26/93

SUPREME COURT OF VICTORIA

OZBINAY v CROWLEY

Byrne J

6, 7, 16 April 1993 — (1993) 17 MVR 176

MOTOR TRAFFIC – DRINK/DRIVING – OPERATION OF BREATHALYSER – CONTROL KNOB TURNED TO "OFF" POSITION – CONTRARY TO MANUFACTURER'S INSTRUCTIONS – WHETHER INSTRUMENT NOT PROPERLY OPERATED – WHETHER DEFENCE MADE OUT – INGREDIENTS OF S49(1)(f) OFFENCE – ONE INGREDIENT OMITTED IN CHARGE – WHETHER CHARGE BAD – WHETHER CAPABLE OF AMENDMENT: *ROAD SAFETY ACT* 1986, SS49(1)(f),(4).

1. By turning the control knob of a Breathalyser to the "Off" position with the test ampoule in place, the operator of the instrument is in breach of an instruction in the manufacturer's manual. However, without more, a court is not required to find that because of such breach the instrument was not properly operated within the meaning of s49(4) of the *Road Safety Act* 1986 ("the Act').

2. It is an ingredient of an offence under s49(1)(f) of the Act that the concentration of alcohol in the blood indicated by the analysis was not due solely to the consumption of alcohol after the driving. An information which fails to include such an ingredient is bad. However, to ensure that justice is not defeated, a court has power to amend the information.

***Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583; [1947] ALR 27, applied.**

BYRNE J: [1] Early on the morning of 13 December 1989 the appellant, Ugar Ozbinay, was intercepted by a police officer while driving a car in Grey Street, St. Kilda. After having given a preliminary sample of breath he was required to furnish a sample of his breath for analysis pursuant to the *Road Safety Act* 1986 s55(1) ("the Act"). The result of the analysis indicated that the concentration of alcohol present in his blood was 0.18 grams per 100 millilitres. A second sample taken immediately afterwards recorded a concentration of 0.19. These readings are, of course, in excess of the prescribed level of 0.05 grams per 100 millilitres. Accordingly, on 15 February 1990 he was charged with an offence against s49(1)(f) of the Act. Nearly three years later, on 15 September 1992, he was convicted by the Magistrates' Court of Victoria at Prahran. The Magistrate imposed a fine of $350 and $25 statutory costs. He also cancelled all licences and permits held under the Act and disqualified him from obtaining any such licence for a period of 18 months. The order on licence was said to be effective from 15 September 1992.

From this conviction the appellant brings an appeal pursuant to the *Magistrates' Court Act* 1989 s92. I have determined to dismiss the appeal for the following reasons: The questions of law raised on the appeal which are set out in the order of Master Evans made on 12 November 1992 are four in number. Only two of these questions were argued before me.

[2] They are:

> "1(a) The learned Magistrate erred in law by holding that a defence under s49(4)of the *Road Safety Act* -
> (i) was not made out by the defendant establishing that the machine used for the breath analysis was operated contrary to the manufacturers instructions and/or scientific dictates;
> (ii) was made out only if the machine was proved to have been used contrary to -
> A. the manufacturers instructions;
> and/or
> B. scientific dictates,
> and that the use would result in an incorrect result being obtained.
>
> 4. The learned Magistrate erred in law by convicting the appellant on a charge which did not allege all the elements of an offence under s49(1)(f) of the *Road Safety Act* 1986."

It is convenient to deal with ground 4 first. The point here raised was that the charge did not set out all of the elements of the offence under the *Road Safety Act* s49(1)(f). This section

provides:

> "49(1) A person is guilty of an offence if he or she—...
> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under s55(1) and—
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle."

The charge described in the Summons with Information dated 15 February 1990 is in these terms:

> **[3]** What is the charge?
> In the said State of Victoria at St. Kilda on the 13th day of December 1989 the defendant did within three hours after driving a motor vehicle and after a requirement to undergo a preliminary breath test was required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s51.1 of the *Road Safety Act* 1986, the result of which analysis indicated more than the prescribed concentration of alcohol was present in his blood.
> Actual reading 0.180.

In the boxes provided on the form, it is indicated that the offence charged is one under State Act of Parliament, "The Road Safety Act 127" (a reference to Act 127 of 1986), s49(1)(f).

It is perhaps relevant to note that the charge was vigorously defended before the Magistrate. The appellant was represented by counsel and the hearing took place on 22 January 1992, 30 April 1992, 18 May 1992 and 15 September 1992. It may be that there was also some hearing on 25 June 1992 for the Magistrate then gave reasons for holding that, on the evidence to that date, the defence provided by s49(4) of the Act had not been made out. The hearing before the Magistrate was conducted with no apparent embarrassment as a result of any inadequacy in the charge as formulated and no complaint was made before the Magistrate about this. This, of course, meant that the question of amendment did not arise in the court below.

I should at the outset declare my strong resistance to a submission founded on a defect of form in the absence of any prejudice to the appellant. Nevertheless, if constrained by authority, I must uphold such a submission whatever be my own views of its **[4]** appropriateness in an era in which lawyers speak in plain English and in which substance takes precedence over form. Counsel for the appellant submitted that the description of the charge must be in terms of the facts and circumstances which constitute the alleged offence and must be set out with certainty and precision: *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583 at p594; [1947] ALR 27, per Starke J. Alternatively, it may be described in the wording of the Act creating it or in similar words: *Magistrates' Court Act* 1989 S27(1); *Walpole v Bywool Pty Ltd* [1963] VicRp 26; [1963] VR 157 at 159; 9 LGRA 44, per O'Bryan J. Dixon J, in *Broome v Chenoweth* (above) at 600 would require the information to set out the ingredients of the offence. In *ex parte Lovell; re Buckley* (1938) 38 SR (NSW) 153; 55 WN (NSW) 63, Jordan CJ, speaking for the New South Wales Court of Appeal, after an extensive analysis of the statutes then in force in that State, concluded at 173:

> "A Magistrate has no jurisdiction to convict a person except for a statutory offence; and it is contrary to natural justice to convict a person of a statutory offence with which he has not been charged. Hence, in order to support a conviction for an offence, it is necessary either that the information and summons upon which it is based should accurately state the acts necessary to constitute all the ingredients of that offence ..."

His Honour then considered a statutory alternative, which is not available here, where the accused has been accurately charged orally and has made no objection to the absence of any information and summons. See also *ex parte Burnett; re Wicks* [1968] 2 NSWR 119.

The facts and circumstances which constitute an offence under s49(1)(f) and the ingredients of that **[5]** offence for the present purposes are the following:

> 1. The defendant has been driving a motor car within three hours before a sample of breath is provided;

2. The defendant furnishes a sample of breath for analysis under s55(1);

3. The result of the analysis as shown indicates that more than the prescribed concentration of alcohol is present in the blood;

4. The concentration of alcohol in the blood indicated by the analysis was not due solely to the consumption of alcohol after the driving.

See *DPP v McNamara* ([1993] 17 MVR 286, SC (Vic), Harper J, 10369/1992, 22 January 1993) at 1. Compare *Smith v van Maanen* (1991) 14 MVR 365, SC (Vic) Tadgell J, 12347/1990, 5th July 1991 at 14. It will be immediately seen that the charge in the Summons with Information is defective in terms of these ingredients in the following three respects:

1. The requirement to furnish the sample of breath is said to be under s.51.1 of the Act and not s55(1).

2. There is no allegation in terms that the defendant has furnished a sample of his breath.

3. There is no mention of the fourth ingredient summarised above.

In *Smith v van Maanen* (above), Tadgell J was faced with a charge which contained the first two of **[6]** these defects and, in addition, did not specify the date of the offence. The third defect above was not before him as the statute then stood at the time of the alleged offence. His Honour held that the charge, notwithstanding the defects complained of before him, was such that a defendant receiving it was able to derive, expressly or by implication from the information contained, all the ingredients of the offence under s49(1)(f) as it then stood. He held that, if the Magistrate had been asked to amend, he could properly have granted such an application. I should add in fairness to counsel for the appellant that he did not challenge his Honour's decision or reasoning, nor did he rely before me upon the first and second defects which I have identified above. His case was put solely on the third defect.

The fourth ingredient to the offence under s49(1)(f) which I have set out above arises from an amendment to that section by Act No. 53 of 1989 which came into force on 19 June 1989. This amendment added to that section a new paragraph (ii). It also inserted in the Act a new s48(1A) which is in these terms:

> "For the purposes of an alleged offence against paragraph (f) or (g) of s49(1) it must be presumed that the concentration of alcohol indicated by an analysis to be present in the blood of the person charged or found by an analyst to be present in the sample of blood taken from the person charged (as the case requires) was not due solely to the consumption of alcohol after driving or being in charge of a motor vehicle unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person."

The consequence of these amendments is, for **[7]** present purposes, twofold. First, they add a further ingredient to the offence. Second, they cast on the defendant the burden of disproving this added ingredient in the manner prescribed. It was submitted on behalf of the respondent that this effectively meant that it was not part of the informant's proofs that the defendant's blood alcohol reading was not due solely to the consumption of alcohol after the driving. Accordingly, it was said, these might properly be omitted from the charge. Counsel might also have referred to rule 5(2) of the presentment rules set out in the 6th schedule to the *Crimes Act* 1958. Counsel for the appellant, on the other hand, contended that such a submission confused the evidence which is led in support of a charge with the ingredients of the charge.

I need not here repeat the analysis of s49(1)(f) and the account of its passage through Parliament which was undertaken by the High Court in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, to which I acknowledge my indebtedness. It appears from this analysis that the offence created by s49(1)(f) is one which fastens attention upon the results of the breath analysis at the time the sample is analysed, rather than upon the concentration of the blood at the time of driving. The 1989 amendment, which may have been a consequence of this case before it reached the High Court, changed the nature of the offence by the inclusion of paragraph (ii). Given that the contents of this paragraph constitute an ingredient of the amended statutory offence, the principles stated in cases such as *Broome* **[8]** *v Chenoweth* (above) and *ex parte Lovell; re Buckley* (above) require

that they be included in the charge. The distinction between a case such as the present and that before the court in *Smith v van Maanen* (above) is that one cannot here, except by reference to the section, discern from the Summons with Information, expressly or by inference, each of the ingredients of the offence. Accordingly, the charge as formulated is bad.

But this does not dispose of this ground of appeal. I accept that, if the matter had been raised before the Magistrate, he would have had the power to amend: *Broome v Chenoweth* (above) at 601, per Dixon J; *Smith v van Maanen* (above) at 18, per Tadgell J. Given the way the hearing was conducted before him, it is inconceivable that the Magistrate would have hesitated to exercise that power to ensure that justice was not defeated. It would in my view be a waste of time to send the matter back to the Magistrates' Court for this amendment to be made. Accordingly, ground 4 is not made out.

Ground 1(a) is concerned with the statutory defence to a charge brought under s49(1)(f). Section 49(4) provides:

> "It is a defence to a charge under paragraph (f) of subsection (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated."

It was accepted before me that this cast on the defendant the burden of proving on the balance of probabilities one of the two matters there recited. The respondent was not able to rely upon the statutory **[9]** presumption, if applicable, of s58(2) as notice had been given by the appellant under the subsection. In the present case the Magistrate's findings of fact were not challenged. He found that the operator had turned the control knob to the "off" position from the "test" or "analyse" position when the test ampoule was in place. This was in breach of an instruction contained in the instruction manual issued by the manufacturer of the instrument:

> "Never place knob in "off" position with test ampoule in place – suction on the delivery tube could draw acid into the sample chamber."

As I understand the evidence, the practical effect of this would be that, if insufficient acid is present in the ampoule, it would inaccurately increase the level of blood concentration indicated by the machine. The Magistrate accepted the evidence of the appellant's scientific witness, Mr Crewdson, as to what could occur when the control knob is turned from the "analyse" position to the "off" position or where the control knob is turned from the "test" position to the "off" position when the ampoule was in place in the machine. Referring to the manufacturer's instruction quoted above the Magistrate summarised Mr Crewdson's evidence as follows:

> "As to this instruction the witness said he was not aware of anything that suggested this instruction does not accord with good scientific practice and that it was his view the machine should be used in accordance with the manufacturers instructions unless, contrary to his understanding of the position, there was good reason to depart from one or more of those instructions. He also said in his many years of using a breathalyser he has only seen chemical drawn from the ampoule on one occasion which was **[10]** when power was disconnected from a breathalyser but that the phenomena is not easy to observe and he cannot therefore say it has not occurred on many other occasions when power supply is cut when the ampoule is in place. His evidence was that suction could be caused by a drop in pressure of a captured sample of breath from cooling of a sample or from a siphoning phenomena."

Counsel for the appellant's primary submission was that the requirement of proper operation was not limited to compliance with the regulations made under the Act. So much is established by *DPP v Martell* [1992] VicRp 64; [1992] 2 VR 249; (1992) 15 MVR 397. He then contended that any departure from the manufacturer's instructions or proper scientific dictates amounted to a failure properly to operate the machine, thereby giving rise to the statutory defence. It should be noted at the outset that the finding of the Magistrate was concerned with the contravention of the manufacturer's instruction referred to above. He made no finding of any non-compliance with any scientific dictate independent of such contravention. It is not clear to me how the latter expression has found its way into ground 1(a). I shall not make further reference to it. Likewise since no argument before me depended upon a non-compliance with the regulations, what follows ignores the possibility that some such non-compliance may exist.

Dealing with the appellant's submission which was based on Mr Crewdson's evidence, which I have referred to – that the machine was not then operating properly – the Magistrate concluded:

> "I am satisfied it is established the machine was not used in the manner recommended by the manufacturer and indeed was used in a way that was contrary to the instructions of the manufacturer. While the instruction is phrased as an injunction (as **[11]** the witness chose to refer it) it is not coupled with a statement that use contrary to the instruction will cause an error in the result given by the machine. The instructions say such use could operate in a particular way which the witness went on to indicate will result in an incorrect result.
>
> No authority was produced to me as to what is contemplated by "proper operation". One possible view is that anything done contrary to an instruction of the manufacturer offends this injunction even if it is not shown that use in that way will result in an incorrect reading. I do not accept this view. It is my view the defendant must prove on the balance of probabilities that use contrary to the manufacturers instruction will result in an incorrect result. As I have noted the evidence falls short of that both as to the statement of the manufacturer that use could have an identified consequence as to operation of the machine and as to the evidence of the expert that in many years of use, he has only once detected the phenomena described by the manufacturer.
>
> The lack of any statement of certainty or of any degree of probability of an incorrect reading from operation contrary to this instruction does not in my view, meet the obligation s49(4) imposes on the defendant to establish it is more probable than not that on 13 December, 1989 the machine was operated contrary to instruction so as to result in an incorrect reading. I realise this may impose a very high evidentiary onus on the defendant but I feel compelled to come to this conclusion. The result does not mean the defence can never be made out because the use of the expression "proper operation" in the regulations means that where matters required by the regulations as part of proper operations are not carried out the defence will be made out without any evidence as to the effect of a failure to comply with a relevant regulation.
>
> For these reasons I find the defendant has not made out this defence provided by s49(4)." (emphasis in the original)

Counsel for the appellant before me challenged this conclusion as a matter of law in the ground under consideration. This ground in fact puts the appellant's position as to the expression "not properly operated" in **[12]** two separate ways. It is alleged that the Magistrate erred:

> (i) in concluding that the appellant did not discharge the onus merely by showing that the machine was operated contrary to the manufacturer's instructions –
>
> (ii) in imposing on the appellant the burden of proving not only some contravention of the manufacturer's instructions but also that the machine so used would result in an incorrect reading result being obtained.

The submission starts from the affirmative proposition that the manufacturer's instructions establish a standard against which the acts of the operator are to be measured so that compliance with them alone constitutes a proper operation of the machine. The second step is to adopt the negative of that proposition: non-compliance with any of these instructions means that the machine is not operated properly. To my mind there is a logical flaw in this. It may be that the manufacturer's instructions contain minimal requirements, so that the proper operation of the machine requires compliance with them as well as with other procedures. In such a case the affirmative proposition above may not be correct but the negative is. Alternatively it may be that the manufacturer's instructions are very detailed and extensive, laying down procedures which are more than sufficient for the proper operation of the machine. In such a case the affirmative proposition above is valid but not the negative. One might also imagine a third **[13]** situation, adverted to by Mr Crewdson, where the manufacturer's instructions are departed from for good reason – perhaps other procedures are substituted for them – with no consequent deterioration in the performance of the machine. In such a case the affirmative proposition may or may not be valid and the negative also.

It will be seen that the assumption which lies behind the appellant's argument is that the manufacturer's instructions must be adhered to in order for there to be a proper operation of the machine. I am not prepared to adopt this assumption as applicable in every case. Its validity is a matter of evidence in relation to the instruction in question. To my mind the word "proper"

in the expression "properly operated" requires an examination of the purpose of the machine's operation. Any other conclusion would confer upon the manufacturer's instructions a legislative import similar to that enjoyed by the regulations. See *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897 at 921; (1988) 9 MVR 257. Such a conclusion too would be inconsistent with the decision of Ashley J in *Dalzotto v Lowell* (unreported, SC (Vic) 8283/1992 18 December 1992) at 21.

This conclusion as to the meaning of s49(4) follows from the evident purpose of s49(1)(f). I refer to s47(c) and generally to the whole of Part 5 of the Act. Although it is clear that the offence which is created by s49(1)(f) is concerned with the analysis of a person's breath three hours after driving, this is in fact a concern which arises from a known or presumed relationship between that breath and the concentration **[14]** of alcohol in the body of the person *DPP v McNamara* (above) at 6. S49(4) is a companion to s49(5) which in relation to blood tests, is concerned that the person be not convicted of an offence where that person can demonstrate that the blood analysis is not correct.

The difference in wording between s49(5) and s49(4) is doubtless explicable by the fact that the offence with which the former subsection is concerned is one established where at the relevant time an analyst has found from analysis from the blood sample that a certain concentration of blood alcohol is present in the blood. In such a case Parliament considered it fair that a defendant be permitted to exculpate himself or herself by challenging the result of the analysis. The relevant ingredient of s49(1)(f) with which s49(4) is concerned is that an instrument records or shows the result of analysis and that that result indicates the concentration of alcohol in the blood. In such a case it is open to a defendant to attack not the reliability of the class of machine used – *Mills v Meeking* (above) at 226 per Mason CJ and Toohey J – but the condition of the machine or the manner of its use, with a view to rebutting the result of the machine's analysis.

In short, the relevant question of fact entrusted to the decision of the Magistrate by s49(4) is whether the defendant has shown that the machine was not properly operated at the relevant time. This may be demonstrated by showing a non-compliance with the regulations: *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257, or by showing that some act or omission in the operation of the machine occurred which would affect its proper **[15]** function so as to impair its reliability. The fact that the act or omission amounted to a contravention of the manufacturer's operating instructions is doubtless relevant for the purpose of showing what instructions were given: *DPP v Martell* [1992] VicRp 64; [1992] 2 VR 249 at 254; (1992) 15 MVR 397, but the significance of the contravention must be established by evidence, as indeed the appellant sought to do in this case through a witness such as Mr Crewdson.

In reaching this conclusion I have regard to the observations of Tadgell J in *Smith v van Maanen* (above) at page 21 and following, to the effect that the accuracy of the breath analysis reading is no part of the informant's proofs in a prosecution under s49(1)(f). With respect, I accept the accuracy of that statement. It is, however, not inconsistent with the views I have expressed about the significance of an accurate reading for the purposes of the defence created by s49(4). Although the correctness of the reported result of the breath analysis is no part of the informant's proofs, the assumed reliability of the machine underlies its use in that part of a statute which is concerned with providing a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol: s47(c). If the court were not in any way concerned with this there would be no warrant for s49(4) or indeed section 49(6).

It follows from this that the criticism contained in ground 1(a)(i) is not established insofar as it is said that the proof by the appellant of a contravention of the manufacturer's instructions, without more, **[16]** requires a finding that the machine was not properly operated within the meaning of s49(4). Counsel for the appellant next submitted in support of ground 1(a)(ii) that the interpretation of s49(4) made by the Magistrate imposed an excessively heavy burden on the appellant. This burden required the appellant to prove that that contravention of the manufacturer's instructions must lead to an erroneous result. This submission fastened upon the Magistrate's emphasised use of the word "will" in the passage set out above.

I do not accept that the burden imposed by s49(4) requires the person charged with an offence against s49(1)(f) to prove the inevitability of error as a result of the contravention. From a

practical point of view such a burden would be in most, if not all, cases impossible to discharge since the sample of breath and the acid which was affected by it is not retained. It would only be in the case of the most egregious departure from operating procedure that the defendant could lead evidence that error must inevitably follow. Such a conclusion would detract very much from the evident usefulness of s49(4). It is sufficient in my view that the defendant on the balance of probabilities establish that the act or omission affecting the operation of the machine was such that the result is unreliable.

Although the emphasis on the word "will" in the passage quoted from the Magistrate's decision set out above may suggest he had in mind a more stringent test, it is clear from the passages which followed that he was **[17]** satisfied that the defendant had failed to satisfy the more lenient test which I have adopted as to the non-compliance with the manufacturer's instructions.

Accordingly ground 1(a) is not established. In the result I will dismiss the appeal with costs.

APPEARANCES: For the appellant Ozbinay: Mr JD Hammond, counsel. CV Kay & Co, solicitors. For the respondent Crowley: Mr SP Gebhardt, counsel. Victorian Government Solicitor.
