41/92

SUPREME COURT OF VICTORIA — FULL COURT

REEVES v BEAMAN

Brooking, Nathan and Byrne JJ

31 August 1992

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST OPERATOR CALLED AS A WITNESS – NO DIRECT EVIDENCE GIVEN AS TO TYPE OF BREATH ANALYSING INSTRUMENT USED – WHETHER OPEN TO FIND THAT INSTRUMENT USED CAME WITHIN DEFINITION: *ROAD SAFETY ACT* 1986 SS3, 49(1)(f), 58(4).

Where a breath test operator gave evidence that he was authorised under s55 of the *Road Safety Act* 1986 ('Act') to operate a breath analysing instrument and that he complied with the relevant Regulations when operating the instrument, the operator must be taken to be referring to the apparatus described in the definition of "breath analysing instrument" in s3(a) of the Act. Accordingly, it was open to a magistrate to find that the informant had proved that the instrument used on the relevant occasion was a breath analysing instrument as defined in the Act.

***Reeves v Beaman*, MC 32/91, affirmed.**

BROOKING J: [1] On 3 December of 1989, the appellant, who had been riding a motor cycle along the Calder Highway at Wedderburn, was intercepted by the respondent, a police officer. As a result the appellant was charged with a number of offences and was, in due course, convicted of assaulting a member of the police force in the execution of his duty, exceeding the speed limit, and furnishing a sample of breath for analysis and recording more than the prescribed concentration of alcohol present in his blood within three hours after driving contrary to s49(1)(f) of the *Road Safety Act* 1986.

Under s92 of the *Magistrates' Court Act* 1989, he appealed to the Supreme Court against the three convictions and sentences. The appeals were heard by O'Bryan J. The appeal against the first conviction mentioned was dismissed, it being conceded that the appeal raised no question of law. The two remaining appeals were dismissed by O'Bryan J, and against the dismissal of those appeals a further appeal has been taken to this court. As a result the Full Court is required to determine, among other things, in effect whether it was open to the magistrate, as the judge held, to find that the defendant had exceeded the speed limit on his motor cycle.

That such a question can be taken without leave to the Full Court affords a useful example to those who think it unfortunate that an unrestricted right of appeal exists from orders determining appeals from decisions of Magistrates' Courts under s92. Many think that there was good sense in the former statutory provision whereby the order nisi could be made returnable before the Full Court **[2]** or the judge could refer it to the Full Court, but if neither of these things was done, no appeal could be taken to the Full Court, an appeal by special leave of the High Court alone being possible.

As regards the appeal from the judge's decision dismissing the appeal against the speeding conviction, there were two questions. The first is whether it was open to the Magistrate to find that the defendant had committed the offence by exceeding one hundred kilometres per hour. The second was whether it was open to him to find that the defendant had exceeded the speed limit to such an extent, by driving at not less than one hundred and thirty kilometres per hour, as to render him liable to a mandatory licence suspension. As to the first, the finding that the speed limit had been exceeded was not only open, but almost inevitable. The defendant's counsel had cross-examined the informant by indicating that his client would give evidence that he was doing no more than one hundred and ten kilometres per hour and the defendant's own evidence was that he had not been doing any more than one hundred and ten kilometres an hour, probably less, and that he was continuously glancing at his speedometer and did not exceed one hundred and ten. Really this point was not argued in this court.

As to the second matter, the informant gave evidence that he did glance at his speedometer

and that he and the defendant were travelling at the same speed, namely one hundred and forty to one hundred and fifty kilometres per hour. He also gave evidence, as appears from paragraph 37(a) of the defendant's affidavit, in cross-examination **[3]** as to speed. That paragraph speaks of the cross-examination of the informant concerning his observations of the defendant's speed over a certain distance and continues, "The witness gave replies to the questions and said *inter alia* that he was travelling between one hundred and forty and one hundred and fifty kilometres per hour when he caught up to the defendant." That passage makes it clear that not all the relevant evidence as to speed actually given was placed before the learned judge. This is, of course, almost inevitable where no transcript is taken.

I think it is clear that the magistrate's finding which founded the penalty actually inflicted was open to him and that this appeal should fail. As regards the appeal on the breath test charge, this raises the question whether it was open to the magistrate to find, as he did, that the instrument used in the taking of the breath test was a "breath analysing instrument" as defined in s3(1) of the *Road Safety Act* 1986. The prosecutor did, in the Magistrates' Court, tender a certificate of an authorized operator of a breath analysing instrument whereby the operator certified that the breath analysing instrument used in the analysis was a breathalyzer as described in s3 which had written, inscribed or impressed on some portion of it or on a plate attached to it, the expression 'breathalyzer" and the numerals 2824789 in that sequence. At the time of the tender of this certificate the decision of Judge Keon-Cohen which led to the statement of the case in *Bracken v O'Sullivan* [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91, had been given, and before the hearing of the prosecution was **[4]** concluded the Full Court had given its decision on the case stated. In fact the magistrate did not receive the certificate in evidence. After he had reserved his decision on a no case submission, and before he ruled that there was a case to answer, the *Road Safety (Certificates) Act* 1990, received the Royal assent. This Act, passed in consequence of *Bracken v O'Sullivan*, by s3, inserted the words "or if a result of a breath analysis" into s58(1) of the *Road Safety Act* 1986, and provided by s2(2) that s3 must be taken to have come into operation on 1 March, 1987.

Mr Billings, for the appellant, has conceded two propositions. The first proposition is that in the Magistrates' Court s58(4) of the *Road Safety Act* 1986, making evidence by a person authorized to operate a breath analysing instrument proof of certain facts, was applicable, so that paragraph (a) of the sub-section was applicable, this dealing with evidence that an apparatus used by the authorized operator was a breath analysing instrument within the meaning of Part 5. This concession makes it unnecessary to consider the extent to which the sub-sections of s58 are interrelated, a matter considered by the Full Court in *Bracken v O'Sullivan*.

The second proposition conceded was that independently of s58(4) it was open to the informant to prove by *viva voce* evidence that the apparatus used by the authorized operator was a breath analysing instrument within the meaning of Part 5. O'Bryan J. held that it was open to the magistrate to rule, as he did, that there was a case to answer. That ruling was followed by an election by the appellant to **[5]** call no evidence, and his conviction. In ruling that there was a case to answer, the learned magistrate said this, speaking of the operator of the instrument:

> "The witness Holt gave evidence that he complied with the appropriate sections of the *Road Safety Act* and the regulations thereunder. I am satisfied the prosecution have proved that the apparatus was a breath analysing instrument for the purpose of a proceeding under Part 5 of the *Road Safety Act*. If I was not so satisfied I would have allowed the production of the certificate. In my view *Bracken v O'Sullivan* is authority only for the proposition that sub-section (1) and (2) of s58 are not relevant to a charge under s49(1)(f)."

The learned judge was of the opinion that the evidence of Sergeant Holt, if it did not directly prove that he used a breathalyzer as defined by s3, did so inferentially. His Honour referred to the evidence of the witness that the instrument was operated by him in accordance with regulation 302 and said that the witness must be taken to have been saying that the instrument was the apparatus described in paragraph (a) of the definition in s3. His Honour continued:

> "In a proceeding of this nature in a Magistrates' Court the essential elements of a charge must be proved by admissible evidence, but it is most undesirable that the progress of the proceeding should be protracted by requiring technical and detailed evidence to be given about matters not put directly in issue by defence counsel. Should counsel for a defendant be instructed to assert by way of defence

that the instrument used by an authorized officer was not an approved breathalyzer because it was something else, then he should alert the court to the point".

Before us it was contended that in this passage His Honour had, as it were, cast some burden upon the defendant in a criminal proceeding, but I do not think that that is what His Honour meant. When the witness Holt said that he was authorized to **[6]** operate a breath analysing instrument under s55 of the *Road Safety Act* he must be taken to have used that expression in the sense in which it is defined in s3. This itself shows, in my view, that elsewhere in his evidence he was using the term in this sense, that is, as a term of art. As the learned judge said, the witness's reference to his operating the instrument in accordance with regulations 302, 303 and 304 shows again that he was using the term as a term of art.

The regulations of which those clauses form part, the *Road Safety (Procedures) Regulations* 1987, were put in evidence. Regulation 302, with which the witness described himself as having complied, begins by defining that to which it applies, namely breathalyzer, as the apparatus described in paragraph (a) of the definition of breath analysing instrument in s3 of the Act. Again regulation 302(3)(c), with which the witness swore he had complied, required that he check the scale reading of every analysis and record the reading on the certificate required by the Act to be delivered to the person the subject of the test.

In *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897 at p916; (1988) 9 MVR 257, Ormiston J considered that on the evidence in that case the magistrate could not find that the instrument used was a breath analysing instrument as defined in s3. His Honour dealt with an argument based on the operator's evidence that he had complied with all regulations relating to the operation of breathalyzers. The evidence in that case differs from that in the present case. The instrument was there described by the operator as an approved instrument. Whatever might be said of the effect **[7]** of the evidence in *Bogdanovski's case*, I do not think that what His Honour decided on the facts of that case should stand in the way of the conclusion that on the evidence in the present case it was open to the magistrate, as the judge held, to find that the informant had proved that the instrument was a breath analysing instrument as defined.

Mr Billings further put an argument that notwithstanding the decision of Tadgell J in *Smith v Van Maanen* unreported 5 July, 1991, on a prosecution for this offence, the informant must prove not only that the instrument's reading showed a blood alcohol concentration in excess of the prescribed concentration, as the oral evidence here showed, but also that the instrument was a scientific instrument and so entitled to the benefit of the so called presumption of accuracy. I do not accept this submission. It reads into the provision creating the offence something that is not there.

In my view the informant did show the instrument to be a breath analysing instrument as defined by evidence which the magistrate was at liberty to accept as sufficient for a conviction. In these circumstances it is unnecessary to consider the effect of the amendment to s58 already mentioned and the effect in this case of sub-section (5) of that section and of the magistrate's willingness, had it been necessary, to receive the certificate in evidence. I would dismiss also the second appeal.

NATHAN J: I agree.

BYRNE J: I agree and I have nothing to add.

BROOKING J: The order of the court in each of the two cases is that the appeal is dismissed with costs including any **[8]** reserved costs.

APPEARANCES: For the appellant Reeves: Mr P Billings, counsel. David M Robinson & Associates, solicitors. For the respondent Beaman: Mr D Just, counsel. JM Buckley, Solicitor to the DPP.
