56/81

SUPREME COURT OF VICTORIA

BIRTHISEL v WHEELER

Jenkinson J

13 October 1981

MOTOR TRAFFIC – DRINK/DRIVING – READING MORE THAN .05%BAC – NOTICE GIVEN REQUIRING OPERATOR TO ATTEND COURT – PROSECUTOR UNAWARE OF NOTICE – EVIDENCE DEFICIENT IN FORMAL RESPECTS – MAGISTRATE INDICATED THAT IT WAS TOO LATE TO RE-OPEN PROSECUTION CASE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

Schedule Seven certificate relied on. After the Informant's case was closed, Counsel for the Respondent called the Informant to give evidence, that the Informant had received a letter from the Solicitor for the Respondent, which purported to be a "notice" complying with the requirements of s80F(3). The letter was then tendered in evidence, having the effect of rendering the statements in the Schedule Seven certificate of no evidentiary value, The Prosecutor, until that time, had been unaware of the existence of the letter. Any application to re-open the Informant's case, and call the Operator, was forestalled by the Magistrate, who stated it was too late to re-open the case, and dismissed the information.

HELD: Copy Schedule Seven certificate is *prima facie* evidence of the facts stated therein, unless the Defendant has given the Informant, written "notice" that he requires the person giving the certificate to be called as a witness. The proper exercise of the Magistrate's discretion was to permit the re-opening of the Informant's case.

JENKINSON J: ... The account of the events on the 16th December 1980, which I gave is consistent with the evidence contained in affidavits filed on behalf of the respondent. The only witness called in support of the information was the informant, who gave evidence of his observations of the respondent's driving of a motor car in Sale, of his interception and subsequent questioning of the respondent and of the conducting of a test carried out by another policeman operating a breath analysing instrument. The informant gave evidence further of a conversation between the operator of the instrument and the respondent; and of the completion of a certificate in, or to the effect of, the form in Schedule 7 to the *Motor Car Act*; and of the delivery of the certificate to the respondent. A copy of the certificate was tendered without objection in evidence before the learned Magistrate who constituted the court.

After the case for the informant had been closed, counsel for the respondent called the informant again to give evidence as a witness in the case for the respondent. On that occasion the informant gave evidence that he had received from the solicitor for the respondent a letter which was then tendered in evidence before the learned Magistrate. For the present that letter may be taken to be a notice which complied with the requirements of s80F(3) of the *Motor Car Act*. Counsel for the respondent then closed the case for the respondent and made a submission. I quote from an affidavit sworn by that counsel and tendered in evidence in this proceeding by way of review:

> "... I made a submission to the Magistrate that the said letter constituted sufficient notice pursuant to the provisions of s80F(3) of the *Motor Car Act* 1958; that it was the giving of the Notice that rendered the Schedule 7 Certificate of no *prima facie* evidentiary value, and that as there was evidence put before the Magistrate that a Notice has been given pursuant to s80F(3) there was therefore no evidence before him sufficient to make out a case against the Defendant. During the course of my submission to the Magistrate, the prosecuting sergeant raised the issue as to why I did not object to the Schedule 7 Certificate at the time it was tendered by the informant. I informed the Magistrate that there was no need to object to it as where the Defendant has given Notice, as required in s80F(3), the Certificate has no evidentiary value as to any of the Statements contained in it, and that the police therefore, had to prove their case by calling the operator. ... the learned Magistrate effectively told the prosecutor that he believed that it was too late to re-open his case. The prosecutor did not formally apply to re-open his case, nor did he raise any argument with the learned Magistrate on being so informed or seek to adduce any evidence of, or to inform the Magistrate of,

> any of the matters alleged to have occurred prior to the hearing of the Information. I agree that the prosecutor drew the attention of the Magistrate to the wording of the said letter and that there was some discussion between the Magistrate and the prosecutor as to the wording of the said letter. It is my recollection that the Magistrate without hearing any further argument from Counsel, found that the letter constituted a sufficient Notice for the purposes of s80F(3) and dismissed the information."

... If that were all that had appeared, the learned Magistrate's exercise of his discretionary judgment whether to permit the re-opening of the informant's case might have been examined by reference to considerations which included those stated by Zelling J in *Leydon v Tomlinson* (1979) 22 SASC 302 at 309. In that case His Honour had to consider whether a consent by a Minister of the Crown, which if valid deprived a defendant of a defence that the complaint with which he was charged was statute-barred, should have been permitted to be given in evidence upon the re-opening of the complainant's case. It was agreed between counsel who appeared on the appeal before Zelling, J that in the court below counsel for the defendant had, at the outset, indicated that he intended to rely upon the time bar to the prosecution. His Honour said:

> "That should have been a very relevant question in the exercise of the Magistrate's discretion. It is one thing to allow the prosecution to re-open a case to prove a mere matter of form, a pure technicality which nobody has attached any importance to until the end of the Crown case, when counsel for the defendant pounces for the first time. It is a very different matter when counsel for the defence announces at the outset that a point is going to be in issue in the case and the Crown still fails to prove an essential point which they have been put on notice is a matter in dispute in this case. In such a case, whilst not wishing to fetter the discretion of Magistrates in any way, I think that that is a very cogent argument against exercising the discretion to re-open the case. No one wants accused persons to be let off on mere technicalities. On the other hand, the onus does lie on the Crown in every prosecution to prove its case and if they are put on notice that a certain matter is in issue, then they have to prove it, and generally speaking there should be no second bite of the cherry, unless it is a matter which could not have been foreseen at the opening or did not appear to be put in issue by the defence either by statements or cross-examination and that is not this case."

However, in this case a good deal more does appear and some of it must have appeared to the learned Magistrate. I turn first to the letter which so far I have assumed to contain a notice satisfying the requirements of s80F(3). The letter is dated 25th September 1980, is addressed to the informant at the Sale Police Station and is signed by the solicitor acting, so far as appears, at all relevant times for the respondent. The letter reads:

> "This is to give you notice pursuant to Section 80F(3) of the *Motor Car Act* that at the hearing of your information dated 11th June 1980, against Ian Robert Wheeler the Defendant will call the authorised operator in this matter as a witness."

For the time being I shall continue to assume that the letter does constitute such a notice in writing as s80F(3) requires. If that be so, it is also a plain intimation by the solicitor for the defendant to the informant that the defendant will call the operator as a witness at the hearing of the information. The letter was before the learned Magistrate and he could therefore read it and see that it contained such a statement. He knew that, notwithstanding the statement in the letter, counsel for the respondent had not called the operator as a witness.

From the material which I have so far discussed it might be said that the Magistrate might have supposed that counsel for the respondent had abstained from making the informant, while the informant was in the witness box on the first occasion, any question concerning the letter because counsel supposed that the operator would be called as a witness in the course of the informant's case. But, even if the Magistrate had made such a supposition, he had before him the plainest indication that it had been represented on behalf of the respondent to the informant, that the operator would be called as a witness in the case for the respondent. The failure to give effect to that written statement of intention, while it remained unexplained, was in my opinion a very cogent circumstance to be weighed in favour of permitting the re-opening of the informant's case.

It seems, however, when regard is had to further evidence before me, that it is very unlikely that the Magistrate made any such a supposition. I quote again from the affidavit of counsel for the respondent in the court below. After deposing to his statement to the Magistrate that the certificate had no evidentiary value as to any of the statements contained in it, the deponent

continued:

> "To object to the Certificate at that stage is unnecessary and may have telegraphed to the prosecutor what he had to do in order to prove his case. I told the Magistrate that it was therefore a matter of tactics, not to object to the Certificate at that stage, and to subsequently prove that appropriate notice had been given."

By way of aside it may be observed that the certificate was, in any event, admissible, since s80F(1) conditions the admissibility of evidence of the percentage of alcohol indicated to be present in the blood of a person by a breath analysing instrument upon compliance with the provisions of s80F(2), which requires that a certificate of the kind now in question should be signed by the operator and delivered to the person whose breath has been analysed. Proof of compliance with those requirements of s80F(2), admitted tender of the document signed by the operator.

Counsel for the respondent made it clear, in my opinion, to the Magistrate that he had deliberately abstained from any reference, by way of cross-examination of the informant or otherwise, to the letter until the case for the informant had been closed in the hope that the proofs offered on behalf of the informant would be held insufficient. That circumstance is, in my opinion, of very great significance in relation to the exercise of any discretion as to whether or not the re-opening of the informant's case should be permitted. In those circumstances the considerations against permitting the re-opening of an informant's case after the conclusion of the whole of the evidence are of very much less weight.

But there are further circumstances which, so far as appears from the material before me, did not come to the attention of the learned Magistrate. The evidence before me shows that there were communications between the solicitor for the respondent and the informant, one result of which was that the hearing of the information was adjourned on the 12th August, on the 11th November and on the 9th December because the solicitor for the respondent had indicated a wish that a chemist by the name of Russell be called as a witness on the hearing of the information as part of the respondent's case and had indicated that Russell would not be able to give evidence on those three dates. It appears that the informant gave his opinion to the respondent's solicitor that, if Russell were to be called, it would be necessary for the respondent to give to him, the informant, a notice pursuant to s80F(3) of the *Motor Car Act*.

It does not appear what the basis for that opinion was. The evidence before me also discloses that on the 16th December 1980, before the hearing of the information commenced, counsel for the respondent informed the sergeant of police who was to conduct the prosecution, one Philip Graeme Blencowe, in the presence of the informant, that it was not proposed to call Russell, or any other chemist. The evidence before me does not enable me to say what, if any, influence that statement by counsel may have had on the mind of the informant, or on the mind of Blencowe, in bringing about the result that the operator was not called as a witness in the course of the informant's case. The evidence does show that Blencowe was unaware of the existence of the letter until it was proved in evidence in the course of the respondent's case. I put aside therefore consideration of those further circumstances which were not disclosed to the learned Magistrate, merely observing that if an inquiry had been made by the learned Magistrate on the 16th December 1980, at the time the submission by counsel for the respondent was made, concerning the circumstances in which the letter had been sent and received and concerning the circumstances which resulted in Blencowe's being unaware of the existence of the letter, it might have been possible for the Magistrate to exercise a well-informed discretion.

However, the learned Magistrate was certainly under no obligation to embark upon an inquisition of either counsel for the respondent, or of Blencowe. But on the material that was before him, in my opinion, there could be an exercise of his discretion conformable with law in only one way. He had no reason to suppose but that the entire hearing of the information had been conducted while an unqualified and uncontradicted statement of the defendant's intention to call the operator as a witness had been in the informant's possession since the end of September 1980. If the respondent's stated intention had been carried out, the proofs which it was submitted on the respondent's behalf were lacking could have been, and almost inevitably would have been, elicited from the operator in the course of his evidence.

The learned Magistrate had also a plain admission by counsel for the respondent that

counsel had refrained during the course of the informant's case from adverting to the letter or to the subject matter of the letter in the hope that there would be such a failure or proof as in fact occurred. In those circumstances, in my opinion, the only proper exercise of the Magistrate's discretion was to permit the re-opening of the informant's case if he had concluded, as one must believe that he did conclude, that the letter satisfied the requirements of s80F(3). Accordingly the order nisi would be made absolute on ground 3, which reads:

> "That the Stipendiary Magistrate erred in not permitting the Applicant's case to be re-opened in order that Senior Constable Michael Allan Hughes could be called to give evidence."

Hughes was the person to whom I have referred throughout as the operator.

I turn back now to consider the question as to whether or not the notice did satisfy the requirements of s80F(3). As a matter of construction I have no doubt that the words "that he requires the person giving the certificate to be called as a witness" express a requirement that that person be called as a witness in the course of the informant's case. Nevertheless, the letter does make it clear that the writer is attempting to give such a notice as s80F(3) contemplates and the letter may be understood, perhaps with some difficulty, as both a notice of the kind which the sub-section describes and as an intimation that the operator will be, whatever else may happen, called as a witness in the course of the case for the respondent. It does not appear to me that sub-section (3) is intended to impose upon persons accused an obligation to express with clarity in the notice the requirement which the sub-section specifies. It seems to me sufficient that the writing should bring to the mind of the recipient an understanding that the giver of the notice is attempting to give such a notice as the sub-section contemplates.

It may well be that there was a great deal of confusion and misunderstanding in a number of the minds that were involved in the proceedings on the 16th December and I think counsel right in suggesting that the matter should be re-heard *de novo.*

Mr Moorhead has pointed out that there was no application made by Blencowe for leave to re-open his case and that is perfectly correct. On the other hand, it is also clear from the frank description by counsel for the respondent in his affidavit that the Magistrate forestalled such an application by indicating that it could not be granted. In those circumstances I would treat the prosecuting sergeant, Blencowe, as having made the application. He continued to raise, or draw matters to the attention of the Magistrate after that statement was made, and I would regard him as to be treated as having sought to re-open the case if his submission were rejected that the letter did not constitute a notice complying with s80(3).

In a case in which qualified lawyers were engaged on each side perhaps it might fairly be said that there had been a failure to make the formal application, but in the atmosphere of a Magistrates' Court where the informant was represented by a sergeant of police, who is described in the affidavit of counsel who appeared for the respondent as having been obviously very upset, I would treat him as having made the application. Alternatively, if he could not be treated as having made the application, the circumstances were such as in my opinion to call for the intervention of the Magistrate of his own motion.

The point that was being taken was, in my opinion, an absurd point. It in one sense bore a superficial resemblance to the inadvertent failure of an informant to put in proof some particular requisite of proof. The mind tends to be drawn into a consideration of all those cases which have been concerned with that sort of situation. But really it is very difficult in my opinion to find an analogy between the situation as it existed in this case and cases of that kind. This was a misunderstanding of a different order, in my opinion, and called for the immediate and emphatic intervention by the learned Magistrate, without the need for any application by the sergeant representing the informant.
