18/73

SUPREME COURT OF VICTORIA

FRANKS v WELLS

Murphy J

18 June 1973

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER TAKEN TO HOSPITAL – DRIVER LATER SUBMITTED TO A BREATH TEST AT THE POLICE STATION – DRIVER LATER CONVICTED AND FINED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F.

HELD: Order nisi discharged.
1. The mere fact that a person does something that he is not legally bound to do or, indeed, does something under the impression that he is legally bound to do it when in fact he is not, does not render what he does inadmissible in evidence against him subsequently.

2. The evidence as to the breath test was relevant and its admission in the circumstances afforded no valid ground for reviewing the conviction of the defendant driver.

MURPHY J: This is the return of an order nisi granted by Master Brett on the 10 November 1972, to review a decision made on the 5 September 1972, by the Magistrates' Court at Echuca, constituted by a Stipendiary Magistrate, whereby the applicant was convicted, and fined $50 in default and distress, and his probationary licence to drive was cancelled and he was disqualified from obtaining a licence to drive for nine months.

The ground upon which the order nisi was granted, was amended by leave at the outset of the hearing before me, pursuant to s158 of the *Justices Act*, see *Nibaldi v Pruscino* [1973] VicRp 9; [1973] VR 113 at pp119-120; (1972) 27 LGRA 114. The ground accordingly then read:

> "Having regard to the requirements of s80F(8)(b) of the *Motor Car Act* 1958 as inserted by s7 of the *Motor Car Driving Offences Act* 1971, the Magistrate on material before him should have held that the defendant was not obliged to submit to a breath test, at any place other than Echuca Hospital, being the place where he was taken, from the place where he was driving, for medical treatment, and there was no power to require him to submit to the test at the Echuca Police Station, and accordingly, the schedule 7 certificate should not have been admitted in evidence and accordingly, the information should have been dismissed."

Mr Monotti for the applicant, submitted that s80F(1) of the *Motor Car Act* which makes a certificate as to the percentage of alcohol indicated to be present in the blood of a person tested by a breathalyzing instrument, subject to the provisions of subsection (2) relating to 7th Schedule Certificates, evidence of the percentage of blood present at the time of the test, is qualified by and subject to sub-sections (5) to sub-section (10) inclusive of s80F. In other words, he said as the certificate is for practical purposes a piece of evidence, it is not admissible on a prosecution under s81(A) unless it is shown that the person who requested that the test be made, was entitled to do so, and unless the test was performed in accordance with s80F(8)(b).

On the facts of this case, he submitted that the only test that could lawfully be required of the defendant, would have had to be performed at the Echuca Hospital, where the defendant had been taken for treatment, and as the test was performed at the police station, apparently after the defendant left the hospital, it was inadmissible in evidence in a charge brought against him under s81A(1) of the *Motor Car Act.* He submitted that in any event, it was confessional evidence and therefore subject to the strict rules applicable to such evidence, and even if it was not, it ought to have been ruled out as evidence, in the exercise by the Magistrate, of his discretion. He so submitted notwithstanding that no objection to the admissibility of this evidence, and no objection to the circumstances in which it was made, the test was made, was taken on the tendering of the evidence in the Court below. He conceded that the authorities appeared to be against him, but sought to distinguish several of them.

Mr Justice Newton in *Genardini v Anderton* [1969] VicRp 61; [1969] VR 502, held that the evidence of the result of such breathalyzer tests was not confessional in nature, or by nature. I am informed by Mr Rowlands that in a number of unreported decisions, copies of several of which he has given me, Newton J's decision on this point has been followed subsequently. I also agree with it and would, in any event, as a matter of practice, follow it, unless I was convinced that it was clearly wrong.

Strict compliance with the statutory provisions appears to me to be necessary in a prosecution under s80F(11), but this sub-section is not mentioned in s80F(1). Section 80F(11) creates the offence of refusing or failing to furnish a sample of breath for analysis when required by a member of the police force pursuant to the provisions of sub-section (6) to do so. As I say, this sub-section is not mentioned in s80(F)(1) and, indeed, sub-section (11) is couched in language which appears to require only that the requirements of sub-section (6), or at least of sub-section (6) be followed. I am not of the view that the provisions of sub-sections (6) to (10) inclusive, or any of them, have anything to do with sub-section (1) of s80(F). In my opinion s80F(1) is purely evidentiary in character.

No objection, as I have said, was taken to the leading of the evidence of the result of the breathalyser test when that evidence was tendered in the court below. It was, in my opinion most relevant evidence, irrespective of how it was obtained, and in my opinion it was admissible unless for sufficient reason it was rejected by the magistrate exercising his discretion on the request of the defendant so to do. I am not called upon in this case to consider the grounds upon which, if there be any, a magistrate might judicially exclude such evidence and I expressly refrain from doing so. I am of the opinion that the mere fact that a person does something that he is not legally bound to do or, indeed, does something under the impression that he is legally bound to do it when in fact he is not, does not render what he does inadmissible in evidence against him subsequently. As I say, the mere fact that he does do these things does not make what he does inadmissible.

I am of the opinion that the evidence was relevant in this case and that its admission in the circumstances of this case affords no valid ground for reviewing the conviction of the defendant. I do not intend to review the several decisions which were referred to me very helpfully on both sides of the Bar table, but I have followed them as they have been referred to and am assisted in arriving at my decision by a consideration of them.

In the circumstances the Order Nisi will be discharged. [Discussion ensued] I order that the applicant pay the respondent's costs of the appeal of and incidental to the appeal, which I fix at $200.
