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SUPREME COURT OF VICTORIA — FULL COURT

GIPP v RICHARDSON

Young CJ, Lush and O'Bryan JJ

30 April 1982 — [1982] VicRp 103; [1982] VR 1031

MOTOR TRAFFIC – DRINK/DRIVING – EVIDENCE OF THE OPERATOR OF THE INSTRUMENT AS TO THE MARKINGS ON THE INSTRUMENT – DID NOT CONFORM WITH THE MARKINGS WHICH, FOR THE PURPOSES OF S80F(14) OF THE ACT IDENTIFIED AN APPROVED INSTRUMENT AND WHICH HAD BEEN PUBLISHED IN THE VICTORIAN *GOVERNMENT GAZETTE* – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* S80F(14).

During the hearing of a charge of driving whilst the percentage of alcohol in the blood exceeded .05% the informant tendered a notice in the *Government Gazette* of 21st May 1979 of the approval for the purposes of s80F(14) of the *Motor Car Act* 1958 of two types of apparatus. The operator was called and said the instrument bore the imprint "U.S. Pat. No. 2824789". The abbreviation "U.S." was used instead of "U.S.A.", "Pat" instead of Patent, and the abbreviation "Nov" preceded the figures, and that there were no commas or stops between the digits. The operator maintained that he had made a note recording the imprint "exactly and literally". The magistrate dismissed the charge. Upon appeal—

HELD: Order nisi discharged.
Young CJ and Lush J (O'Bryan J dissenting): The evidence showed the instrument used was not one of either of the types referred to in the notice in the *Government Gazette*.

[In the course of the proceedings in the Supreme Court the defendant sought to show the magistrate's decision was correct because the notice in the Gazette did not describe a type of apparatus. This argument was rejected by all members of the Court. An application by the informant to tender on the hearing of the review a notice of approval in the Government Gazette on 20th July, 1972 was not allowed by Young CJ and Lush J.]

YOUNG CJ and LUSH J: ... "The second of these matters is a major one. The respondent's argument was that the *Gazette* notice of 21st May 1979, did no more than describe markings or labels on an apparatus, and not the apparatus to which the markings and labels were attached. Any instrument for the ascertainment of blood alcohol by analysis of breath on which they appeared was therefore an approved instrument, regardless of what type of instrument it was.

This argument appears to have been presented only once to the Supreme Court and then unsuccessfully (*Wylie v Sewell*, unreported, Gray J, 23rd December 1981). Nevertheless, it demands consideration. It has the support of a majority decision of a full court of the Federal Court in *Gosden v Billerwell* [1980] FCA 84; (1980) 31 ALR 103; (1980) 47 FLR 357; 2 A Crim R 1. That decision ... was considered in detail by O'Brien, CJ of Cr Div of the Supreme Court of New South Wales, in *Rose v Livingstone* [1982] 1 NSWLR 299 but not applied by him to the New South Wales legislation and notices, and indeed was rejected by him.

[After referring to the differences in the notices under the ACT and Victorian law, Rose v Livingstone *and* Gosden's Case*, on the question as to what is meant by the word "type" their Honours continued.]* ... On 6th November 1981, a differently constituted Full Court of the Federal Court, in *Bradley v Armstrong*, in relation to an approval of a preliminary testing instrument, indicated that it would consider itself bound by the decision in *Gosden's Case*, but upon the terms of the approval then under consideration it came to a different conclusion. The Court observed, however, that the majority in *Gosden's Case* had not held or said that a "type" could only be described by reference to inherent or technical characteristics.

In both the Federal Court decisions to which we have referred, there are to be found expressions which indicate doubt on the part of judges on the question whether the minister in making an approval (in this State the Governor-in-Council) can properly take into consideration, in choosing his designation of a type, the ease of proof which his description will afford. In our

opinion, this doubt has no place in relation to s80F, for ... the approval given under sub-section (14) is to be the basis of evidence given on oath under sub-section (5). On any view, the evidence contemplated by sub-section (5) may include hearsay evidence, but this implication should be restricted within minimum limits, and in our opinion the combination of the two sub-sections indicates that the legislature contemplated that approvals would be given in a fashion which would enable an operator to check the instrument which he has used and to say on oath that it was an approved type. This encourages the view that designation of a type by reference to external, non-functional characteristics is appropriate to the general tenor of the section."

We turn then to the ground upon which the applicant obtained the order to review, namely that the Magistrate was wrong in dismissing the information on the ground that the description of the designation on the breathalyser did not correspond, for reasons of detail, with the descriptions of the patent in the notice of approval. An argument resting upon the same basis as the Magistrate's ruling was rejected by all three judges in *Gosden's Case* and by Murphy J in this Court in *Hill v Dunne* (unreported, 29th April 1974). In each of those cases, only one type of instrument was designated in the notice before the Court by a description which included the patent number. The strength of the applicant's argument in the present case is that the informant produced in court the notice of approval of 1979, which will be seen to contain the designation of two types, the only distinction between the types being found in the minutiae of the inscription of the patent number.

We would respectfully agree with the relevant passages in the last two decisions to which we have referred, but in the present case the evidence before the Court showed that there were two approved types distinguished only by variations in these minutiae. In these circumstances, when the informant proved and insisted upon the accuracy of a third description, the only construction which the Magistrate could give the notice of approval was that the minutiae were essential to the identification of each of the types referred to, and that accordingly the instrument described by the operator in his evidence did not fall within either of the types of approval which was proved. *Gosden's Case* and *Hill v Dunne* are distinguishable, because the courts which decided them were considering a document of approval which referred to only one type. ...

[In the course of his dissenting judgment O'Bryan J indicated that he would have allowed the informant to tender and rely upon the Government Gazette *of 20th July 1972. He said "I shall assume therefore that an instrument bearing thereon, (inter alia), the word 'Breathalyzer' and either the expression US Patent No. 2,824,789 or US Patent 2,824,789 or USA Patent No. 2,08210789 was an approved instrument for the purposes of s80F when the information was heard in the Magistrates' Court.]*

O'BRYAN J: ... The differences in markings between three of those types is of minimal significance so far as one can see. One might postulate that small differences did not warrant further gazettals unless the intention of the legislature was that only instruments bearing the identical markings to an approved type should be accepted as approved apparatus for Court purposes. ...

I am not altogether satisfied from my appreciation of s80F that the legislature intended that only instruments bearing markings identical in every respect with the markings specified in the *Gazette* from time to time were instruments as defined or approved by the Act. Sub-sections (2) and (5) relax the ordinary rules of evidence and obviate the necessity to strictly prove the instrument.

... I believe that it was not the intention of the legislature that small differences in the markings upon breathalyzer instruments would lead to the dismissal of cases such as this one. ... I would have been prepared to uphold the informant's grounds and to send the matter back to the Court below for further hearing.

[Note: The Motor Car (Breath Analysing Instruments) Act *1982 No. 9740, Proclaimed: 5.7.82 amends Section 80F of the* Motor Car Act*. Sub-section (14) now includes a description of "Breathalyzer" which is more general in application than previously. Sub-section (15A) has been added and provides for the evidence given by Breathalyzer Operators to include the expression "Breathalyzer and numerals 2824789" to be sufficient evidence when describing the apparatus used by him. Schedule 7 of the Act has been similarly amended. Acquittals of persons previously charged under 80F are not affected by this amendment.]*