136 of the [*Magistrates' Court Act* 1989]. The plaintiff does not submit that there is provision in this or any other Act to the contrary of section 136. The power that is given by the legislation is to make orders which the court considers conducive to the "effective, complete, prompt and economical determination" of the particular proceeding. It seems to me that that power extends to a power to give a direction to an informant to supply documents.

9. His Honour continued:

> Ultimately, we are concerned with the due administration of justice in the criminal justice system. In prosecutions of the kind considered below, the legislature has given the prosecution significant assistance in proving its case and, as a result, a substantial forensic advantage. In the vast majority of cases the defendant will not contest the result of the radar test. In those cases where a defendant

> wishes to contest the result, however, it would, in my view, be contrary to the interests of justice for the prosecuting authority to withhold relevant documentary information concerning relevant aspects of the radar device, its testing, sealing and its use if that is sought by the accused. If it reveals nothing to detract from the evidence of the device's reading, no harm is done from the prosecution's point of view. If it reveals [4] facts which do so detract, then the accused is entitled to know. To permit the withholding of such information would be to allow a situation to exist where, in most cases, the *prima facie* proof intended by Parliament would become conclusive. That was not Parliament's intention and the courts should not permit such a situation to exist without the plainest statutory direction.

10. The submission of Mr Dennis that *Gaffee v Johnson* was wrongly decided did not convince me, and I would, with respect, accept and adopt the principles which I have quoted from the judgment of Smith J. The statutory scheme for proof of the alcohol content of the blood of a driver leaves to the driver the right to challenge the alleged alcohol content, as the statutory scheme for proof of the speed of a vehicle leaves to the driver the right to challenge the alleged speed; see sections 49(4) and 79 of the *Road Safety Act.* The principles which I have adopted from *Gaffee v Johnson* are as applicable to the contesting of a breathalyser reading as they are to the contesting of a radar speed test; and as applicable to relevant software and documents as they are to relevant testing equipment.

11. In that context, I would refer, as did Smith J, to the following passage from the judgment of Brooking J (as he then was) sitting in the Appeal Division of this Court in *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at 48; (1993) 65 A Crim R 466:

> But it cannot now be denied that the court in its criminal jurisdiction has inherent power to order the prosecutor to produce to the defence for inspection *documents or things* in the possession of the prosecutor where the interests of justice require it. (Emphasis added).

Later on the same page His Honour continued:

> Can it in 1993 be doubted that a criminal court has, to use the words of Cardozo CJ in posing the question, inherent power to allow by order the inspection of documents or objects "in furtherance of justice"?

12. Accordingly, I find that the magistrate had power to order pre-trial disclosure of the objects described in paragraphs 1, 2 and 3 of the order.

13. Mr Dennis submitted that, if I should find that the magistrate had that power, the production of a machine was a different matter from the production of documents. To allow a party to examine documents was one thing. To hand over a machine without **[5]** controlling what could be done with it was another. He referred to Order 37 of the *General Rules of Procedure in Civil Proceedings*, only as an indication of the manner in which, he submitted, the Supreme Court considered that such a power should be exercised. He did not suggest that that provision had direct operation in this matter. Order 37, which is headed "Inspection, detention and preservation of property" relates only to civil proceedings, where it has relevance in the Magistrates' Court as a result of Rule 1.14 of the *Magistrates' Court Civil Procedure Rules*.

14. Rule 37.01 provides, so far as relevant:

> (1) In any proceeding the Court may make an order for the inspection, detention, custody or preservation of any property, whether or not in the possession custody or power of a party.
>
> (2) An order under paragraph (1) may authorise any person to—
> (a) enter any land or do any other thing for the purpose of obtaining access to the property;
> (b) take samples of the property;
> (c) make observations (including the photographing) of the property;
> (d) conduct any experiment on or with the property;
> (e) observe any process.
> ...
>
> (4) The Court may make an order under this Rule on condition that the party applying for the order give security for the costs and expenses of any person, whether or not a party, who will be affected by the order.

15. Mr Dennis pointed out that that Rule did not contemplate that property should be transmitted to another party to be under the possession and control of that party. It made specific provision for an order to be made specifying the way in which the property was to be treated by that party, and provided for orders to be made conditional on the giving of security for the costs and expenses of any person affected. He submitted that there was no authority for the making of an order as wide as that with which I am here concerned, and that clearly the Supreme Court had not considered it appropriate that such orders should be made. Pre-trial disclosure was not the same as uncontrolled pre-trial delivery. Neither section 136 of the Act, nor any incidental power of the Magistrates' Court, could **[6]** authorise an order that a machine be handed over to someone else, out of the control of the owner, and with no restrictions on what could be done with it.

16. I accept that submission. Accordingly it is not necessary to consider the other issues which were raised before me.

17. Mr Tehan, for the defendant, suggested that it might be possible for this Court, in the exercise of its supervisory jurisdiction, to make an order for mandamus sending the matter back to the magistrate with directions to vary the magistrate's order so as to reduce the breadth of its operation. He was unable to produce any authority in support of that proposition. Mr Dennis submitted, in my view correctly, that the Court had no power to make such an order; and that even supposing such a power to exist, the Court had no evidence before it which would enable it to formulate appropriate directions.

18. For the reasons given, there will be an order quashing the magistrate's order. Counsel may wish to make submissions as to costs.

APPEARANCES: For the Police Informant: Mr B Dennis, counsel. Victorian Government Solicitor. For the Defendant: Mr PF Tehan QC and Mr PG Priest, counsel. Woodhams O'Keeffe & Co, solicitors.
