14/92

SUPREME COURT OF VICTORIA

DPP v DOOLAN; DPP v MARTELL

Smith J

31 January, 18 February 1992

[1992] VicRp 64; [1992] 2 VR 249; (1992) 15 MVR 397

MOTOR TRAFFIC – DRINK/DRIVING – OPERATION OF BREATH ANALYSING INSTRUMENT – REQUIREMENTS FOR PROPER OPERATION – REGULATIONS AND INSTRUCTION MANUAL – WHETHER REGULATIONS CONTAIN A COMPLETE GUIDE FOR PROPER OPERATION – ADMISSIBILITY OF INSTRUCTION MANUAL – WHETHER FAILURE TO FOLLOW MANUAL CAN MAKE OUT DEFENCE – WHETHER COURT SHOULD PERMIT EXPERT WITNESS TO BE CROSS-EXAMINED - LIMIT OF DEFENCE: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f), (4), 58(2), 95; *ROAD SAFETY (PROCEDURES) REGULATIONS* 1988, R314.

1. The concept of the proper operation of a breath analysing instrument is not exhaustively defined by the *Road Safety (Procedures) Regulations* 1988. Whilst the Regulations may be complied with, the instrument may still not be properly operated and a defence under s49(4) of the *Road Safety Act* 1986 ('Act') may be made out by reference to errors in the operation of the instrument which do not involve a breach of the Regulations. Accordingly, a magistrate was not in error in receiving evidence concerning something which did not involve a breach of the Regulations namely, the operation of the control knob of the breath analysing instrument.

***Curmi v Matthews*, MC 4/1991, referred to.**

2. Where an expert witness is accepted by the court as being qualified to express an opinion, the court should allow the other party the opportunity of cross-examining the witness so as to test the opinion expressed.

3. The 'Breathalyzer' Instruction Manual is not admissible in the absence of authenticating evidence, i.e., evidence which establishes that the Manual is what it purports to be.

4. The statutory defence under s49(4) of the Act does not apply to a charge laid under s49(1)(b) of the Act. Where such a charge is laid, the onus remains on the prosecution to prove that a defendant drove a motor vehicle with a blood/alcohol level in excess of the prescribed concentration.

SMITH J: [1] The Appeals (in the Martell proceedings)
The Director of Public Prosecutions appeals from orders made in the Magistrates' Court at Wangaratta on the 9th August 1991 dismissing charges against Wayne John Martell for offences pursuant to s49(1)(f) and 49(1)(b) of the *Road Safety Act* 1986. In relation to the dismissal of the charge brought under s49(1)(f), the appellant relies upon the following questions of law:

> "1. The Magistrate erred in finding that the breath analysing instrument was not properly operated.
>
> 2. The Magistrate erred in finding that the Defence provided by Section 49(4) of the *Road Safety Act* 1986 is not confined to proof of failure to comply with the *Road Safety (Procedures) Regulations* 1988.
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> 3. The Magistrate erred in admitting into evidence the contents of an extract from the manufacturer's manual relating to the Breathalyzer instrument.
>
> 4. The Magistrate erred in denying the prosecutor the opportunity to cross examine the expert witness as to the basis of his expert opinion."

In relation to the charge brought under s49(1)(b) the appellant relied upon the same questions of law but added a further question in the following terms:

> "2. The Magistrate erred in finding that a Defence under Section 49(4) of the *Road Safety Act* 1986 was available to the Respondent when charged with an offence pursuant to Section 49(1)(b) of the said act."

(The above questions 2, 3 & 4 were repeated as questions 3, 4, and 5.) **[2]** It will be seen that there is some overlap between the issues raised and I will deal first with the questions of law raised in respect of the charge under s49(1)(f). As to those questions it is convenient to commence with the second question as the first question covers the same ground as the other questions. I will then deal with the additional question raised in the proceedings relating to the s49(1)(b) charge.

Section 49(1)(f) Information – Question 2

Section 49(1)(f) provides as follows:

> "49(1) A person is guilty of an offence if he or 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 section 55(1) and—
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; or ...."

The second question of law raised involves the consideration of s49(4) of the *Road Safety Act* 1986 and the regulations made under it, together with other provisions of that Act. Section 49(4) provides as follows:

> "(4) It is a defence to a charge under paragraph (f) of sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated."

[3] The appellant argues that s49(4) in referring to the proper working order or proper operation is referring to a standard set by regulations. Thus, to succeed in defending the charge by use of s49(4), it would be necessary for the defendant to prove non-compliance with the regulations. It is argued that it was not open to the defendant to establish that the breathalyzer was not operated properly by referring to some act or omission which affects the operation but which is not referred to in the regulations. This issue was left open in *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897 at 921; (1988) 9 MVR 257.

To put the issue in context, it appears that the breathalyzer operator, Sgt. McCormack, admitted in evidence that the breathalyzer control knob had been turned to the "off" position during each phase of the operation. The defendant called evidence from an expert witness, Mr Young, to the effect that this was not a proper operation of the breathalyzer. The question of the operation of the control knob is not something dealt with in the regulations. The learned Magistrate held that the regulations could be complied with and the instrument still not be properly operated. He further held that it was not properly operated in this case and that the defence under s49(4) was made out. Thus it will be seen that if the concept of proper operation is exhaustively defined by the regulations, it was not open to the learned Magistrate to receive or consider the evidence relating to the control knob in determining whether the breathalyzer was properly **[4]** operated and it was not open to him to hold that the defence under s49(4) was made out.

It is argued for the appellant that the regulations must be taken to be a statement of all that is needed for proper operation. It is further argued that if in fact the regulations fall short of ensuring an accurate and reliable result, nonetheless it cannot be said that the breathalyzer was not operated properly if it was operated in accordance with regulations.

Turning to the Regulations, s95 *Road Safety Act* 1986 empowers the Governor in Council to make regulations with respect to matters including matters specified in schedule 2 to the Act. Schedule 2 includes a number of matters and, in particular, the following:

> 51. for handling, storage, use and maintenance of breath analysing instruments used for the purposes of s55 and the procedures and methods to be employed in the use of those instruments for ensuring that they give accurate and reliable results.

The reference to s55 is a reference to the testing by breathalyzer with which we are concerned. The appellant's argument appeared to turn on the significance to be placed on the

words "for ensuring" in the schedule paragraph to which I have referred. On the face of it, it does not seem to me that the words of the schedule (in particular, "for ensuring") do any more than indicate the purpose for which the regulations may be made. The schedule does not require that the regulations state everything that is needed to ensure an accurate and reliable result. The regulations also do not purport to **[5]** exhaustively state the requirements for the proper operation of a breathalyzer. They simply remove a number of issues from debate. If Parliament had wanted to limit the defence available to the defendant to non-compliance with the regulations it would have been a very simple matter to express s49(4) in those terms instead of using the phrase "in proper working order or properly operated".

Recent amendments to the legislation appear to me to confirm the view that the proper operation of the breathalyzer as referred to in s49(4) is not limited to compliance with any regulations laid down for the operation of the breathalyzer. Prior to amending legislation in 1991, s58(2) provided the following:

> "(2) A document purporting to be a copy of a certificate given in accordance with section 55(4) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments under section 55 is admissible in evidence in any proceedings referred to in sub-section (1) and is conclusive proof of the facts and matters contained in it, unless the accused person gives notice in writing to the informant not less than 7 days before the hearing that he or she requires the person giving the certificate to be called as a witness."

That section had been amended prior to the hearing in 1991 (*Road Safety (Drivers) Act* 1991 s22) following upon, amongst other things, a decision of his Honour Judge Shillito in a case of *Curmi v Matthews* (unreported 25 and 26 February 1991). That case related to an appeal against conviction under s49(1)(f). An attempt was made to address certain problems that had emerged in *Curmi's case* relating to the form of the certificate and, in particular, a Schedule 6 was provided **[6]** setting out a form to be used while at the same time allowing the old regime to apply by continuing the operation of Regulation 314 of the *Road Safety (Procedures) Regulations* 1988. What is of interest is that the Schedule 6 certificate provided for the analyst to say that the breathalyzer instrument used was "in proper working order and properly operated by me in accordance with the regulations". The certificate did not provide for a statement that it was properly operated. The fact that the concepts differ appears to me to be confirmed by s22(2) of the 1991 amending legislation, which inserted in s58(2) of the principal Act, the following words after the words "contained in it"
:

> "and of the fact that the breath analysing instrument was on the relevant occasion properly operated."

In other words, the material in the certificate did not deal conclusively with proper operation. Therefore, it was necessary for the legislation itself to confer conclusiveness on the certificate on the issue of proper operation. The certificate was not conclusive in its own terms because it referred to proper operation in accordance with the regulations. In conclusion, I note that in *Curmi v Matthews* (above) His Honour Judge Shillito expressed the view that the fact that the operator had complied with the regulations did not prevent the defendant challenging the reading under s49(4) on the grounds that for other reasons the breathalyzer was not operated properly. It had been argued for the appellant, on the basis of instruction Manuals and **[7]** expert evidence, that the instrument had not been properly operated because waiting periods of one and half minutes between certain stages in the operation required by the Instruction Manual had not been complied with. This requirement was not spelt out in the regulations. The amendments to the legislation did not overrule the interpretation of His Honour but rather accepted it and amended s58(2) in such a way as to recognise the distinction. The effect of the provision is to require a defendant wishing to rely on defective operation outside the regulations to give notice to overcome the conclusiveness of the certificate (as was done in the present case).

It was also argued for the appellant that the operator's certificate set out in Schedule 6 of the *Road Safety (Drivers) Act* 1991, asserts only proper operation in accordance with the regulations and that this confirms that the expression that "properly operated" in s49(4) relates only to the requirements of the regulations. In my view, however, that conclusion does not follow and there is a clear indication to the contrary in the amendment in the same legislation to s58(2) referred to above. For these and the foregoing reasons, question 2 should be answered in the negative.

Section 49(1)(f) Information – Question 3

The next question raised by the appellant is question 3 which relates to the admission of evidence in the form of extracts from a Manual purporting to relate to the breathalyzer instrument. **[8]** During the cross examination of Sgt. McCormack a copy of a document purporting to be Breathalyzer Model 900 Instruction Manual 1970 Edition was shown to him and he was asked to read certain passages. On the first occasion this was done objection was taken on two grounds:-

> (a) that there was no evidence before the Court that the document was in fact what it purported to be; and
>
> (b) it was inadmissible on the ground that it was documentary hearsay.

The learned Magistrate ruled that the document was admissible on the basis that what was being put to the witness was contained in the document and that the document was accepted by the Court as what it purported to be and nothing more. Reference was made to other passages of the particular book. Objection was taken and noted with the learned Magistrate ruling in the same way. The defendant sought to rely on the passages in the alleged Manual as indicating that the control knob should not be placed in the "off" position until the conclusion of the operation.

The appellant concedes that the breathalyzer referred to in the alleged Manual was the same as that which was used. The relevance of the evidence and its *prima facie* admissibility depended on establishing that the document was what it purported to be – operating instructions produced by the manufacturer for the relevant breathalyzer.

Sgt. McCormack did not authenticate the Manual nor did the expert called by the defendant, Mr Young. In those circumstances the extracts were not strictly speaking admissible because the evidentiary facts needed to establish **[9]** the relevance of the material – that the Manual was what it purported to be – had not been the subject of any evidence. (See JH Chadbourn (Ed.) *Wigmore on Evidence* 1978 para.2129, 2130; JB Weinstein and MA Berger, *Weinstein's Evidence* 1983, 901-20; EW Cleary (ed.), *McCormick's Handbook on the Law of Evidence*, 2nd Ed. 1972 paras. 218 and 185). The common law does not allow inferences to be drawn from the document itself – at least in the absence of authenticating evidence outside the documents. The law's "agnosticism" (CT McCormick, *Cases and Materials of the Law of Evidence*, 3rd Ed. 1956, 388) has been criticised for many years (see Australian Law Reform Commission, *Interim Report on Evidence* (No.26, Vol.l. para. 491ff). Having been shown the alleged Manual, I can sympathise with the learned Magistrate's common-sense approach. The Manual, however, was strictly not admissible.

As to the hearsay argument, it appears to me that the relevance of the contents of the Manual turned not on the truth of what was asserted in the Manual but the fact that the Manual was a statement of instructions given by the manufacturer to those who were to operate the machine. In determining the proper operation of the machine it is relevant to know what instructions the manufacturer has given. Thus it would not seem to me to infringe the hearsay rule if tendered for that purpose. For the above reasons, however, question 3 should be answered in the affirmative.

Section 49(1)(f) Information – Question 4

The remaining question raised, question 4, is whether the learned Magistrate erred in denying the prosecutor the **[10]** opportunity to cross-examine the defendant's expert witness on the basis of that expert witness' opinion. The learned Magistrate did not allow cross-examination because he ruled that the basis for the opinion of the witness as to the proper operation of the machine was not relevant and that cross-examination about the consequences of the operation of the machine with the control knob in the "off" position was not permitted. He further commented that his finding, that the witness was qualified to give an opinion, prohibited cross-examination in relation to his expertise in the use of machines for analysis and commented that the prosecution would be hard pressed to find a question that was relevant to ask of the witness. In light of those rulings the prosecutor did not question the defendant's expert.

The defendant's expert had said that he had formed the opinion, from his experience in the use of instruments of analysis, that turning the breathalyzer control knob to the off position during the course of an analysis was not a proper operation. Accepting, as I have indicated above, that the defence under s49(4) of the Act can be made out by reference to errors in the operation of the machine which do not involve breach of the regulations, it was argued that, where an expert asserts that a machine was not operated properly, it is open to the prosecution to cross-examine

the expert with a view to demonstrating any flaws in the basis of the opinion so expressed and its meaning. This is plainly correct. The learned Magistrate appears also to have not appreciated that there is a distinction between the question whether a witness **[11]** is an expert and the question whether and to what extent his evidence should be accepted. He appears to have decided that his decision that the witness was an expert had the result that the expert's evidence of opinion had to be accepted and the basis of that opinion should not be tested. This is plainly not so. Accordingly the learned Magistrate also erred in his rulings on the prosecutor's right to cross-examine, (cf. *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503, 510, 514, 515; (1986) 24 A Crim R 234; *Humphrey v Wills* [1989] VicRp 42; [1989] VR 439, 445, 446).

The Section 49(1)(b) Information

Turning to the appeal against the dismissal of the other proceedings for breach of s49(1)(b), an additional question is raised by the appellant that the Magistrate erred in finding that the defendant under s49(4) of the *Road Safety Act* 1986 was available to the respondent when charged with an offence under s49(1)(b) of the Act.

Plainly the defence under that section is not available because in terms it applies only to s49(1)(f) offences. I do not think, however, it can be said that the learned Magistrate decided that charge having regard to the defence under s49(4). When charged with an offence under s49(1)(b) which relates to the level of blood alcohol being over a prescribed limit at the time of driving, a defendant may challenge the police evidence. In particular, if faced with a breathalyzer certificate the defendant may file a notice which overcomes the conclusiveness of the certificate and may call experts and other evidence which directly or indirectly will challenge the validity of the certificate or its accuracy. Sub-s.(4) changes that evidentiary onus into a legal onus **[12]** placing the legal burden of proof on the defendant in respect of the proper working order or operation of the breathalyzer when charged under s49(1)(f). It does not apply to s49(1)(b). Thus so far as the charge under s49(1)(b) is concerned, the onus remained on the prosecution throughout to persuade the learned Magistrate that the breathalyzer reading should be accepted.

The learned Magistrate had before him evidence that the Sergeant had the control knob in the "off position during the various phases of the operation and had expert testimony that that was not a proper operation. Assuming that such testimony had been properly dealt with (as to that see above), it would plainly have been open to the learned Magistrate to entertain at least a reasonable doubt as to the accuracy of the reading obtained and therefore to dismiss the proceedings. Looking at the statement in the affidavit material about the learned Magistrate's final rulings the following appears –

> "The Court found that the instrument was not properly operated and the defence under s49(4) was made out. The charges under s49(1)(b) and s49(1)(f) of the said Act were dismissed."

That simple statement appears to me to be consistent with the learned Magistrate finding that the s49(1)(b) charge should be dismissed because he found that the instrument was not properly operated, as he apparently stated, and that, therefore, he was not satisfied beyond reasonable doubt that the prescribed level had been exceeded. The appellant is faced with the problem that every reasonable presumption must be made in favour of the decision of the learned Magistrate and it should be upheld if it can be **[13]** supported upon any reasonable view of the evidence (*Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38; [1954] ALR 168). I am not persuaded that this ground is made out. As to the other questions raised, I refer to my comments above in relation to the charge brought under s49(1)(f) of the Act.

The Martell Proceedings – Conclusions.

As a result of the foregoing the questions raised in Proceeding No. 11125 relating to the s49(1)(f) charge should be answered as follows–
(1) Yes. (2) No. (3) Yes. (4) Yes.

The question in Proceedings No.11124 relating to the s49(1)(b) charge should be answered as follows–
(I) Yes. (2) No, the learned Magistrate did not so find. (3) No. (4) Yes. (5) Yes.

The errors of law demonstrated relate to the refusal to allow the prosecution to cross-

examine the expert, Mr Young, about the basis of his opinion and the admission of the alleged Manual into evidence. In all the circumstances the orders dismissing each of the informations should be set aside and the matters referred to the relevant Magistrates' Court for rehearing. **[14]**

The Appeal (in the Doolan proceedings)

I turn then to the third appeal brought before me. This was also an appeal by the Director of Public Prosecutions. The defendant respondent was Terence Donald Doolan. He was charged with breach of s49(1)(f) of the *Road Safety Act* 1986. At the Magistrates' Court at Nhill the charge was dismissed. The Director of Public Prosecution appeals from that decision relying upon the following questions of law:-

> (a) The learned Magistrate erred in finding that the breath analysis instrument was not properly operated.
>
> (b) The learned Magistrate erred in finding that the defence provided by the *Road Safety Act* 1986 s49(4) is not confined to proof of failure to conform to the *Road Safety (Procedures) Regulations* 1988.
>
> (c) The learned Magistrate erred in denying the prosecutor the opportunity to cross-examine the expert witness as to the basis of his expert opinion.

The defendant was represented. In the course of cross-examination Senior Constable Blair, the breathalyzer operator, was questioned about the steps taken in operating the breathalyzer and amongst other things stated that before the breath test the breathalyzer control knob had been turned to the "off" position. He gave evidence that this was the way that operators were instructed to operate the breathalyzer. The defendant called Mr Young, the expert who had been called in the other proceedings to which I have already referred. As it happened, the learned Magistrate trying the charges against Mr Doolan was the same Magistrate who had tried the charges against Mr Martell. He stated to the parties that he was familiar with the witness Young having presided recently over **[15]** an almost identical case of *Costigan v Martell* in which the witness Young had also been called to give evidence for the defence in that case.

The learned Magistrate stated he was familiar with the arguments and submissions that had been raised in that case by the prosecutor and counsel for Mr Martell. He ruled that he would accept the evidence of the witness Young as the evidence of an expert in the field of breath analysing instruments. Mr Young gave evidence that in his opinion turning the breathalyzer control knob to the "off" position during the course of operation was not operating the instrument properly. The learned Magistrate stated that as he had already ruled that he accepted the evidence of Mr Young, there was no point in the prosecution asking any questions in cross-examination of the witness Young. The defendant closed his case. The Magistrate then stated that consistently with his decision in the case of *Costigan v Martell*, he found that the instrument was not properly operated and that the defence under s49(4) of the Act had been made out. He said he would dismiss the charge brought under s49(1)(f) of the Act.

The appeal raises the same issues as those raised in the Martell proceedings relating to s49(1)(f). For the reasons I have given in the Martell proceedings, the questions raised in the Doolan proceedings should be answered in the following way:- (a) Yes. (b) No. (c) Yes.

[16] The error demonstrated relates to the refusal to allow cross examination of the expert about the basis of his opinion and the admission of the alleged Manual into evidence. In all the circumstances the order dismissing the information should be set aside and the matter referred to the relevant Magistrates' Courts for rehearing.

Solicitor for the appellant: JM Buckley, solicitor to the Director of Public Prosecutions.
