32/91

SUPREME COURT OF VICTORIA

REEVES v BEAMAN

O'Bryan J

6, 15 August 1991

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST OPERATOR CALLED AS WITNESS – NO DIRECT EVIDENCE GIVEN AS TO TYPE OF BREATH ANALYSING INSTRUMENT USED – NOT CHALLENGED IN CROSS-EXAMINATION – WHETHER OPEN TO INFER TYPE OF INSTRUMENT USED: *ROAD SAFETY ACT* 1986, S49(1)(f), 55(4), 58(1).

On the hearing of a charge laid under s49(1)(f) of the *Road Safety Act* 1986 ('Act') a breath test operator gave evidence that: "the instrument I used was in proper working order and operated by me in accordance with Regulations 302, 303 and 304 of the *Road Safety (Procedures) Regulations*." There was no cross-examination as to the type of instrument used and whether it came within the definition of "breath analysing instrument" in s3(1) of the Act. Upon appeal against conviction—

HELD: Appeal dismissed.
If the operator's evidence did not directly prove that a breath analysing instrument as defined by s3(1) of the Act was used, it did so inferentially. Unless the evidence was challenged by cross-examination, it was unnecessary for the operator to identify or describe with any more particularity the instrument used. Accordingly, it was open to the magistrate to find that the operator used a breath analysing instrument within s3(1) of the Act.

O'BRYAN J: [*After dealing with appeals against convictions imposed for offences of speeding and setting out the questions of law raised in the appeals, His Honour continued*] … **[9]** Finally, the appeal relating to the charge laid pursuant to s49(1)(f) must be considered. The first question of law which related to procedural fairness was abandoned at the hearing. In my opinion, the decision to abandon this point was both sensible and appropriate.

It is necessary to set out at some length the evidence. At the conclusion of the evidence called on behalf of the informant in the Court below counsel for the appellant made a "no case" submission which was rejected by the learned Magistrate. The appellant called no evidence and was convicted. When the appellant's vehicle was intercepted the respondent conducted a preliminary breath test on the appellant which proved positive. The preliminary breath test was administered pursuant to s53 of the *Road Safety Act* (the Act). The respondent said that he then required the appellant to accompany him to a police station for the purpose of the appellant furnishing a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the Act. The respondent said that at Wedderburn Police Station Sgt Holt conducted a breath test on the appellant, the result of which showed a blood alcohol reading of 0.105%. The respondent also said that he was present during the whole of the breath analysis at the conclusion of which he saw Sgt **[10]** Holt fill out and hand a Certificate of Authorized Operator of Breath Analysing Instrument to the appellant. The witness received a copy and a third copy was retained by Sgt Holt. The witness was not cross-examined by counsel for the appellant on this evidence.

Sergeant Holt gave evidence that he was authorised by the Chief Commissioner of Police under s55 of the Act to operate a breath analysing instrument. He produced his authority and a copy of the *Road Safety (Procedures) Regulations* 1988 and they were received in evidence. Sub-section 3 of s55 of the Act states:

> "A breath analysing instrument must be operated by a person authorised to do so by the Chief Commissioner of Police."

Sergeant Holt said that he had been an authorised operator of breath analysing instruments for five years and in that time had conducted many tests. He proceeded to detail the steps he took to conduct a breath analysis of the appellant's breath at 11.47 p.m. on 3rd December 1989. He

repeated the evidence given by the respondent of compliance with s55(4)(a) and (b). He said: "the instrument I used was in proper working order and operated by me in accordance with Regulations 302, 303 and 304 of the *Road Safety (Procedures) Regulations*." After objection was taken by counsel for the appellant to the proposed tender of a certificate pursuant to s58(2) of the Act, Sgt Holt gave evidence as to his qualifications and experience in the operation of a breath analysing instrument. During cross-examination the witness said that he was "not an expert in the field of breath analysis." **[11]** When this evidence was completed the "no case" submission was made. It is convenient to consider shortly question of law numbered 5.

Question of law numbered 5 asks whether it was open to the learned Magistrate to hold that the instrument was a breathalyser as defined by s3 of the Act or an approved instrument for the analysis of breath. Mr Billings submitted that the evidence failed to prove that the breath test was conducted by a breathalyser as defined by s3 of the Act or an approved instrument upon the basis that direct evidence on these matters was not given by any witness.

Section 3 defines "breath analysing instrument" as follows:

> "(a) the apparatus known as the 'Breathalyzer' a description of the specifications of which is to be found in the Patent Office of the United States of America under the reference number 2824789; or
>
> (b) apparatus of a type approved for the purposes of section 55 by the Minister by notice published in the *Government Gazette* or for the purposes of any corresponding previous enactment by the Governor in Council by notice published in the *Government Gazette* for ascertainment by analysis of a person's breath what concentration of alcohol is present in his or her blood."

In my opinion, there is no substance or merit in this ground. The evidence of Sgt Holt, if it did not directly prove that he used a breathalyser as defined in s3 of the Act or an approved instrument for the analysis of breath, it did so inferentially. The learned Magistrate said in his reasons that "the prosecution have proved that the **[12]** apparatus was a breath analysing instrument for the purpose of a proceeding under Part 5 of the Act."

When Sgt Holt said that "the instrument I used was in proper working order and operated by me in accordance with Regulation 302" he was saying, and must have been understood to be saying, that the instrument was the apparatus described in paragraph (a) of the definition of breath analysing instrument s3 of the Act (Reg 302(1)) and that it was in proper working order. It was unnecessary for the witness to identify or describe with any more particularity than he did the instrument which he used, unless his evidence was challenged under cross-examination, which it was not. In a proceeding of this nature in a Magistrates' Court the essential elements of a charge must be proved by admissible evidence, but it is most undesirable that the progress of the proceeding should be protracted by requiring technical and detailed evidence to be given about matters not put directly in issue by defence counsel. Should counsel for a defendant be instructed to assert by way of defence that the instrument used by an authorised officer was not an approved breathalyser because it was something else, then he should alert the Court to the point. It is too late to raise an issue in this Court which could have been answered by more explicit and direct evidence in the Court below had the point been squarely raised. The learned Magistrate was entitled to infer that Sgt Holt, an authorised officer, used an approved breathalyser in working order at the conclusion of the evidence as no challenge was made in cross-examination to suggest that Holt had not used an approved breathalyser at the relevant time. It was enough, in my opinion, for Sgt **[13]** Holt to say what he did about the Regulations and to tender them in evidence and in the absence of challenge being made to the type of instrument used, for the Magistrate to make the findings which he did.

Before proceeding to the remaining questions of law it is necessary to consider evidentiary provisions contained in s58 of the Act, amendments made to s58 by the Act No. 66 of 1990, and recent case law. Section 58 of the Act as amended by Act No. 66 reads: [*His Honour set out the Section and continued*] ... **[14]** The hearing was adjourned on 20th November 1990 to enable the learned Magistrate to consider a 'no case' submission. When the matter came on for hearing again on 12th February 1991 no further evidence was called and no application was made by the prosecutor to re-open the informant's case or to tender a certificate pursuant to **[15]** ss(2) of s59 as amended. By s2 of the Act, s3 "must be taken to have come into operation on 1st March 1987." By s4 "the amendments made to the Act by s3 do not affect the rights of the parties in the

proceeding known as *Bracken v O'Sullivan* No. 8248 of 1990) in the Supreme Court of Victoria." *Bracken v O'Sullivan* was decided in the Court of Appeal on 13th November 1990 and is reported at [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91. The Court decided that during the hearing of a charge under s49(1)(f) a certificate given in accordance with ss(2) of s58 of the Act was not admissible evidence in the proceeding because ss(1)(f) of s49 created an offence which was different in its nature from that created by ss(1)(b), an offence of driving or being in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in the blood. The operation of ss(1) was held limited to cases where the question whether a person is under the influence of intoxicating liquor or the question of the concentration of alcohol in the blood is relevant to the proceedings set out in sub-paragraphs (a), (b) and (c).

The decision in *Bracken* was relied upon in the Court below by counsel for the appellant with the result that a certificate under s58(2) was not tendered in evidence. Oral evidence was given by Sgt Holt of matters necessary to prove all the elements of the offence created by s49(1)(f). Mr Billings submitted that the amendment to s58(1) effected by Act No. 66 of 1990 did not have any operation in the part heard proceedings. To give it an operation would have a retrospective effect and adversely affect a vested right namely, the presumption of innocence. **[16]** Cf. *Ah Hing v Hough* (1926) 28 WALR 95; *Richardson v Shipp* (1970) Tas SR 105; *Newell v R* [1936] HCA 50; 55 CLR 707; [1936] ALR 457.

This is a most unusual and interesting argument. The amendment effected to s59 is to a provision which is essentially procedural in character and the legislature has expressly indicated that the amendment, when it receives Royal Assent, is to operate from 1st March 1987. In my opinion, ss(1) as amended by Act No. 66 of 1990, applied to the part heard proceeding before the Magistrate. This follows from the express words of the legislature: "S3 must be taken to have come into operation on 1st March 1987."

I am of the opinion that the proceeding in the Court below fell to be decided in accordance with the statute law in force when the decision was given. Any retrospective operation in the statute adverse to the appellant's rights was expressly intended by the legislature. I consider that s58(1), as amended, rendered admissible the oral evidence of Sgt Holt of the concentration of alcohol indicated to be present in the blood of the appellant by a breath analysing instrument operated by a person authorised to do so by the Chief Commissioner of Police under s55 and the concentration of alcohol so indicated was, subject to compliance with s55(4), evidence of the concentration of alcohol present in the blood of the appellant at the time his breath was analysed by the instrument. Sergeant Holt's evidence, therefore, was admissible pursuant to the evidentiary provisions of s58(1). The same evidence also might have been admitted on common law principles.

[17] The evidence of Sgt Holt was capable of proving compliance with ss(4) of s55 in the absence of evidence to the contrary. The learned Magistrate said, in substance, that Holt's evidence proved compliance with ss(4) when he said: "The witness Holt gave evidence that he complied with the appropriate sections of the *Road Safety Act* and the regulations thereunder. I am satisfied the prosecution have proved that the apparatus was a breath analysing instrument for the purpose of a proceeding under Part 5 of the *Road Safety Act*." No issue arose as to the concentration of alcohol indicated to be present in the blood of the appellant at the time the breath was analysed by the instrument. The appellant did not raise a defence in the Court below based on ss(4) or (5) of s49 of the Act. Mr Billings relied upon the decision of Chief Justice, Sir Edmund Herring in *Porter v Kolodzeij* [1962] VicRp 11; [1962] VR 75 for the proposition stated succinctly in the headnote of the report of the case.

> "In the absence of specific legislative provisions the admissibility of the evidence of blood-analysis tests and their results falls to be determined on common law principles. The admissibility of evidence of such tests and their results depends upon satisfactory evidence of the training, qualifications and experience of the witness and of the scientific character and operation of such instrument. A breathalysing instrument, developed for the purpose of ascertaining from the analysis of the breath of a person the quantity of alcohol in that person's blood, is not at present a scientific instrument which falls within that class of notorious scientific and technical instruments, such as clocks and speedometers, whose accuracy is presumed at common law."

Cf. *Shearer v Hills* (1989) 51 SASR 243; (1989) 9 MVR 555 at 558-9.

[18] Section 58 (as amended) gave legislative authority to the admissibility of the evidence of alcohol tests by a breath analysing instrument and of the concentration of alcohol indicated to be present in the blood of a person if the result of a breath analysis is relevant on a hearing for an offence against s49(1)(f) of the Act. I do not consider that *Porter's* case has any application to the present proceeding because the result of the breath analysis carried out at Wedderburn was relevant on the hearing of the s49(1)(f) charge.

There is a further difficulty in the path of the appellant. Mr Billings very properly drew my attention to a recent unreported authority directly in point, *Smith v Van Maanen* (1991) 14 MVR 365 decided by Tadgell J on 5th July 1991. *Smith's* case was concerned with an appeal from a conviction in the Magistrates' Court at Werribee on 25th October 1990 on an information for an offence against s49(1)(f) of the Act. The offence occurred in June 1989. The learned Judge conveniently stated the essential elements of s49(1)(f) to be proved by the prosecution in these terms:

> "that the defendant has been driving a motor car within the last three hours relevant to the time of the alleged offence; that a preliminary breath test has been undergone pursuant to sub-section (1) of s53; that the defendant has been duly required to furnish and has furnished a sample of breath for analysis; and that the result of analysis of the sample as recorded by the breath analysing instrument indicates that more than the prescribed concentration of alcohol was present in his or her blood. The furnishing of the sample has to be proved to be one for analysis by a breath analysing instrument, as defined, and, of course, the **[19]** requirement must be one to furnish under s55(1)."

The judgment sets out in detail a summary of the evidence given in the case. The evidence given in *Smith* bears a striking similarity to the evidence admitted in the Court below. Objection was taken by counsel for the appellant in *Smith's* case in the Magistrates' Court to the admissibility of a certificate, relying upon the ruling given in *Bracken* by Judge Keon-Cohen, but the learned Magistrate did not uphold the objection. When the appeal came before Tadgell J the judgment in *Bracken* by the Full Court had been delivered. Mr Billings argued the appeal in *Smith* before Tadgell J The judgment records that he submitted.

> "that s58 being unavailable, the informant was thrown back to common law principles to determine the admissibility of the breath test and the evidence of it given by the informant and by the operator, Turner. Counsel made submissions to the effect that the common law principles had not been satisfied to enable the Magistrate to accept that evidence independently of s58."

These submissions were, in substance, made in the present appeal by Mr Billings in support of the questions of law numbered 2, 3 and 4 in the Master's order. They were rejected by Tadgell J, as was the further submission "that it was necessary that the informant prove by evidence admissible at common law the result of the breath test which Turner had administered to the appellant." His Honour observed: "The submission misapprehends the proof that is required by s49(1)(f)" and proceeded to quote passages from the decision of the Full Court in *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at 745; (1989) 9 MVR 1.

> **[20]** "It (s49(1)(f) in combination with s53(1) and s55(1)) creates an offence where a test performed by a person at a particular time records a particular result ... The correctness of the result of an analysis is not relevant for the purpose of s49(1)(f)."

And from the decision in the High Court in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190 at 193; (1990) 45 A Crim R 373; (1990) 10 MVR 257:

> "The elements of an offence under paragraph (f) as it then stood (before an amendment made by Act No. 53 of 1989) concerned only the concentration of alcohol at the time a breath sample is furnished and the result recorded by the instrument in question."

Tadgell J then observed:

> "What the informant is to prove by the operator is that the analysis having been performed within the three hour period, the result of it is to indicate more than the prescribed concentration of alcohol present in the blood of the person tested."

Mr Billings invited me not to follow the decision in *Smith* upon the basis that it was not

correctly decided. I decline the invitation, firstly, because the decision accords with my own view of the law and, secondly, because the facts and the law applicable in *Smith* are on all fours with the present appeal. In my opinion, the oral evidence of Sgt Holt admitted in the present case, if not admissible pursuant to s58(1) (as amended by Act No. 66 of 1990), was admissible at common law and together with the evidence of the respondent entitled the learned Magistrate to find all the ingredients of the offence charged pursuant to s49(1)(f) proved beyond reasonable doubt.

In my opinion, the questions in proceeding No. 6735 of 1991, save question 1 which was not pursued should be answered in the affirmative. **[21]** The three appeals will be dismissed and the appellant is ordered to pay the respondent's costs.
