53/87

SUPREME COURT OF VICTORIA

ROBERTS v BEET

O'Bryan J

30 October, 11 November 1987 — [1988] VicRp 15; [1988] VR 118; (1987) 6 MVR 51

MOTOR TRAFFIC – DRINK/DRIVING – BREATHALYZER OPERATOR REQUIRED AS A WITNESS – WRITTEN NOTICE TO BE GIVEN TO INFORMANT – WHETHER SUCH NOTICE REQUIRED TO BE SERVED PERSONALLY ON INFORMANT: *MOTOR CAR ACT* 1958, SS80D, 80F, 81A, 81AA; *INTERPRETATION OF LEGISLATION ACT* 1984, S49.

Where pursuant to the provisions of section 80F(3) of the *Motor Car Act* 1958 an accused person requires the breathalyzer operator to be called as a witness, the accused person is required to give written notice to the informant a reasonable time before the hearing; however, the accused person is not required to personally serve such notice upon the informant.

***R v The Deputies of the Freemen of Leicester* [1850] EngR 644; (1850) 15 QB 671; 117 ER 613, applied.**

O'BRYAN J: [1] This is an order nisi to review the decision of the Magistrates' Court at Dandenong on 14 April 1986. The applicant was the informant in an information which charged the respondent with 5 offences. The respondent pleaded not guilty to a charge of driving while his ability to drive was impaired by intoxicating liquor at Tooradin on 25 January 1986, contrary to s81A(1) of the *Motor Car Act* 1958, and to a charge of driving while alcohol was present in his blood at Tooradin on the same date contrary to s81AA of the said Act. The other three charges are not relevant to this proceeding.

The affidavit in support of the order nisi is most unsatisfactory in that it omits details of the evidence given on behalf of the informant and the defendant and of the course of the hearing. The point at issue **[2]** concerns the admissibility of a Certificate in the form of Schedule 7, *Motor Car Act* and the operation of s80F. The affidavit in support shows that the informant tendered a Schedule 7 Certificate. When asked by the Prosecuting Officer if he had received a notice pursuant to s 80F(3), the informant answered in the negative. The informant also said that he had personally searched the record books at Traffic Operations Group Office at Dandenong, the address given in the information, and found no entry or record of a notice being received by that office in his name.

The respondent's solicitor gave evidence that written notice had been caused to be served by post on the informant at his station, requiring the breathalyzer operator to be called as a witness pursuant to sub-s (3) of s80F of the Act. The notice was in writing, in the form of a letter dated 3 April 1986, addressed to Constable M.C. Roberts, Traffic Operations Group, 50 Langhorn Street, Dandenong. The letter was in these terms:-

> "re: Alan Ernest Beet
>
> I advise that at the hearing of this matter at the Dandenong Magistrates' Court on 14 April, the defendant will require Victor Graeme Mclvor to be called as a witness pursuant to s80F(3) of the *Motor Car Act* 6325.
>
> Yours Faithfully, Elizabeth A. Einsiedel."

The learned Magistrate upheld a submission that the letter constituted proper and reasonable service of the notice upon the informant, within a reasonable time prior to the hearing. As the witness Mclvor was not present at Court, the learned Magistrate held that the certificate of the percentage of alcohol indicated by the analysis to be present in the blood of the respondent and of the date and **[3]** time at which the analysis was made, could not be used as *prima facie* evidence in the proceeding. The charges against s81A(1) and s81AA were dismissed.

On 23 May 1986, Master Barker granted an order nisi upon the following grounds:-

> "1. No reasonable Magistrate properly directing himself as to the applicable law could have concluded upon the evidence before the Court
> (a) that the defendant had given notice in writing to the informant a reasonable time in the circumstances before the hearing that he required the person giving the certificate to be called as a witness, within the meaning of Act No. 6325, s80F(3); and
>
> (b) evidence that written notice had been caused to be served by post on the Informant was evidence or any sufficient evidence of the fact of service.
>
> 2. The learned Magistrate erred in law in holding that in the premises the defendant had given notice in writing to the Informant a reasonable time in the circumstances before the hearing that he required the person giving the certificate to be called as a witness, within the meaning of Act No. 6325, s80F(3).
>
> 3. The learned Magistrate should have held in law -
> (a) that because the manner of the alleged service of the said notice in writing was not prescribed by s80F(3) of Act No. 6325, service of the said notice should have been effected in accordance with s159(b) of Act No. 8731; and
>
> (b) that the burden of proving the giving of the said notice in writing within the meaning of s80F(3) of Act No. 6325 was on the Defendant and that such burden could only be discharged by proof on the balance of probabilities".

The course taken at the hearing was unusual, in that one might have expected the informant to have sought an adjournment of the drink driving charges when the Court was **[4]** advised that the maker of the certificate was required by the defence to be called as a witness. The affidavit in support of the order nisi fails to make clear whether the Court was advised by the defence, before the hearing began, that the defendant required the maker of the certificate to be called as a witness. Had the defence done so, one would suppose that the informant would have stated that he did not receive notice in writing of the defence requirement. The proper and most reasonable course then would have been to adjourn the hearing to a later date. Why this course was not adopted is not dealt with in the affidavit.

The point involved is whether upon the proper construction of s80F(3) the 'accused' person who desires a breath analysis instrument operator to be called as a witness is required to give notice in writing, to the informant, by personal service. Should s80F(3) require personal service of a notice, the learned Magistrate was in error. Should s80F(3) be satisfied by post, the learned Magistrate was entitled to find on the balance of probabilities that notice in writing was given to the informant, within a reasonable time before the hearing.

The *Motor Car Act* Part 6, contains the most serious driving offences: Cf. ss80A, 80B, 81AA, 81A and 82. Section 80D and s80F are concerned with evidentiary matters. Section 80D relaxes the rules of evidence to admit as evidence of the facts and matters stated therein, certificates of a legally qualified medical practitioner, an approved analyst and a prescribed person as to safekeeping of a blood sample, provided that:-

> **[5]** "...a copy of such certificate is proved to have been personally served on the accused more than ten days before the day on which such certificate is tendered in evidence." (sub-s(5))

Section 80F also relaxes the rules of evidence to admit as evidence of the facts and matters stated therein a certificate showing the percentage of alcohol indicated to be present in the blood of a person by a breath analysing instrument, operated by a person authorised in that behalf by the Chief Commissioner of Police provided that:-

> "As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument shall sign and deliver to the person whose breath has been analysed a certificate in or to the effect of Schedule seven of the percentage of alcohol indicated by the analysis to be present in his blood ... and of the date and time at which the analysis was made." (sub-s(2))

Sections 80D and 80F were both inserted in the *Motor Car Act* No. 8143 in 1971. Although each section has undergone amendments since 1971, the principal purpose of each section has

remained unchanged. Sub-s (3) of s80F provides:-

> "A document purporting to be copy of any certificate given in accordance with the provisions of sub-s(2) and purporting to be signed by a person authorized by the Chief Commissioner of Police to operate breath analysing instruments shall be *prima facie* evidence in any proceedings referred to in sub-s(1) of the facts and matters stated therein unless the accused person gives notice in writing to the informant a reasonable time in the circumstances before the hearing that he requires the person giving the certificate to be called as a witness."

Sub-s(7) of s80D provides:-

> "Where the accused has been served with a copy of a certificate given pursuant to this section he may not less than four days before the hearing of any proceedings arising out of the charge or, with the leave of the Court, at any time by notice in writing served personally or by post on the officer in charge of the police station **[6]** at which he was charged require the person who has given the certificate to attend at all subsequent proceedings for the purpose of cross-examination and such person shall attend accordingly."

Mr Downing of Counsel, who appeared for the informant, submitted that whereas s80D(7) authorises service of a notice in writing by post, s80F(3) does not. Mr Downing submitted that the dictionary meaning of the verb "to give" is; "to deliver freely; hand-over; to deliver to; to present to" (*Macquarie Dictionary*). Stroud's *Judicial Dictionary*, Volume 2, at 11164 says:- "The primary meaning of the word, "give" appears to have been the placing of a material object in the hands of another person". The legislature however is using the verb "to give notice" which does not carry with it such a strict and limited definition of "to give". The expression, "to give notice of something", does not imply the delivery of notice personally by one person to another person. A requirement to give notice in writing of a meeting may be satisfied by publishing a notice on a notice board or in a newspaper or by posting the same to a person or persons interested in the meeting. Mr Downing drew attention to s49 of the *Interpretation of Legislation Act* 1984 which provides:-

> "Where an Act or subordinate instrument authorizes or requires a document to be served by post (whether the expression "serve" or the expression "give", "send" or "deliver" or any other expression is used), the service shall etc."

In my opinion, s49 is not applicable to this proceeding because s80F(3) does not "authorise or require a **[7]** document to be served by post." I consider that s49 is confined to an act or subordinate instrument which authorises or requires a document to be served by post. S80F(3) does neither.

Mr Hardy of Counsel, who appeared for the respondent, submitted that an 'accused' person may satisfy s80F(3) by posting notice in writing to the informant and that personal service of a notice is not required. Mr Hardy further submitted that the expression "gives notice" means doing an act sufficient to bring a matter to the awareness of the informant or doing an act calculated to do so in the ordinary course of post. Mr Hardy further submitted that by s11 of the *Magistrates (Summary Proceedings) Act* 1975, the informant may serve the summons to appear to answer the information by posting the same, by prepaid registered post, to the defendant, addressed to him at his last known place of residence or business. It would be anomalous, Mr Hardy submitted, should the respondent be required to give notice in writing by personal service upon the informant when the informant may initiate the proceeding by post.

The intention of the legislature in specifying either personal service or service by post in s80D(7) on the one hand and in omitting to specify the manner in which notice in writing may be given to the informant in s80F(3) on the other, cannot be determined from reading the sections as a whole. The problem may be resolved by the application of a principle of statutory interpretation enunciated in 1850 in the Court of Queens Bench: *R v The Deputies of the Freemen of Leicester* [1850] EngR 644; (1850) 15 QB 671; 117 ER 613).

[8] By a Private Act, Deputies were to be elected by The Freemen of Leicester and should the election of any Deputy be disputed, the Deputies were to decide at their next meeting the validity of the election. Before the meeting, a party questioning the right of the sitting Deputy was to give or deliver 4 days notice in writing unto such Deputy. A dispute arose over the election of a Deputy and at the next meeting of the Deputies, evidence was given that notice had been left

in due time with the Deputy's wife. The Deputies decided that personal service was requisite and refused to enquire further into the election. Mandamus proceedings were taken, in which the principal question of law was whether the words:- "To give or deliver 4 days notice in writing" required personal service. Lord Campbell, Chief Justice, held that the words did not require personal service. He said:-

> "In general when personal service is required by an Act, it is so said in express words; but here the words used are:- 'give or give notice in writing unto such Deputy', which have no such force."

This rule of construction was applied by Lord Esher, Master of the Rolls, in *ex parte Portingell* (1892) 1 QB 15. After quoting Lord Campbell, Lord Esher said:-

> "We have to say whether we agree with the rule so laid down, and, if so, what its application is to the present case. It appears to me to be a very sensible rule of interpretation."

Lords Justices Fry and Lopes concurred in the judgment of Lord Esher in the Court of Appeal.

In my opinion, effect should be given to the rule of construction enunciated by Lord Campbell, as the **[9]** expression the Court is here required to construe (in s80F(3)) is in similar language to the expression under consideration in the *Freemen of Leicester Case*. There is no obvious reason why the legislature should have intended to require personal service of a notice in s80F(3), particularly when an alternative was offered in s80D(7). I have reached the conclusion that upon the proper construction of s80F(3), an 'accused' person is not required to give notice in writing to the informant by personally serving such a notice upon the informant.

In reaching this conclusion, I have regard, first, to the nature of the section which relaxes the rules of evidence in favour of an informant in a quasi-criminal proceeding and, second, to the fact that should an issue be raised concerning reception of a notice in writing by the informant, inevitably a Court would adjourn the hearing of the information at the request of the informant, to enable the informant to produce the breath analysing instrument operator as a witness. To hold that personal service of a notice upon an informant is required by s80F(3) would impose a considerable burden upon an 'accused' person for no compelling reason. The interpretation I favour is less strict and appropriate for the purposes of s80F. In these circumstances, the order nisi will be discharged with costs.
