4/97

SUPREME COURT OF VICTORIA

BREGAZZI v KILBY

Nathan J

25 September, 18 October 1996 — (1996) 25 MVR 285

MOTOR TRAFFIC – DRINK/DRIVING – BREATH ANALYSING INSTRUMENT – CERTIFICATE OF RESULTS – MEANING OF "RESULTS" – WHETHER MUST REFER TO NUMERIC VALUES – BREATH ANALYSIS MANUAL – WHETHER MAGISTRATE MAY REFER TO: *ROAD SAFETY ACT* 1986 S49(1)(f); *ROAD TRAFFIC (PROCEDURES) REGULATIONS* 1988 R314.

1. Regulation 314 of the *Road Traffic (Procedures) Regulations* 1988 requires that a certificate of a breath analysis operator include the results of zero tests and self tests. Whether the response to such a test is determined in words or figures is immaterial. The word "results" does not have to refer to numeric values. The word "correct" renders the results in compliance with para (f) of Reg 314.

2. There is no objection to a magistrate having recourse to the Breath Analysis Manual of the Victoria Police. However, if a magistrate intends to rely on the Manual, it is necessary to inform the parties of that fact and give them an opportunity to be heard.

NATHAN J: [1] Peter Bregazzi was driving his car in Cranbourne at night on 3 June 1995, when he was stopped by Senior Constable Kilby and asked for a sample of his breath for analysis. He complied, and later at the police station breathed into a Lion Alcolmeter model 7001. His breath registered .248 grams of alcohol per 100 millimetres in his bloodstream. He was charged with an offence under the terms of s49(1)(f) of the *Road Safety Act* 1986 (the Act) (exceeding the limit which permits people to drive motor cars). A magistrate convicted him and this has resulted in the appeal now before me which raises two questions of law.
Those questions are:

> "(a) Did the Learned Magistrate err in Law by holding that Certificate of Breath Analysis Operator tendered in evidence complied with Regulation 314 of *Road Safety (Procedures) Regulations* and was evidence of the facts and matters stated in it?
>
> (b) Did the Learned Magistrate err in Law by having regard to the contents of the Breath Analysis Manual of the Victoria Police when:
> (i) The said manual had not been proved in evidence before the Court?
> (ii) Counsel for the Appellant had not had the opportunity to read the manual and address the Learned Magistrate thereon?"

The Alcolmeter used to administer the breath tests upon Bregazzi was itself tested at the time. It was given "zero tests" and a "self tests". In response to all these tests the machine registered "correct". It did not record a numeric value. The word "correct" is, as argued by Mr Hardy for Bregazzi, the recording of a comment and not a "result"; therefore, so he contends, Senior Constable Kilby has not **[2]** complied with the Regulations which require the certification of "results". The second question springs from a remark the magistrate made when delivering his decision. He said "I have looked at the Manual of the Victoria Police ... there is nothing in there to cast illumination on what a self-test means. Relying upon (Justice Hansen in *Jones v Purcell*) it is up to the defendant to come up with something which shows what it means." This comment, so argued Mr Hardy, was a fatal reference to extrinsic and unproved evidence, in fact not to evidence at all, and thus the magistrate strayed into irredeemable error. It is necessary to rehearse in full the Regulation which governs certificates under s55(4) of the Act, and ultimately upon which any conviction pursuant to s49 must rest:

> "A certificate given in accordance with section 55(4) is in the prescribed form if it includes
> (a) the serial number of the instrument; and
> (b) the sample number; and
> (c) the location of the test; and

(d) the name and date of birth of the person tested; and
(e) the surname of the operator; and
(f) the results of the self tests conducted before and after the analysis of the sample provided; and
(g) the results of zero tests conducted before and after the analysis of the sample provided; and
(h) the date and time the test was taken; and
(i) the concentration of alcohol in grams per 100 millilitres of blood indicated by the analysis to be present in the blood of the person tested."

Undoubtedly a certificate must accord with, and contain all of the information set out in the Regulations; **[3]** near enough is not good enough is the common sense epithet which applies. (See *Entwistle v Parkes* (1992) 16 MVR 349, Hedigan J and *Jones v Purcell,* 19 July 1995, Hansen J where the nature of "certificates" themselves was examined.) Neither the Regulations nor the Act descend to define the terms "self tests" or "zero tests" referred to in Regulation 314(f) or (g) and no evidence was given as to what in fact they were, other than to say that after the tests the Alcolmeter registered "correct". Mr Hardy contended that the word "results" in parts (f) and (g) had to refer to numeric values, otherwise the defendant would not have results upon which to base a possible defence. In support of this argument he referred to evidence that similar machines in the A.C.T. registered figures not words, although it might have been that the Alcolmeter in this case, had been programmed differently. Be that as it may, it does not affect my conclusion as to the proper construction of the Regulation which is as follows. The requirements in Regulation 314 parts (a), (b) parts of (d), (h) and (i) require certification of figures not words; parts (c), part of (d), (e), part of (h) do require words, therefore the overall requirement is that certificates must contain both words and numbers. There is nothing in the maxim *noscitur a sociis* which assists in resolving this case. I must return to the words of the Regulation.

In my view what is required are "the results"; not of tests *simpliciter*, but of "zero" and "self" tests. If **[4]** the response to a zero test is "correct" then the numeric value must be zero. Whether the response to the test is determined in words or figures is immaterial. The effect of the certification is that the zero tests measured zero. This is the information which must be delivered in the certificates and this is the information which the word "correct" conveys. Therefore, part (g) has been complied with and the certificate accords with this part of the Regulation.

I turn to part (f), the "self tests". Other than knowing they are conducted before and after the test of the breath supplied, no information as to what they are is in the material. A reasonable view is that they are tests performed by the operator who knows that he or she has not consumed alcohol for some time prior to administering the tests. However, the self tests are not set up in numeric terms, they are "self tests". The reasoning used to interpret "zero tests" should also be applied to "self tests". Whatever they are, the response of the machine shows them to have been "correct" rather than incorrect. The word "correct" renders "results" and this part (f) has also been complied with. If "self tests" are what I suspect them to be then it would be preferable but not mandatory that the person tested be given a numeric certification, but I cannot say conclusively as I do not know what self tests involve; other than the results thereof must be made known and certified. My view is in alignment with that expressed by Hansen J in *Jones v Purcell*. I should accord his opinion **[5]** comity although the facts here are different. Of the word "correct" as registered by a machine he said:

> "The magistrate concluded that the expression "self test correct" is a statement that the result of the self test was correct, and relied on the dictionary definition of the word "result", namely "arise as actual or follow as logical consequence; have outcome or end in specified manner, especially in failure success; consequence, issue, or outcome of something; satisfactory outcome". I agree with the magistrate that the word "correct" is an apt word to describe a result. It depends on the nature of the test. There is no reason to suppose that "correct" was not an appropriate statement of the result of the test. The appellant relied on *Iles v Orr* [1935] VicLawRp 40; [1935] VLR 203; [1935] ALR 307 but the different terms of the statutory provision with which that decision was concerned renders the case distinguishable and not of material assistance."

I come to the second ground of appeal, that is, the magistrate's reference to the Police Manual. This, so Mr Hardy contended, amounted to a denial of natural justice as the magistrate must have sought to gather evidence himself, evidence about which the defendant knew nothing and could not test. Therefore, so he says, it leads to speculation as to what the magistrate actually did; ie contrary to *DPP v Martell* [1992] VicRp 64; [1992] 2 VR 249; (1992) 15 MVR 397. I find no attraction in these arguments. There could be no objection to a magistrate having recourse to a

dictionary to help comprehend a word in a statute. If the word was a technical one, no objection could be made if recourse was had to technical dictionary. The Police Manual is of the same nature as a dictionary insofar as it defines how things are to be done, it is known as a matter of common sense to be so. Of course if the magistrate was going to rely on it, it **[6]** would have been necessary to inform the parties of that fact and to have given them an opportunity to have been heard. Here he did not rely on the Manual and said so. There is no room for speculation. What the magistrate did was transparent and could not have been the subject of submissions. This ground must fail.

The appeal must be dismissed. Costs should follow the event, but I shall hear counsel.

APPEARANCES: For the Appellant: Mr G Hardy, counsel. Solicitors: Einseidels. For the Respondent: Mr G Horgan, counsel. Solicitor for Public Prosecutions.
