

43/82

SUPREME COURT OF VICTORIA

HUNTER v PEARCE

Starke J

12 May 1982

MOTOR TRAFFIC - DRINK/DRIVING - REFUSING BREATH TEST - POLICE OFFICER SAID THAT AFTER ADMINISTERING PBT DRIVER MAY HAVE BEEN OVER THE LEGAL LIMIT - "INDICATES" - MEANING OF - NOT NECESSARY TO GIVE AN OPINION OF A POSITIVE NATURE THAT PERCENTAGE WAS OVER .05 - CHARGE DISMISSED BY MAGISTRATE - WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S80F(6).

When giving evidence on the return of a drink/driving charge, the police officer who administered the preliminary breath test said that "in my opinion the Defendant may have been over the legal limit." S80F(6)(a)(i) of the *Motor Car Act* 1958 states that the PBT "indicates that the percentage of alcohol in the person's blood is greater than .05 per centum." It was submitted that the officer's opinion had to be expressed that the BAC was in fact greater than .05%. The magistrate accepted this submission and dismissed the charge.

HELD: Order absolute. Matter remitted to the Magistrate for further determination.

The magistrate's construction failed to take into account the use of the word "indicates". There are various words in the *Concise Oxford Dictionary* defining the word "indicates". The one that is most relevant as far as present circumstances are concerned is the word "suggests" and, if read in that sense, the opinion that is to be formed by the testing officer must be that the test "suggests", not proves or establishes positively, that the defendant had more than .05 per cent alcohol in his bloodstream. That being so, the Magistrate's decision that the informant is required to give an opinion of a positive nature that the percentage of alcohol was over .05 was an incorrect one.

STARKE J: This is the return of an Order Nisi to review the decision of the Magistrates' Court at Lilydale constituted by Mr L Winton-Smith made on 11th August 1981, in which he dismissed an information which in general terms charged the defendant with refusing to undergo a breathalyzer test. The learned Chief Justice on 28th September 1981, granted an Order Nisi to review on three grounds, but Mr Nash, who presented argument here for the applicant in this case, relied only on ground 2. Ground 2 is in those terms:

The learned Magistrate was wrong in law -

- (a) in the interpretation which he placed on Section 80F(6) of the *Motor Car Act* 1958;
- (b) in holding that before a member of the police force has power to require a sample of breath for analysis pursuant to Section 80F(6) of the *Motor Car Act* 1958, it is necessary for that member of the police force to form the opinion that the percentage of alcohol in the blood of the person, a sample of whose breath is required for analysis, is greater than .05 per centum;
- (c) in holding that a member of the police force, who, on the basis of a preliminary breath test administered pursuant to Section 80E of the *Motor Car Act* 1958, forms the opinion that the percentage of alcohol in the blood of the person to whom the preliminary breath test has been administered may be greater than .05 per centum, does not on forming that opinion have power pursuant to Section 80F(6) of the *Motor Car Act* 1958 to require that person to provide a sample of breath for analysis;
- (d) in holding that the Defendant did not have a case to answer;
- (e) in holding that the evidence did not disclose facts authorising Constable Graeme John Hunter to require the Defendant to furnish a sample of breath for analysis by a breath analysing instrument pursuant to Section 80F(6) of the *Motor Car Act* 1958".

The offence is created by Section 80F(11)(a) of the Act. This section is in these terms:

"Any person who, when required by a member of the police force pursuant to the provisions of sub-section (6) to furnish a sample of his breath for analysis or when further required to accompany a member of the police force to a police station or the grounds or precincts thereof, refuses or fails to do so shall be guilty of an offence against this sub-section."

The outcome of this Order Nisi depends on the construction of Section 80F(6)(a) which

provides:

"Where a person undergoes a preliminary breath test when required by a member of the police force under section 80E or by a testing officer under section 80EA so to do and—

(i) the test in the opinion of the member or the testing officer in whose presence it is made, indicates that the percentage of alcohol in the person's blood is greater than .05 per centum; the member of the police force or the testing officer in whose presence the test is being made may require the person to furnish a sample of breath for analysis by a breath analysing instrument."

The facts are simple and need not be recited at length. It appears that a constable of police on patrol observed some erratic driving by the driver of a car, who turned out to be the defendant's. They followed the defendant and when he stopped outside his home he was questioned by the police officer. After some interrogation, the officer requested the defendant to blow into the bag which contains crystals which is the basis of a preliminary breath test.

The evidence was in this form:

"The Defendant then attempted to blow into the bag but was unable to hold his breath and then blow long enough. I informed him to inflate the bag with one continuous breath. He then attempted again and on the second attempt managed to inflate the bag to my satisfaction. The result of this test indicated to me that the Defendant may have been well over the limit and I then felt that he should give a sample of his breath into an approved breath testing machine. I said "The result of this test shows that you may be over the legal alcohol limit and I am now going to take you to where you will be given the opportunity of giving a further sample of your breath on a breath testing machine."

The defendant said, "Yeah OK but can I just tell the wife". He was taken to a police station where a breath analysing machine was set up.

The evidence proceeded;

"I said 'At 9.05 p.m. I found you driving a motor car and you underwent a preliminary breath test on a prescribed device which indicated that the percentage of alcohol in your blood was greater than 05 per centum and I now require you to furnish a sample of your breath for analysis by this approved breath analysing instrument. Do you understand that?' He said, 'Yes'. Sergeant McDonald said 'Will you give a sample of your breath?' He said 'No bugger ya'."

He, in fact, did not permit a breathalyzer test to be made. In cross-examination, he was asked: "After the preliminary breath test did you form any opinion of my client?" The witness said "Yes, it is my opinion that he may have been over the legal limit". The Magistrate intervened and said "Will you repeat what you said just now?". The witness said 'In my opinion the Defendant may have been over the legal limit'." At the conclusion of the evidence, Mr Window, the solicitor for the defendant, made a submission in these terms:

"The prosecution has failed to comply with Section 80T(6)(a)(i) of the *Motor Car Act* 1958 in that it clearly states the test in the opinion of the member or the testing officer in whose presence it is made, indicates that the percentage of alcohol in the persons blood is greater than .05 per centum. The Informant formed the opinion that my client may have been over .05 and he is required by the Act to have an opinion that my client is over .05 and there is no case to answer'."

The Magistrate retired to consider the submission and then had the solicitor and the prosecuting sergeant into his chambers where he said:

"I have been reading the Act and I feel that the wording of the Act is incorrect and I am going to dismiss the matter but I would strongly urge you Sergeant to review my Order."

They then went back into court and the Magistrate made the formal order dismissing the information. The matter to be decided involves the construction of S80F(6)(a). The critical words are these:

"The test in the opinion of the member or of the testing officer in whose presence it is made, indicates that the percentage of alcohol in the person's blood is greater than 0.05 per centum."

As I have already indicated by reading the submission of the solicitor in the Magistrates' Court, his

contention was that the opinion had to be expressed that the blood alcohol was, in fact, greater than .05 per cent. This construction, I think, fails to take into account the use of the word "indicates". There are various words in the *Concise Oxford Dictionary* defining the word "indicates". The one I think that is most relevant as far as present circumstances are concerned is the word "suggests" and, if read in that sense, the opinion that is to be formed by the testing officer must be that the test "suggests", not proves or establishes positively, that the defendant has more than .05 per cent alcohol in his bloodstream. That being so, it seems to me that the Magistrate's decision that the informant is required to give an opinion of a positive nature that the percentage of alcohol was over .05 is an incorrect one.

I am encouraged in reaching this conclusion by the fact that the whole tenor of the legislation would appear to be negated if a contrary construction to the one I have just outlined were given to the words of the section. If an officer formed a positive opinion upon this test that the percentage of alcohol in the defendant's bloodstream was more than .05 per cent, it would have been unnecessary to legislate for a subsequent test on a breathalyzing machine.

Of course, the legislation does so provide and it is plain to me that the purpose of this legislation is twofold: one, to protect a citizen in these days of haphazard breath testing from being taken to a police station when there is, in fact, no suggestion that his blood count is over .05; it also, no doubt, is an aid to the police officers administering this Act in so far as it does not require them to waste their time taking a citizen who has no sign of alcohol in his blood to a police station. Accordingly, not only do I think the plain words of the section contradict the Magistrate's construction of the section, but also the commonsense of the matter points in the same direction. In those circumstances, the Order Nisi will be made absolute. The matter will be sent back to the Magistrates' Court at Lilydale to be dealt with in accordance with this judgment.
