39/73

SUPREME COURT OF VICTORIA

DAVISON v ELDRIDGE

Murphy J

27 November 1973

MOTOR TRAFFIC – DRINK/DRIVING – EXCEEDING .05BAC – FINDING BY MAGISTRATE THAT PROSECUTION SHOULD HAVE PROVED THE BREATH ANALYSING INSTRUMENT BY PRODUCTION OF THE *GOVERNMENT GAZETTE* – JUDICIAL NOTICE – PROSECUTOR FAILED TO CALL ANY FURTHER EVIDENCE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F(14), 81A; *CRIMES ACT* 1958, s408A.

HELD: Order nisi discharged.

1. Section 80F(14) of the *Motor Car Act* 1958 read as follows;

> **"In this section 'breath analysing instrument' means apparatus of a type approved for the purposes of this section or of any corresponding previous enactment by the Governor-in-Council by notice published in the *Government Gazette* for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood."**

2. It is clear that section 408A of the *Crimes Act* was a "corresponding previous enactment" within the meaning of those words appearing in section 80F, and that the results of testing samples of breath analysed by a breath analysing instrument approved under section 408A and prior to the gazettal of the new approval under section 80F were preserved.
***Wylie v Nicholson* [1973] VicRp 58; [1973] VR 596, applied.**

3. The oral evidence of the operator that the machine used was an approved breath analysing instrument was *prima facie* evidence of that fact. Further, the ruling given by the Magistrate, to the effect that there was no approved breath analysing instrument prior to the gazettal of the fresh notice in July 1972, was wrong. A breath analysing instrument approved under s408A of the *Crimes Act* was approved under a "corresponding previous enactment" within the meaning of s80F(14) and was a breath analysing instrument within the meaning of s80F at the relevant time.

4. Judicial notice pursuant to s77 of the *Evidence Act* 1958 should have been taken of s408A(6) by the Magistrate, and that the existence of such an enactment was not a matter for evidence.

5. It is clear that on the evidence that was led, the Magistrate could not have convicted the defendant, for there was no evidence led that the defendant drove a motor car, a fact which it was necessary to prove before it could be held that the defendant was guilty of the commission of an offence against s81A. Even if the evidence concerning the blood alcohol content of the defendant's sample of breath was admitted, there simply was no evidence in the case led before the Court upon which the Magistrate could have found in favour of the party alleging that he was aggrieved by the Magistrate's decision.

MURPHY J: This was the return of an order nisi to review the order of the Magistrates' Court at Williamstown made on the 21 September 1972, dismissing an information by the applicant that the defendant did drive a motor car whilst the percentage of alcohol expressed in grams per 100 millilitres present in his blood was more than .05 per cent contrary to s81A of the *Motor Car Act* No. 6325.

The grounds upon which Master Brett granted the order nisi on 20 October 1972 were:

(a) The Magistrate was wrong in holding that the prosecution should have produced the *Government Gazette* dated 20 July 1972, which approved certain instruments for the purposes of s80F of the *Motor Car Act* 1958 in order to prove that the breath analysing instrument used to analyse a sample of the defendant's breath was a breath analysing instrument within the meaning of the said s80F.

(b) The Magistrate was wrong in holding that it had not been proved that the breath analysing

instrument used to analyse a sample of the defendant's breath was a breath analysing instrument within the meaning of s80F of the *Motor Car Act* 1958.

(c) The Magistrate was wrong in dismissing the said information following the submission made on behalf of the defendant since there was evidence before him that the breath analysing instrument used to analyse a example of the defendant's breath was a breath analysing instrument within the meaning of s80F of the *Motor Car Act* 1958.

Before me both parties were represented by counsel; Mr Graham appeared to move the order absolute. He submitted that section 80F of the *Motor Car Act* had its origin in section 408A of the *Crimes Act* 1958 as inserted by s2 of the *Crimes (Breath Test Evidence) Act* No 6806 of 1961.

There was, he submitted, evidence before the Magistrates' Court of the approval of the relevant breath analysing instrument under section 408A(6) of the *Crimes Act*. He relied in this connection upon the relevant extract from the *Government Gazette* dated 18 April 1962, the statement which appears in the Schedule 7 Certificate tendered, and the oral evidence of Senior Constable Woodall, who stated: "The defendant furnished a sample of his breath directly into an approved breath analysing instrument."

Apart from the *Gazette* provisions and the Schedule Certificate, Mr Graham relied therefore on the oral evidence and in support of this he referred to several *dicta* of McInerney J in *Wylie v Nicholson* [1973] VicRp 58; [1973] VR 596 particularly at pp601-2.

The Magistrate ruled in the Court below that at the relevant time of the alleged offence no approval had been given to any apparatus pursuant to the provision of s80F(14), of the *Motor Car Act*. There was, he ruled, a hiatus between the date of the repeal of s408A of the *Crimes Act* and the promulgation of the new approval under s80F, which occurred on the 20 July 1972.

It was conceded that the informant could not rely upon this gazettal of the new approval provisions under section 80F published in July 1972. However, section 80F, sub-section (14), itself read as follows;

"In this section 'breath analysing instrument' means apparatus of a type approved for the purposes of this section or <u>of any corresponding previous enactment</u> by the Governor-in-Council by notice published in the *Government Gazette* for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood."

It is clear, Mr Graham submitted, that s408A of the *Crimes Act* was a "corresponding previous enactment" within the meaning of those words appearing in s80F, and that the results of testing samples of breath analysed by a breath analysing instrument approved under s408A and prior to the gazettal of the new approval under section 80F were preserved. (See *Wylie v Nicholson*, (*supra*) at p60, lines 40-50.)

I agree that judicial notice should have been taken of s408A(6) by the Magistrate, and that the existence of such an enactment was not a matter for evidence. (See section 77 *Evidence Act* 1958.)

Mr Aizen, who appeared to show cause, did not, before us, contend that s408A of the *Crimes Act* 1958 was not a "corresponding previous enactment" but simply argued that there was no evidence led in the Court below to prove its existence. I find no substance in this submission by Mr Aizen.

Before me, however, he did seek to uphold the Magistrate's decision on other grounds. namely.

(a) The extract from the *Government Gazette* No 41, dated 18 April 1962 ought not to have been admitted in evidence, as it did not purport to be printed by the Government Printer. (See ss47, 62, and 63 of the *Evidence Act* 1958, and *Wylie v Nicholson* (*supra*).

I myself would have allowed the actual *Government Gazette* of 1962 to be tendered by Mr Graham before me if this had been in any way decisive of the case.

(b) There was no evidence that the defendant had driven a motor car, and this had to be proved before any offence against section 81A of the *Motor Car Act* could be said to have been committed. Mr Aizen submitted that as there was no agreement or concession in this regard, and since no evidence was led by the informant on this point, the decision of the Magistrate on the face of the record must be said to be correct.

(c) If an informant against whom an evidentiary ruling was made in running was entitled to refrain from leading further vital evidence and to review the consequent decision dismissing the information, relying simply on the ground that the evidentiary ruling was wrong, then Mr Aizen submitted, the courts would in effect be allowing orders to review to go on evidentiary rulings, which would be quite wrong. (See *State Savings Bank v Rogers* [1954] VicLawRp 24; [1954] VLR 149; [1954] ALR 318.

(d) There is a presumption in favour of upholding the Magistrate's decision and it should be upheld if it can be supported upon any reasonable view of the evidence. In this connection Mr Aizen relied upon the cases of *Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38; [1954] ALR 168 at VLR p42 per Hudson AJ, and *Yendall v Smith Mitchell & Co Ltd* [1953] VicLawRp 53; [1953] VLR 369 at 378-9; [1953] ALR 724; *Sandhurst and Northern District Trustees Co Ltd v Auldridge* [1952] VicLawRp 64; [1952] VLR 488 at 496; [1952] ALR 900.

It is apparent from the affidavits that in the court below this case proceeded in an unorthodox yet no doubt practical manner. The technical witness for the prosecution was committed to attend another court, and to suit his convenience he gave evidence first and his evidence was heard subject to an overall objection to its admissibility, upon which objection no ruling was made at the outset.

The Magistrate later ruled that Mr Aizen's submission was correct, namely, that at the date of the alleged offence, 25 March 1972, no breath analysing machine had been approved pursuant to s80F of the *Motor Car Act*. Therefore the Magistrate ruled that the evidence of the expert with regard to the percentage of alcohol present in the blood of the defendant as shown by the sample of his breath furnished directly into an "approved breath analysing instrument" could not be admitted pursuant to the evidentiary provisions of s80F(1).

The Magistrate appears to have been aware of the further words appearing in s80F(1), namely, "without affecting the admissibility of any evidence which might be given apart from the provisions of this section", for he immediately went on to ask the prosecutor whether he desired to call any further evidence. However, according to the defendant's affidavit, the prosecutor "declined to call any further evidence and closed the case for the prosecution". The Magistrate thereupon dismissed the information. Apparently he was not asked to state, nor did be state, his reason for dismissal.

It is my view that the oral evidence of the operator that the machine used was an approved breath analysing instrument was *prima facie* evidence of that fact. This view was also held by McInerney J in *Wylie v Nicholson* (*supra*) at page 601, lines 30 - 50, and page 602, lines 1 - 15.

I am also of the view that the ruling given by the Magistrate, to the effect that there was no approved breath analysing instrument prior to the gazettal of the fresh notice in July 1972, was wrong. A breath analysing instrument approved under s408A of the *Crimes Act* was approved under a "corresponding previous enactment" within the meaning of s80F(14), and in my opinion was a breath analysing instrument within the meaning of s80F at the relevant time.

However, it is also clear that on the evidence that was led in the Court below, the Magistrate could not have convicted the defendant, for there was no evidence led that the defendant drove a motor car, a fact which it is necessary to prove before it could be held that the defendant was guilty of commission of an offence against s81A.

The informant in this case did not make any agreement with the defendant, nor was any concession made that on a review the correctness of the Magistrate's ruling would be tested and that other points ordinarily open to the defendant on a review could not be taken.

What the informant in effect seeks now to do is to review the correctness of the Magistrate's ruling on the admissibility of the evidence insofar as it depended upon the existence or otherwise of an approved breath analysing instrument.

I have already indicated that in my opinion the Magistrate's ruling on this matter was incorrect. My powers of dealing with this matter are set out in s160 of the *Justices Act* 1958. They include a power to remit the case for hearing or rehearing with or without any direction in law.

However, it is my opinion that if a party to proceedings in the Magistrates' Court (whether they be criminal or civil proceedings) lays down arms whenever an unfavourable ruling is given and refrains from leading any further evidence, and then, upon a decision being given against him, seeks to review the decision itself on the ground that the particular ruling was wrong, he may be met, as he has been in this case, by the submission that even if the ruling was wrong, yet the decision was perfectly right.

Even if the evidence concerning the blood alcohol content of the defendant's sample of breath, which I have ruled was excluded, was admitted, there simply was no evidence in the case led before the Court below upon which the Magistrate could have found in favour of the party now alleging that he is aggrieved by the Magistrate's decision.

There may be cases in which a ruling given by a Magistrate at the outset of a case makes it clear to everyone that the leading of further evidence would be a complete waste of time from any point of view. That is not this case, for evidence could have been led as to the blood alcohol percentage in the defendant's blood independent altogether of the evidentiary provisions of s80F(1) and the section itself clearly contemplates that this is the position.

There may be other cases in which common sense indicates to both parties that following a critical ruling by a Magistrate, rather than spend some days proceeding with other evidence, an agreement could be reached as to the appropriate course to follow. Such cases may, as a discretionary matter, entitle the Court on the successful return of an order nisi to review a decision based on the ruling, to send the case back for rehearing on the merits.

In the instant case further evidence could have been led as to the percentage of alcohol present in the blood of the defendant, and the ruling relating to the instrument was clearly not fatal to the informant's case. Consequently, as I see it, in effect, the informant in this case seeks to review a ruling as to the admissibility of a piece of evidence, and could not seek to review the actual order dismissing the information, even though the order nisi refers only to the order dismissing the information.

In circumstances such as exist in this case, I am of the opinion that to rule the order nisi absolute, would be to lend countenance to a procedure which in my view is wrong and which should be discouraged. One can envisage many cases in which the adoption of the course adopted here could lead to repeated orders nisi being granted in the one case, if further evidence was led piecemeal and if as each ruling on a piece of evidence was made, the party aggrieved by the ruling led no further evidence, but, following an unfavourable decision, simply applied for and obtained an order nisi.

As I say, there may be some cases where it could be appropriate to review a decision based on a ruling which was admittedly fatal to a party's case. In that event, the appropriate course following a successful review, would no doubt be to send the matter back for a hearing on the merits according to law. As I see it, however, that is not this case.

I find it unnecessary to decide other subsidiary points raised during argument. The order nisi will be discharged. I will, in all the circumstances of this case, make no order as to costs.
