

21/69

SUPREME COURT OF VICTORIA

STOREY v LIVINGSTON

Starke J

8 October 1969

MOTOR TRAFFIC – SPEEDING – SPEED CHECKED BY AN AMPHOMETER – PROVISION IN THE REGULATIONS THAT INSTRUMENT TO BE TESTED AND SEALED FOR ACCURACY BEFORE BEING FIRST USED AND THEREAFTER TESTED FOR ACCURACY AT LEAST EVERY SIX MONTHS – THE CERTIFICATE PRODUCED TO THE COURT DID NOT STATE THAT THE REQUIREMENTS IN RELATION TO THE TESTING AND SEALING HAD BEEN CARRIED OUT – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S91(a); MOTOR CAR REGULATIONS, RR190, 191, 193.

HELD: Order nisi absolute. Conviction and penalty quashed.

1. The offence was alleged to have occurred on the 7 December 1968, and consequently the certificate produced to the Court was within the six months required by Regulation 190 for the last testing of such instrument. However, there was oral evidence that the instrument had been in operation for about two years, but there was no evidence that the instrument was tested for accuracy and sealed before it was first used, and was tested for accuracy and sealed at least once in each six months from the time it was first brought into operation until the time of the alleged offence. The Legislature has said in the Regulation that the amphotermeter must be tested and sealed every six months.

2. Accordingly there was no proof in relation to the testing and sealing of the Amphotermeter from when it was first brought into operation and no proof that the regulation had been breached.

STARKE J: This is an order to review an order of the Court of Petty Sessions made at Cheltenham on the 21 May 1969.

The Applicant who was the Defendant in the court below was charged under Regulation 1001 of the *Road Traffic Regulations* 1962, with driving a vehicle in a built-up area at a speed exceeding 35 miles an hour. The offence was committed just after midnight on the 7 December 1968 and was committed in South Road between Clay Street and Sheppard Street.

The information was based on an amphotermeter reading taken by the Respondent who was the Informant below, and who was the only witness at the hearing. He gave evidence and largely launched his case by the production of two certificates to which I will refer to later. The Defendant was convicted and was fined \$20.00 and his probationary licence was cancelled. The Informant was the only witness for the prosecution and the Defendant gave evidence on oath, but his evidence related only to the question of penalty.

An Order Nisi was granted on the 23 May 1969 by Master Brett. The grounds were:

- (1) That on the evidence the Court was in error in holding that the speed or time measuring instrument or the amphotermeter used for determining the speed at which the said Applicant's motor car travelled at the time of the alleged offence had been tested and sealed in accordance with the requirements of Regulation 180 and 190 of the *Motor Car Regulations*.
- (2) There was no properly admissible evidence before the said court that the said Applicant had driven a vehicle in a built-up area at a speed exceeding 35 miles an hour as alleged in the information and summons.
- (3) That on the evidence the Magistrate should have dismissed the information.

Mr Morrish who appeared for the Applicant in these proceedings made two submissions. Both related to s91(a) of the *Motor Car Act*. Section 91(a) provides:

"Whereupon proceedings for an offence against this Act or the Regulations or any other Act or law relating to motor cars or the use thereof, the speed at which the motor car travelled on the occasion of the alleged offence is relevant in the proceedings, evidence of the speed of the motor car is indicated or determined on that occasion by the speed measuring device known as the amphotometer when used in such manner and subject to such conditions as are prescribed, shall without prejudice to any other mode of proof be *prima facie* evidence of the speed of the motor car on that occasion."

Mr Morrish's argument proceeds on the basis that the amphotometer was not used in such manner and subject to such conditions as are prescribed in the regulations. His argument was twofold. Firstly, he submitted that the conditions laid down in Regulation 190 of the *Motor Car Regulations* had not been complied with. Secondly, he submitted that the manner in which the amphotometer was used was in breach of Regulation 194 of the same Regulations.

Regulation 190 provides that:

"Every speed or time measuring instrument of a device for determining the speed at which a motor car travels shall be tested for accuracy and sealed by the Electrical Engineering Department before being first used and then thereafter be tested for accuracy and sealed at least once in each six months by the Electrical Engineering Department."

And there is then a proviso which I do not think in any way touches the problem which confronts me here.

I was at first of a tentative opinion that all that need be done to comply with this Regulation was to establish that it was tested and sealed within six months of the alleged offence. There was a certificate in evidence, signed by the Technical Officer of the University of Melbourne and the Reader in Electronics for the same University. This certificate becomes evidence through the operation of Regulation 193 which provides that;

"The production of a certificate in the form or to the effect of the form contained in the Seventh Schedule and purporting to be signed by a Technical Officer and a Professor of Electrical Engineering of the University of Melbourne, or the Reader in Electronics at the University of Melbourne shall be *prima facie* evidence of the testing and sealing of the speed or time measuring instrument of the device referred to in such certificate, and the accuracy of such instrument."

The certificate in question, which it is conceded was admissible, and that it complied with the terms of Regulation 191 reads as follows:

This is to certify that the speed or time measuring instrument of the portable speed measuring device bearing No. SM 28 was tested on the 23rd July 1968 by the Electronics Engineering Department at the University of Melbourne, and that this instrument when used with detectors placed 88 feet, plus or minus three inches apart, was found to be capable of accurately determining the speed at which the motor car travels within a limit of error or not exceeding one part in 30, and that the said device has in accordance with the provisions of the *Motor Car Regulations* been duly and properly sealed by the said Electrical Engineering Department of the University of Melbourne."

The offence was alleged to have occurred on the 7 December 1968, and consequently this certificate is within the six months required by Regulation 190 for the last testing of such instrument. However, there is oral evidence that the instrument had been in operation for about two years, but there is no evidence that the instrument was tested for accuracy and sealed before it was first used, and was tested for accuracy and sealed at least once in each six months from the time it was first brought into operation until the time of the alleged offence. If the Legislature had desired to make the testing for accuracy and sealing of the instrument a necessity within a period of six months of the alleged offence, it could easily have said so, but it has said no such thing. It has said, and I have already read the Regulation, that it must be, and I shorten the words of the Regulation, it must be tested and sealed every six months.

Now it may be, and it was argued by Mr Hart, that the only important testing and sealing is the last one within six months, but I must bear in mind that this is a penal regulation, and it must therefore be strictly construed. I agree with the submission of Mr Morrish that the consistency of the machine over a period of time since it was first introduced into operation may be a very relevant matter to consider in determining whether or not there is proof that the Regulation under

the *Road Traffic Act* has been broken. I am further fortified in this view by reference to Regulation 192 which provides that:

"Full and accurate records of all speed or time measuring instruments tested and sealed shall be kept by the Electrical Engineering Department in a book provided for the purpose, giving the identifying number of such instrument, the dates on which the tests were made, the result of such tests and the signatures of the persons conducting the tests."

If the only relevant piece of evidence was related to the last time of testing and sealing before the offence, there would seem to be no point in including this regulation in the Regulations under the *Motor Car Act*. I am accordingly of opinion that the Order Nisi should be made absolute on that ground.

The second ground which was raised by Mr Morrish in his argument relates to the interpretation under the *Weights and Measures National Standards Act* 1960-66 of the expression "standard of measurement" and "subsidiary standard of measurement." I find the Act and Regulations, the Commonwealth Act and the Regulations thereunder most confusing and I certainly would not be prepared to express any view in regard to this matter without mature reflection. However, in view of the opinion I have formed in regard to the first ground, it is unnecessary for me to form any judgment as to the second ground.

There will be an order absolute. The conviction and penalty are quashed, and I order the respondent to these proceedings to pay the applicant's taxed costs, not to exceed \$120.00.

APPEARANCES: For the applicant/defendant Storey: Mr G Morrish, counsel. MacPherson, Robinson & Co, solicitors. For the respondent/informant Livingston: Mr LR Hart, counsel. Thomas F Mornane, State Crown Solicitor.
