

73/89

SUPREME COURT OF VICTORIA

ZYLSTRA v SMITH

Nathan J

26 October 1989

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST – EXCESSIVE BLOOD/ALCOHOL CONCENTRATION – "BREATH ANALYSING INSTRUMENT" – EVIDENCE THAT "BREATHALYZER" USED – WHETHER PROOF THAT INSTRUMENT SATISFIES DEFINITION: ROAD SAFETY ACT 1986, S58.

Where there was evidence that a breath test was conducted with an instrument known as a "Breathalyzer" on which was engraved the numerals "2824789", a magistrate was in error in dismissing the charge on the basis of lack of satisfaction beyond reasonable doubt that the instrument complied with the specifications contained in the US patent.

Bogdanovski v Buckingham [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 25, followed.

NATHAN J: [1] Mr Justice Ormiston, with typical taciturnity, said in *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 25:

"This is yet another order to review in which it has been necessary to consider the provisions of the recently enacted *Road Safety Act* and in particular Part 5 of that Act relating to 'Offences Involving Alcohol or Other Drugs.' One of the purposes of the Part, stated explicitly by Parliament in s47(c) is to 'provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol'".

His Honour went on to observe that:

"This simple objective seems to have attracted the attention of magistrates and the profession to the extent whereby there are more orders to review in relation to this Act than any other."

I have found it pertinent to repeat Ormiston J's observations, as in this case the order nisi recites the respondent, David Russell Smith, show cause why the order of a Magistrates' Court made the 19th day of September 1988 should not be set aside. In respect of that order, Smith had been charged by Zylstra with driving whilst his blood alcohol concentration was in excess of the legally imposed limit. Mr Smith had enjoyed an afternoon at the Hallam Hotel in the company of his cohorts. He was driving around in a [2] somewhat dizzying fashion when brought to a stop by the policeman, who then administered a preliminary breath test and subsequently a more elaborate test at the Dandenong Police Station.

That test was administered by an instrument known colloquially as a 'Breathalyzer' and on which had been engraved the numerals 2824789. As such it was submitted to the court that the instrument was a 'Breathalyzer' within the meaning of s58(5) of the *Road Safety Act* number 127 of 1986. The magistrate ultimately held, and I will return to his decisions in full in a moment, that he was not satisfied the instrument was a 'Breathalyzer' and accordingly the information was dismissed. Such is the background of the first provision in the order nisi.

The second reads "that the learned magistrate erred in failing to have regard to the provisions of s58(5) of the *Road Safety Act*".

For reasons I shall now go on to elaborate, I am satisfied that the order nisi should be made absolute. They are as follows: *Bogdanovski v Buckingham*, to which I have already referred, required Ormiston J to consider whether an instrument known as a 'Breathalyzer', in particular the instrument used in that case to test [3] the breath of Mr Bogdanovski, was a "breath analysing instrument" within the meaning of the Act. I refer to the first question, which came under his consideration. In what can best be described as a thorough, exhaustive and pertinent examination of the law and authorities, including American authorities, he concluded at page 913:

"The only satisfactory means of approaching the definition in para. (a) of s3(1) is to read it as a whole, requiring the relevant breath analysing instrument to be that which is known as a 'Breathalyzer' and, lest there be any doubt, that apparatus which is described in the filed specification number 2824789. It is not necessary to ascertain whether the breathalyzer satisfies the narrow description contained in the specific embodiment or the broad description of the apparatus contained in the claim." (that is, the claim for patent protection).

I refer to the remainder of his Honour's judgment in respect of this issue, in which his Honour concluded that:

"To be encompassed by the Act, the nature of the machine and its appellation and engravings were to be examined and not necessarily to be defined by its method of operation or the ingredients used to effect the operation of the machine."

I consider that comity between justices sitting at single instance directs that I should follow that decision, and I do so. Bearing that in mind, I turn to say whether the same is pertinent to the case before me, and I am satisfied that it is. To reach this conclusion I must have recourse to the magistrate's findings. He went on to define the issue before him as follows:

The question to be answered is whether or not I am satisfied beyond reasonable doubt, upon the evidence before me, that the instrument [4] used was a properly operated breath analysis instrument within the meaning of part 5 of the *Road Safety Act*. There is no definition of "breath analysing instrument".

He went on to examine the Act, but the pertinent matter is that the magistrate defined the issue before him as being the nature of the machine, and not whether the machine was being operated properly by a proper officer. The Act bifurcates the provisions of proof, of driving with blood alcohol levels in excess of the permitted regimens, into two mechanical processes; firstly, the instruments to be used and, secondly, the methods and procedures by which those instruments are in fact used. A careful examination of that part of the Act reveals the dichotomy.

I return to the magistrate's findings. He went on to consider the nature of the chemicals used in the particular test and concluded that those chemicals in the particular test may or may not have resulted in different readings, Which could be subject to attack, but his final conclusion is the one which underscores the reasons why this order nisi should be made absolute, and I quote:

"Accepting all the evidence, I have some doubt that the machine used did comply with the specifications contained in the patent. That is a finding of fact. I am not satisfied beyond a reasonable doubt that the machine so complied and accordingly the information will be dismissed."

The reason for the non-compliance in the magistrate's view was, the machine itself failed to comply. I believe that the magistrate's decision was made [5] in ignorance of the *Bogdanovski* case, and understandably so. I also believe that the attack upon the magistrate's findings launched before me as to the mode of operation and the capacities of the operator are issues which may be recanvassed. I am satisfied that in the ultimate despatch of this matter I should return this information to the Magistrates' Court for rehearing in accordance with the terms of this judgment.

I repeat the essence of this case. The magistrate's finding being that the machine did not comply with the patent specification was an error. The mode of operation of that machine is another question, in which instance certain other sections of the Act which were not referred to by the magistrate, namely s49, may have application.

Therefore it follows that the order nisi will be made absolute on the three grounds sought. I will direct that this matter be returned to the Magistrates' Court for rehearing in accordance with the tenor of this judgment.

APPEARANCES: For the plaintiff Zylstra: Mr M Colbran, counsel. For the defendant Smith: Mr GA Hardy, counsel.