20/92

SUPREME COURT OF VICTORIA

DPP v WALKER

Nathan J

7 May 1992

MOTOR TRAFFIC – DRINK/DRIVING EVIDENCE GIVEN BY INFORMANT – PRELIMINARY BREATH TEST DEVICE MISPRONOUNCED – NO EVIDENCE GIVEN AS TO WHETHER DEVICE A PRESCRIBED ONE – NO EVIDENCE THAT FORMAL DEMAND MADE OR BREATHALYSER AVAILABLE – INFORMANT NOT QUESTIONED ON THESE POINTS – WHETHER ACT NOT COMPLIED WITH – WHETHER DISMISSAL OF CHARGE JUSTIFIED: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55(1); *ROAD SAFETY (PROCEDURES) REGULATIONS* 1988, R301.

Upon the hearing of a charge under s49(1)(f) of the *Road Safety Act* 1985 ('Act'), the informant gave evidence that he intercepted W. driving a motor car and asked: "Are you prepared to undergo a preliminary breath test"? to which W. replied: "Yes". The informant said the device used was a 'Lion Alcometer' (instead of the prescribed 'Alcolmeter'). Also, the informant did not say that the device used was one prescribed by the Regulations. W. was conveyed to a police station and asked: "Are you prepared to furnish a sample of your breath for analysis?" to which W. replied: "Yes". The informant did not give evidence that a formal demand to undergo a breath test was made on W., nor that a breath analysing instrument was then and there available to perform the test. The Magistrate upheld a submission that the statutory requirements had not been complied with and dismissed the charge. Upon appeal—

HELD: Appeal upheld. Remitted to the Magistrate for further hearing.
(1) The mispronunciation of the name of the preliminary breath test device was of such infinitesimal inconsequence as to be immaterial and should have been ignored by the Magistrate.

(2) In view of W's consent to undergo the preliminary breath test and the fact that the informant was not cross-examined about the propriety of the test or the nature of the device used, there was no need for the informant to give evidence of the technical details of the device used.
***Browne v Dunn* (1894) 6 Co Rep. 67, applied.**
***Robertson v Smith* MC 33/1983, not followed.**

(3) On a charge under s49(1)(f) of the Act, the need for a formal demand and a formal identification of the breath analysing instrument are not ingredients required to be established by the prosecution. Accordingly, (and having regard to W's consent to undergo the full breath test), there was no need for the informant to give evidence that a formal demand was made and that a Breathalyser was then and there available to perform the test.
***Scott v Dunstone* [1963] VicRp 77; [1963] VR 579, not followed.**
[See also *Reeves v Beaman* MC 32/1991. Ed.]

NATHAN J: [1] Early one morning in November 1988 Miss Walker, the respondent, was stopped by police whilst she was driving her motor car. One of the police members, David Watt, the informant, considered she had been affected by alcohol and after asking her her full name and other particulars questioned her as follows: "Are you prepared to undergo a preliminary breath test?" She said, "Yes". The evidence is uncontested that she was then given a preliminary breath test by a Lion Alcolmeter. Upon reading the results of this test, the informant asked her to accompany him back to the Carlton Police Station in order to undergo a breathalyser test. Early in the following morning he asked Miss Walker whether she had consumed alcohol and she indicated she had. He then questioned her as follows: "Are you prepared to furnish a sample of your breath for analysis?" She replied "Yes".

Miss Walker was charged with an offence under the *Road Safety Act* s49(1)(f) which reads as follows:

> "A person is guilty of an offence if she—
> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under s55(1) and the result of the analysis as recorded ..."

and here I paraphrase "exceeds the statutory limit."

The magistrate, upon hearing the information in December 1990 dismissed it. And it is from that dismissal that the appeal now comes before me. The grounds argued before me are as follows: whether for the purposes of s55 of the *Road Safety Act* 1986 it is a requirement that the **[2]** breath analysing instrument be set up and ready for use when the request to furnish a sample of breath for analysis is made. Secondly, whether for the purposes of s53 of the *Road Safety Act* proof that the device was of the kind prescribed may be circumstantial, and thirdly, whether the magistrate erred in failing to regard the description of the preliminary breath test device given by the informant as sufficient proof that it was a device which was a breath test device of a kind prescribed by Regulation 301 of the *Road Safety (Procedures) Regulations* 1988.

In order to further comprehend these grounds of appeal it is necessary to recite the legislation. Section 53 of the Act intituled 'Preliminary Breath Tests' so far as is relevant, reads:

> "A member of the police force may at any time require any person he or she finds driving a motor vehicle to undergo a preliminary breath test by a prescribed device."

Regulation 301 under part 3 Statutory Rules No. 28 of 1988 intituled 'Preliminary Breath Test Devices' reads:

> "The devices prescribed for the purposes of section 53 of the Act are the breath testing devices known as"

and here I recite as part C, "The Lion Alcolmeter". I return to the Act. Section 55 can be paraphrased as follows, "If a person undergoes a preliminary breath test when required by a member of the police force under s53 to do so and the test in the opinion of the member in whose presence it is made indicates that the person's blood contains alcohol in excess of the prescribed concentration of alcohol the member of the police force may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that **[3]** purpose may further require the person, in effect, to go to the police station."

The magistrate accepted contentions of law advanced by Mr Billings that there had been a threefold failure to comply with the statutory requirements to which I have just referred. Firstly, that the informant had not referred correctly to the preliminary breath analysing device and had referred to it as an 'Alcometer' – rather than an Alcolmeter. Secondly, that there had been a failure to give evidence or aver that the instrument was a prescribed preliminary breath analysing instrument, and finally, that there had been a failure to give evidence that the preliminary breath test instrument was one of those listed in Regulation 301.

I have had much authority referred to me and it will be necessary to canvass some of it. I deal with the first of the contentions immediately. In my view the mispronunciation of the name of the preliminary breath analysing device by the informant is immaterial and an unedifying argument to have been advanced to a magistrate. The informant apparently omitted the consonant 'L' within the word 'Alcolmeter' and said "Alco Meter".

There are many words in the English language which become foreshortened or mispronounced by common usage, yet there is no doubt that the auditor of such words has a perfectly clear comprehension of what is being said. In this case the mispronunciation of the name of the device, occurring in the context of the machine being a preliminary breath analysing device is of such infinitesimal inconsequence to be immaterial and utterly **[4]** *de minimis*. To assent to an argument to the contrary would be to require a uniform pronunciation of technical, or indeed, common terms by all police members at all times. The absurdity of that proposition is revealed merely by being stated. And accordingly, insofar as the magistrate accepted a contention that the preliminary breath analysing instrument had not been defined or made known, he was in error.

I turn to the other contentions advanced by Mr Billings and return to the authorities. Mr Billings relied heavily on *Scott v Dunstone* [1963] VicRp 77; (1963) VR 579, a case similar in fact and revealed by the following extract at p582. When dealing with the statutory requirements to comply with a request to have a test by a preliminary breath analysing instrument, Sir Reginald Sholl said this:

> "I have construed the words, 'for analysis by a breath analysing instrument' as stating what the

> requirement by the officer must express to the suspect. And if he does not expressly say that the analysis is to be by an approved instrument, he must at least point out such an instrument as that by which the analysis is to be done. I have rejected any notion of applying to this legislation the concept of anticipatory breach or refusal. If the construction which I have given to the legislation and which appears to me to be at least simple, easily understood and calculated to avoid all prejudice to a suspect, is not what Parliament intended, it can easily amend the enactment."

I observe that Sir Reginald was applying the legal maxim that penal statutes be strictly interpreted, and accordingly he required close identification of the breath analysing device referred to in that legislation and which finds its reflection in the Act as before me. But it must be said that *Scott v Dunstone* has received subsequent judicial consideration which, in my view, has effectively **[5]** overruled it. I refer to *Lisiecki v Grigg* (1990) 10 MVR 336. Of that authority Marks J said this:

> "In *Scott v Dunstone* Sholl J decided that the provisions of s408A of the *Crimes Act* 1958, (which might well be regarded as a predecessor of s55(1) in combination with s49(1)(e) of the Act) required such proof. It is a question here whether I should follow *Scott v Dunstone*. Regrettably, despite the eminence of the late Sir Reginald Sholl and the very high desirability that a single judge of this court should follow the decision of another single judge as matters of comity and promotion of certainty in the law, the matter here is one of great public importance requiring a decision which I think is right. I have reluctantly concluded that *Scott v Dunstone* should not in all its aspects be followed and I do not propose to do so."

Further at p339 His Honour went on:

> "In my opinion, *Scott v Dunstone* confuses proof of the elements of the offence with proof of the facts which might establish their existence. The question is always whether the evidence is sufficient to found proof of the elements of the offence which the statute defines. This is my understanding of the approach of the law. If it is correct then the soundness of the conviction in the present case depends upon whether the evidence was capable of establishing that the plaintiff received a requirement "to furnish a sample of breath for analysis by a breath analysing instrument" and whether he refused comply."

No useful factual distinction can be made from those strong statements in that case to the present one. For the principles of comity and promotion of certainty to which Marks J refers I now defer to his judgment in *Lisiecki v Grigg*. In my view Marks J correctly characterised *Scott v Dunstone* in the passage to which I have referred and isolated the question as follows; "The question is always whether the evidence is sufficient to found proof of the elements of the offence which the statute defines." They are the matters to which I must defer and as I come to the evidence in this case it will be apparent in my view there was more than sufficient evidence upon which to found convictions. For further reasons I shall go on to **[6]** elaborate, the magistrate was enticed into error in ruling to the contrary.

I continue with my examination of the authorities and consider the principle that where a party intends to rely on an inference which it is argued can be drawn from the evidence to establish that the Crown has failed to prove an ingredient in the case, then that inference should be subject to the rule in *Browne v Dunn* (1894) 6 Co Rep 67. It had been suggested to me that the unreported decision of Nicholson J in *Robertson v Smith* 27 July 1983 was good authority for the proposition that no complaint could be heard from the Crown where an inference was to be drawn against it had not been averted to in cross-examination.

In my view, and for the reasons already pronounced in relation to *Lisiecki v Grigg*, the decision of Beach J in *Matosic v Hamilton* (1991) 13 MVR 171, is to be preferred. He said this in a case which also concerned a breath analysing instrument.

> "The omission of the operator to swear affirmatively that the breathalyser had been kept stable during the test did not of itself justify a positive finding that it had not been kept stable. In his evidence-in-chief the operator swore that in operating the breathalyser he had complied with all appropriate regulations. In the absence of evidence to the contrary, that was proof of all necessary facts, including the fact that the breathalyser had been kept stable during the test."

I interpolate that that being a statutory requirement.

> "The fact that the operator then stated during cross-examination that what he had said in evidence-

> in-chief was the totality of everything he had done to comply with the regulations, and then giving that evidence, failed to state that the breathalyser had been kept stable, was quite insufficient to justify an affirmative finding by the magistrate that the breathalyser had not been **[7]** kept stable. In some respects the question put to the operator in cross-examination could be described as a trick question and little weight should have been given to the operator's answer."

And further on:

> "In such circumstances I consider very little weight should be attached to a witness' answer that his evidence-in-chief was the totality of everything he had done. Where the onus is upon the applicant to establish that the breathalyser was not kept stable, it is incumbent upon the applicant to either obtain that concession from the breathalyser operator during the course of cross-examination, or to call evidence to that effect. In my view it is quite unsatisfactory to ask an operator, 'Is the evidence you have given the totality of everything you did?', and in the event that he replies, 'Yes', and has not made reference in his evidence to the fact that the breathalyser was kept stable during the conduct of the test, to use that answer as the basis for establishing affirmatively that the breathalyser was not kept stable during the conduct of the test. In my opinion, to satisfy the magistrate that the breathalyser was not kept stable during the currency of the test, it was incumbent upon the applicant Matosic to elicit or call evidence of sufficient cogency and weight to satisfy the magistrate, on the balance of probabilities, that the breathalyser was not kept stable during the currency of test. This, he failed to do."

In my view, the case is entirely apposite to the facts before me. In that instance, the issue was whether the breath analysing instrument had been kept stable during the test. In the facts before me it is whether the breath analysis device had been sufficiently identified as a prescribed device to Miss Walker.

When I search the evidence to which I have referred I find identifying the instrument by the mispronunciation of its trade name to be of such immateriality as to be ignored and one must take into account the circumstances in which the test was delivered. The question was, "Are you prepared to undergo a preliminary breath test?" and her reply being, "Yes." Was there any further need for the policeman to identify the technical details of the **[8]** device by which the test was to be administered in view of the prior consent of the suspect to submit to such a test? I think not. I think the surrounding circumstances would spell out to any ordinary decent citizen that the policeman was performing the test in furtherance of his police duties. If there had been any contest by the suspect, Miss Walker in this case, as to the propriety or the convenience of the test being conducted then and there she would have been entitled to raise those matters and inferentially raise the propriety of the test and the instrument by which it was to be performed. None of that was done.

In this case the regulations which prescribe the Alcolmeter as a device were tendered and part of the case. And the magistrate had before him those regulations for his consideration and he apparently failed to give sufficient weight to them.

Returning to Mr Billings' submission, before the magistrate he contended there was no evidence that at the time Miss Walker was asked at the police station to furnish a sample of her breath that a machine was then and there available on demand to perform the test. When examined in the light of reality this submission also falls to the ground. It would be mere surplusage or redundant for a policeman when asking a suspect to furnish a sample of her breath to be also obliged to say, "And I have here and now the required device to analyse that sample." If that were to be a requirement then, indeed, it would have found its place in the Act. There is no such requirement. Acts must be interpreted so as to give them potency and effect and although strictly **[9]** interpreted in the case of criminal statutes, the section requiring the furnishing of a sample assumes, as indeed, was the assumption underlying the transaction on this night, that a machine was ready and there available to perform the test. That was the reason she had been taken to the police station and for no other. It is a nonsense then to import into the statute some requirement that the suspect be told that there is available a machine to perform the test which is being asked of her.

Mr Billings also contended that a demand in specific terms had to be made of Miss Walker and that no such peremptory command is to be found in the evidence. In my view, no requirement of a like character can be found in the statute. So far as the preliminary test is concerned she

replied, "Yes," that she would have it and there would be little point then in making a demand of her. So far as the breath sample under s55 is concerned, the following exchange occurred; "Are you prepared to furnish a sample of your breath for analysis?" Reply: "Yes." There was no need in those circumstances to make a formal demand when consent to the giving of the sample for analysis had been forthcoming.

It follows then that the magistrate was unfortunately misdirected as to the current state of the law. I am unsure whether he had before him the authority of *Smith v Van Maanen* (1991) 14 MVR 365. In fact, upon contemplation, he could not have because, of course, this matter preceded that case. However, I have had the advantage of reading the unreported decision wherein His Honour isolates the ingredients required to be established **[10]** for conviction under s49(1)(f).

In my view, the requirements of formal identification and explicit demand contended for by Mr Billings do not find their place in the statute or on the analysis by Tadgell J, and accordingly, I am of the view that the appeal should be upheld, the matter remitted to the Magistrates' Court for further adjudication in accordance with the tenor of this judgment.

APPEARANCES: For the appellant DPP: Mr SP Gebhardt, counsel. Director of Public Prosecutions. For the respondent Walker: Mr P Billings, counsel. Jack Sher & Associates, solicitors.
