33/83

SUPREME COURT OF VICTORIA

ROBERTSON v SMITH

Nicholson J

27 July 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD ALCOHOL EXCEEDING .05% – REFUSAL BY DRIVER TO FURNISH SAMPLE OF BREATH FOR ANALYSIS – NOT GUILTY PLEA – FORMAL PROOFS REQUIRED: *MOTOR CAR ACT* 1958, SS80E, 80F.

R. was intercepted by a police officer S., whilst driving a motor vehicle. S. conducted a preliminary breath test on R. which indicated a positive result. Accordingly, R. was accompanied to a police station and interrogated concerning his alcohol consumption. S. then formally demanded that R. take a breathalyzer test, but R. refused to comply with the demand; he was duly charged. When the matter came on for hearing, R. pleaded "not guilty". After S. and a police officer from the Breath Analysis Section gave evidence, R's. counsel submitted that there was no case to answer on the grounds that there was no evidence to show that S. was a person authorised to conduct the test, that the relevant regulation concerning the preliminary breath testing device had not been tendered and that the device used was a prescribed instrument. The prosecutor made no application to re-open his case to correct these deficiencies. The magistrate held that there was a case to answer, inferring that S. was authorised as R's. counsel did not question S. in regard to his authorisation, and stating that the prosecution's failure to prove the authorisation of S. was secondary to the question whether R. had refused to take the test. No evidence was called by R., and he was convicted. On order nisi to review—

HELD: Order nisi absolute.
(1) The presumption of regularity cannot be used to supply deficiencies in proof as to matters such as the authority of the operator or the prescribed nature of the device used.
***Mallock v Tabak* [1977] VicRp 7; (1977) VR 78, distinguished;**
***Merchant v R* [1971] HCA 22; (1971) 126 CLR 414; [1971] ALR 736; 45 ALJR 310, applied.**

(2) As no evidence was given to show that the device was a prescribed instrument, it was not open to the Magistrate to infer that this fact had been proved.
***Cummins v Dalton* (unreported, 10 February 1982; MC 49/82) and;**
***Scott v Baker* [1969] 1 QB 659; [1968] 2 All ER 993; [1968] 3 WLR 796, applied.**

(3) *Obiter*: If it were found that the regulations were not in fact tendered at the hearing before the Magistrate, the court would have permitted their tender upon the hearing of the order nisi.
***Schuett v McKenzie* [1968] VicRp 24; [1968] VR 225, followed;**
***Reddy v Ross* [1973] VicRp 46; [1973] VR 462, distinguished.**

NICHOLSON J: *[After setting out the facts, the grounds of the order nisi, and the relevant provisions of the* Motor Car Act *1958, his Honour continued]:* ... **[15]** In the present case it is quite clear that there was no evidence before the magistrate that the informant was authorised to carry out a preliminary breath test or **[16]** that the device used to administer the same was a prescribed device. Further, when submissions based upon the failure to call such evidence were made, no attempt was made by the prosecution to remedy these matters. If it were simply a matter of giving formal proof, then it seems surprising that such an application was not made and it would have been more surprising if it had not been acceded to by the magistrate, even at the cost of an adjournment. In *Ross v Smith* [1973] VicRp 46; (1969) VR 411, which was a case involving an argument relating to the admissibility of oral evidence as to the contents of a certificate relating to breath analysis, Winneke CJ, after commenting upon the importance of there being strict proof beyond reasonable doubt in prosecutions of this nature said:

> "It is also material, in my view, that objection on this very point (i.e. the admissibility of oral evidence as to the contents of the certificate) was taken at the time before the magistrates, and that no application was then made by the prosecutor after hearing the justices' announcement to re-open the informant's case and give evidence as to the time of delivery of the certificate if such evidence was in fact available."

Similar considerations apply to this case. Counsel for the informant submitted that it was open to the magistrate to infer in the absence of any challenge by way of cross-examination that the informant was authorised to conduct the relevant test and that the device was a prescribed preliminary breath testing device upon the basis of the presumption of regularity. In support of this proposition he relied upon the decisions of this court in *Iskov v Matters* [1977] VicRp 26; (1977) VR 220 and *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78.

Iskov v Matters was a case involving a refusal **[17]** to take a preliminary breath test following an accident where the police officer did not formally state that he had formed a belief as required by s80C(1)(b) of the *Motor Car Act* that the person concerned had been involved in an accident during the previous two hours. **[18]** Murray J held that it did not follow that in every case the officer was required to give formal evidence of this belief and the ground upon which it was based. He pointed out that belief is a state of mind which is capable of proof by means other than the direct evidence of the person allegedly holding it, and in the absence of formal evidence of the police officer's belief and the grounds therefor, there may be justification to infer from the evidence that the informant believed that within the period of two hours the defendant had been the driver of a car when it was involved in an accident on the highway and that the grounds for such belief were reasonable. He said that the evidence clearly established that there had been an accident and the applicant submitted having been the driver of the car at the relevant time and the evidence showed that she was still seated in the driving seat at the time when the police arrived. His Honour said, having regard to the place where the events occurred, that is, the Nepean highway, Frankston, it would be impossible to entertain any reasonable doubt that the accident had occurred inside the three-hour period.

In my view, that case is clearly distinguishable from a situation where a vital element in establishing a charge has not in fact been proved because what Murray J held was that, in that case, it had in fact been proved by other means.

Mallock v Tabak was a case where a blood test had been taken from the accused man at a hospital and the prosecution sought to rely upon a certificate as to his blood alcohol content. No evidence was given that the defendant had in fact, been injured in a relevant accident, or that he had entered, or been brought to the hospital for examination or treatment, which was a necessary prerequisite to the taking of a blood **[19]** sample. The accused man had, in fact, it appeared on the evidence, been involved in an accident and had, in fact, been conveyed to the hospital in an ambulance together with another person who had been injured in the accident. Lush J held that the case was one appropriate for the application of a presumption of regularity as to blood having been taken upon the basis that the accused was at the hospital for examination and/or treatment consequent upon an accident. His Honour said at p85:

> "In this case, I am concerned with a statute which imposes duties on a class of responsible and disinterested persons which involve an invasion of the normal rights of a citizen. For that invasion immunity is granted to the class of persons on whom the duty is imposed. The duty is imposed in specific circumstances and the immunity will not be available except in those circumstances. It is to be expected in the context that the persons on whom the duty is imposed are instructed in and know their duty and traditions of its exercise. In these circumstances, it can, in my opinion be presumed from the fact that a sample was taken in purported performance of the duty that the conditions of the performance were satisfied. The situation is one in which the mind may be satisfied of the likelihood of correct observance of s80D(a) and of the unlikelihood of lack of observance of its conditions."

Although this case offers more support to the informant's argument, it is, I think, clearly distinguishable upon the basis that the person carrying out the relevant test is an entirely disinterested medical practitioner who, unlike a police officer, has no interest whatever in the outcome of a successful prosecution and, secondly, I think it can be distinguished upon the basis that the conduct which he is authorised to engage in, would, in normal circumstances, constitute an assault constituting both a criminal offence and sounding in damages at common law. Although he requirement that a person blow into a tube is an invasion of his normal rights as a citizen, **[20]** it falls far short of requiring him to submit to an assault. Counsel for the applicant relied upon a number of authorities in support of his proposition that the presumption of regularity did not apply to the circumstances of this case. In particular, he relied upon *Merchant v R* [1971] HCA 22; (1971) 126 CLR 414; [1971] ALR 736; 45 ALJR 310, where Barwick CJ (with whom the remainder of the members of the court agreed) in discussing the requirements of proof in a case involving the administration of a preliminary breath test in New South Wales, expressed the clear

view that it was necessary to strictly prove that a device used for the purpose of a preliminary breath test complied with the relevant regulations. His Honour said at p417:

> "There was no direct evidence that the device into which the applicant was required to breathe by the arresting constable, though branded 'Alco Test', was a device for carrying out a breath test. But the question would remain whether nonetheless if the applicant's basic submission be accepted there was sufficient material upon which a tribunal of fact could conclude that it was such a device. Paucity of the description of the device which the notification contains invites challenge. It is, I think, undesirable in matters of this kind that the identification of the device to be used by police officers should depend upon an inference drawn, perhaps with difficulty, from evidence not really intended to provide that identification."

I think that is what the informant has attempted to do in the present case and I think that the remarks of the learned Chief Justice are apposite to the present case. Further, in *Reddy v Ross*, McInerney J said in relation to a prosecution for failing to take a preliminary breath test at p465:

> "It was of course an essential part of the informant's' case to prove that the preliminary breath test device was to be operated by a person authorised in that behalf by the Chief Commissioner of Police, and in the absence of evidence of such authority the informant could not succeed in a prosecution such as the one here in question."

[21] In that case, His Honour went on to hold that a document entitled "Certificate of Authority" and purporting to be signed by the Deputy Commissioner of Police for Victoria, was sufficient to prove the necessary authority. Here no such document was tendered, nor was any evidence given whatever as to the informant's authority.

So far as the question of failure to prove that the device used was a prescribed instrument is concerned, I again do not think it was open to the Magistrate to infer that this fact had been proved. I do not accept the somewhat tenuous argument advanced by counsel for the informant that the informant's description of the instrument as a preliminary breath test device, coupled with his assertion made in the course of putting an allegation to the applicant that the device used was a prescribed device, was sufficient to enable the Magistrate to draw this inference. In *Cummins v Dalton* (*supra*), Crockett J was dealing with the return of an order nisi to review a decision of a Magistrate on the grounds that notice in writing having been given under s80F(13) of the *Motor Car Act* 1958, the Magistrate erred in finding that there was any or any sufficient evidence that the defendant's breath had been analysed by an approved breath analysing instrument as defined in s80F(14) of the said Act.

The evidence was that the breathalyzer operator had said that the instrument used by him was of an approved type and that the Magistrate held that, as such, a *prima facie* case had been made out and that it was for the defendant to call evidence and show that it was not an approved machine. His Honour pointed out that, although the point taken was narrow and technical, it related to an alleged deficiency of proof of an offence which was a serious one and which had attracted a **[22]** substantial penalty. The same comments are apt to the present case. **[23]** He also said that the prosecution in such a case was under an obligation to ensure that all proper proofs, no matter how technical, were made. His Honour commented that, if a matter was not in contest concerning the prescription of a device, it would be sufficient in order to prove that a device was a prescribed device to simply aver it was an approved type as prescribed by the order of the Governor-in-Council.

However, in the case which he was dealing with the matter clearly was in issue and he went on to hold such evidence was not sufficient. In the present case there was no reason to suppose that the matter was in issue. But, nevertheless, the informant was bound, if he desired to prove that the device was a prescribed device, to at least assert that fact. Evidence not having been given by the informant at all concerning whether or not the instrument was a prescribed instrument, in my view counsel for the defendant was entitled to remain silent, as he did, and to rely upon the informant's failure to prove this matter as a failure to prove an essential element of the charge. The learned magistrate was clearly wrong in suggesting there was any obligation on counsel to raise the matter by means of cross-examination and I am of the view that his reference to the fact that counsel did not do so suggests that he was acting under some temporary misapprehension as to where the onus of proof lay. In my view, the presumption of regularity

cannot be used to supply deficiencies in proof as to matters such as the authority of the operator and the prescribed nature of the device used in cases of this nature. See also *Scott v Baker* [1969] 1 QB 659, 674; [1968] 2 All ER 993; [1968] 3 WLR 796 (1969) which is a decision of the Court of Appeal. It follows, **[24]** therefore, that I am satisfied that the prosecution did fail to prove that the informant was authorised to operate a preliminary breath test device or that the device used by him was a prescribed device.

Counsel for the informant, however, next submitted that it was not necessary for the informant to prove all of the formal requirements enabling the policeman to require a person to undergo a preliminary breath under s80D in order to establish an offence against s80F(11)(a) of failing or refusing to take a breathalyser test in circumstances where such a preliminary breath test had, in fact, been taken.

As I understand it, he said that the offence under sub-s 11(a) of s80F was constituted by a refusal or failure to comply with the requirements under sub-s6 of that section and that in the circumstances the fact that a person had undergone a preliminary breath test was sufficient to constitute the offence, even if all of the formal requirements for the taking of such a test were not proved. I think that the defect in this argument is that the court cannot assume that a preliminary breath test within the meaning of the Act has been taken, if there is no evidence that it was taken on a prescribed instrument and/or if there was no evidence that the operator was authorised to administer it. This argument accordingly fails.

Counsel for the informant next submitted that all that was necessary in order to establish an offence against sub-s11(a) of s80F was that there should have been a requirement made pursuant to sub-s6. He correctly pointed out that the right to make such a requirement could **[25]** arise in two ways, as already discussed. For present purposes he said that these were where the policeman had obtained a preliminary breath test from the suspect which in the policeman's opinion indicated that the percentage of alcohol in the person's blood exceeded .05 per cent, or, alternatively, where the person had behaved in a manner which in the reasonable belief of the policeman indicated that his ability to drive had been impaired by the consumption of intoxicating liquor.

Counsel argued on the principle of *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; (1962) VR 346; (1961) 19 LGRA 232, that, even if the policeman had no right to make a requirement on the basis of the preliminary breath test, the magistrate was entitled to find that the policeman had a right to make a requirement under sub-s6 on the basis that the applicant's behaviour was such as to enable him to form a reasonable belief that his ability to drive was impaired by the consumption of intoxicating liquor. In the present case he pointed to the informant's evidence that the applicant smelt strongly of intoxicating liquor, was unsteady on his feet and continually walked around when being spoken to as evidence of behaviour which would enable the policeman to form a reasonable belief pursuant to part (b) of sub-s6 of s80F.

He said that, although the magistrate had not expressed his decision in these terms, he had said that he did not have to be satisfied as to the authority of the operator of the preliminary breath test device and as to the prescription of that device to find that there had been a refusal sufficient to constitute the offence. Counsel suggested that it was implicit in this finding that the magistrate thought that the requirement was lawfully made pursuant to the alternative **[26]** method. He said that although the information was expressed in terms referable to the applicant having been a person who had undergone a preliminary breath test pursuant to the provisions of s80E and having thereafter failed or refused to furnish a sample of his breath for analysis pursuant to s80F, the actual offence was constituted by a failure to comply with the requirement made under s80F(6).

As I understand him, counsel was arguing that the information should be construed in such a way that the reference to the applicant having undergone a preliminary breath test pursuant to s80E should not be taken into account. Even if this was a correct view, it seems to me that it would necessarily follow that the reference to having undergone a preliminary breath test would be particularisation of the offence alleged. I think that this argument also fails. First, the informant never expressed himself as having formed the necessary belief under part (b) of sub-s6 of s80F as to the applicant's behaviour although such a belief can be inferred from other evidence. See *Iskov v Matters* (*supra*). I would be loath to draw such an inference in the present

case. Had the informant formed such a belief, then it was unnecessary for him to seek to administer a preliminary breath test at all. In order to administer a preliminary breath test he need only to have formed the belief (for this purpose) that the applicant had consumed intoxicating liquor and that his ability to drive might be impaired. The fact that he administered a preliminary breath test suggests that his belief as to the possible impairment of the applicant's driving fell short of the standard required to make a **[27]** requirement under s80F(6)(b), i.e. that it was impaired. Secondly, he at no stage purported to make a requirement under sub-s6 of s80F other than in the terms of the applicant having undergone a preliminary breath test, the result of which indicated that his blood alcohol was in excess of .05 per cent. I think that it would have been necessary for the informant to have made a requirement under part (b) of sub-s6 of s80F before the applicant could be accused of having failed to comply with such a requirement.

Thirdly, even if the reference in the information to the applicant having been a person who had undergone a preliminary breath test could be construed as a mere particularisation of the offence, no attempt was made to amend such particulars, and the applicant was entitled to meet the charges on the basis of the particulars supplied. It was never suggested that he had failed to comply with a lawful requirement made under part (h) of sub-s6 of s80F and in my opinion it is too late to do so now. It follows that the magistrate's decision to convict the applicant cannot stand and must be set aside. The order nisi will be made absolute on grounds 2 and 3 and the added ground permitted by me to be added at the hearing. **[28]** So far as ground 4 is concerned, it is unnecessary for me to decide whether the regulations were, in fact, tendered at the hearing before the magistrate.

However, I should say that, had I found that they had not been tendered, I would have permitted the informant to tender them at this hearing. It is, of course, true that regulations of this kind do not prove themselves and, accordingly, if the regulation is an essential part of the informant's case, no contravention of the law is established unless the regulation is tendered in evidence. See *Schuett v McKenzie* [1968] VicRp 24; [1968] VR 225 and *Reddy v Ross* (*supra*). However, in the former case, Winneke CJ took the view that the omission to tender the regulation in the court below is not an incurable defect and that, in an appropriate case, leave to adduce the further evidence can and should be granted by the court hearing the order nisi to review.

In *Reddy v Ross*, McInerney J did not permit the tender of the regulations at the return of the order nisi to review, but he did so in the particular circumstances where it appeared to him that, had the regulations been tendered in the court below, the defendant might have desired to argue the invalidity of the regulations and that he should not assume that such an argument would have been hopeless (see p469).

In the present case, no question of validity arose and had this been the only defect, then I can see no reason why the regulations should not have been tendered before me. I will order that the applicant's costs be taxed and when taxed paid by the respondent. I order that the conviction and penalties in the Magistrates' Court be set aside and that there be substituted therefor a dismissal of the information.
