49/82

SUPREME COURT OF VICTORIA

CUMMINS v DALTON

Crockett J

10 February 1982

MOTOR TRAFFIC – DRINK/DRIVING – NOTICE SERVED REQUIRING ATTENDANCE OF BREATHALYSER OPERATOR – PROOF NECESSARY THAT BREATH ANALYSING INSTRUMENT WAS OF AN APPROVED TYPE – EVIDENCE GIVEN BY OPERATOR UNSATISFACTORY IN IDENTIFYING THE INSTRUMENT USED – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F(14).

1. One of the matters required to be established as formal proof as part of the prosecution case was that the breath analysing instrument used was of an approved type. Sub-s14 of s80F of the *Motor Car Act* states that in that section "Breath analysing instrument" means "Apparatus of a type approved for the purpose of this section by the Governor-in-Council by notice published in the *Government Gazette*."

2. The operator said in evidence that the instrument used on the relevant occasion was of an approved type. However, once the matter was put in issue, the bald statement that the instrument used was of an approved type was insufficient probative effect as to enable a finding that the machine used was in fact a breath-analysing instrument as defined by the Act. The witness was unable to give any satisfactory evidence that the instrument he used was of an approved type. He gave a number which was different from the one referred to in the Order-in-Council. On the evidence, it was insufficient to allow the magistrate to find the charge proved. It is not up to the defence to call evidence to show it was not an approved machine; it can be shown through cross-examination of the witness by the defence.

CROCKETT J: The applicant was charged with having driven a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum. The charge was heard in the Magistrates' Court at Apollo Bay on 17 March 1981. Prior to the commencement of the hearing a notice in writing was given to the effect that the applicant required the person who gave the certificate referred to in Schedule 7 of the *Motor Car Act* to be called as a witness. It was that person who conducted the analysis. Following upon the analysis's taking place the original certificate, which was then completed in accordance with the provisions of the Act, was handed to the applicant. That certificate contained a number of averments. By reason of the communication's being given shortly before the commencement of the hearing, and to which I have just referred, those averments no longer had the effect of amounting to *prima facie* proof of the matters so averred. It thus became necessary for the prosecution to establish each of the matters referred to by way of averment. This was attempted by calling as a witness the person who had conducted the analysis.

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The *Government Gazette* containing the relevant description of approved breath analysing instruments was placed in evidence. The question to which some attention was given in the course of the presentation of the prosecution evidence, and which has ultimately led to this appeal, was whether the breath analysing instrument used to analyse the breath of the applicant was an instrument which was of a type approved for the purposes of the section by the Governor-in-Council. At the conclusion of the case for the prosecution a submission was made that there was a defect in the prosecution case inasmuch as there had not been sufficient proof that the Instrument used was of a type approved by the Governor-in-Council.

According to the uncontradicted evidence in this regard to be found in an affidavit sworn by the applicant the Magistrate in rejecting the submission said that the operator, that is a Senior Constable Kent had said that the instrument used by him was of an approved type, and as such a *prima facie* case had been made out it was for the defendant to call evidence to show that it was not an approved machine. The result is that the submission failed and the applicant not having given evidence or called evidence on his behalf, the case was found proved against him and a penalty imposed.

The applicant has obtained an order nisi to review the decision to convict him on a single ground which has been stated in these terms:

> "That a notice in writing having been given under Section 80F sub-section 3 of the *Motor Car Act* 1958 the Magistrate erred in finding that there was any or any sufficient evidence that the defendant's breath had been analysed by an approved breath-analysing instrument as defined in Section 80F, sub-section 14 of the said Act."

The point taken is a narrow and, indeed, technical one. Nevertheless, the point relates to an alleged deficiency of proof of an offence which is a serious one and which can attract, and in this case has attracted, a substantial penalty. The applicant is, accordingly, quite entitled to rely upon the point taken no matter how devoid of merit it might be. So, correspondingly, is the prosecution under an obligation to ensure that all proper proofs, no matter how technical, are made in a prosecution of this nature.

In an endeavour to demonstrate a deficiency in the material before the Magistrate, the applicant has in an affidavit sworn by him set out what he deposes is in substance the full testimony of the relevant witness, Senior Constable Kent. That testimony covers evidence in chief, cross-examination and re-examination. In his evidence-in-chief, he is said to have stated that the instrument used by him was of an approved type. It may be taken for the purposes of the present case that an attempt to define a breath-analysing instrument such as is referred to in s80F by prescription such as was adopted in the terms of the order of the Governor-in-Council is a valid form of definition. On that assumption it can also be taken, I think, that if the matter is not in contest it would be sufficient in order to prove that a defined breath-analysing instrument had been employed, simply to aver an oath that such instrument was one that was of an approved type as prescribed by the order of the Governor-in-Council. However, if the matter is put in issue, as it was clearly in this case, I am of the view that the bald statement that the instrument used was of an approved type is insufficient probative effect as to enable a finding that the machine used was in fact a breath-analysing instrument as defined by the Act.

During the cross-examination of the witness, according to the applicant's affidavit, the witness was shown as being not able to give any satisfactory evidence establishing that the machine he used was of an approved type. It is unnecessary to refer in full to the fairly lengthy cross-examination, but it is clear that when endeavouring to show what steps he had taken to establish that the machine was of an approved type the witness changed his ground on a number of occasions.

For present purposes it is sufficient, I think, to say that it would be adequate proof, when the matter was put to the test, of the machine used having been one of an approved type that the machine which was used was checked as to the description to be found on it so that it might be seen what its patent number was and that that patent number was checked with the patent number referred to on the Order-in-Council and found to correspond. It is not, I think, necessary for the evidence to go so far as to say what the patent number was. In fact, it apparently runs to six or eight digits, and it would be understandable that a witness would not be able to recollect what the actual numbers were, while at the same time he could recollect on the check's having been made that the numbers on the instrument did in fact correspond with those to be found in the Order-in-Council.

That such would be the appropriate way of establishing satisfactorily that the instrument used was of an approved type stems from the fact that the form of prescription to be found in the order in council is by reference to there being found upon the machine the inscription "breathalyser" followed by the patent numbers which are apparently those numbers assigned by the US Patent granted to the particular machine. In this connection reference may be made to the unreported

decision of the learned Chief Justice in *Altman v Foley* delivered on 3rd February 1975. According to the applicant's affidavit, the closest that the witness came in cross-examination to establishing the necessary proof in the way that I have mentioned is that he said he had checked the machine he had used against the *Government Gazette* and that it was the number of the machine that he had so checked. If the matter rested there that may well have been sufficient evidence to have justified the conclusion reached by the Magistrate. However, the witness was asked what the number was that he had checked, and the answer given shows that it was quite a number quite different from that which is referred to in the Order-in-Council. What I think is significant (for a reasons that will shortly be mentioned) is that the appellant's affidavit then sets out what is said to have been the re-examination of the witness by the Prosecutor, a Sergeant Thomson. In re-examination, according to that affidavit, the witness was asked whether there were any other markings on the machine to which he paid attention or placed any reliance upon "In coming to his assertion that the machine was of an approved type". The witness said that he was unable to indicate any further markings or enumeration on the breath analysing instrument.

I think it is perfectly clear that if that material alone were to be looked at that it has been shown that there was a deficiency in the evidence as it stood following the conclusion of the cross-examination and that the prosecutor was attempting to mend the defect by having the witness direct his attention to the patent number for the purpose of determining whether it was that number which had been made the object of a cross-check. Accordingly, I think that on the material to which I have made reference there was insufficient evidence for the Magistrate to have reached the conclusion that he did.

There have, however, been filed two further affidavits, one by the witness, Senior Constable Kent, and the other by the prosecutor, Sergeant Thomson. In essence the affidavit of the witness Kent gives a somewhat different account as to how the reference to the numbers that the applicant says was made came into evidence and he also swears affirmatively that he did check "all the relevant information" in the *Government Gazette* with the issued instrument and found that the requirements of the *Gazette* to make the instrument an approved instrument had been met.

If this evidence was given, then clearly enough it would have afforded ample proof of the relevant element to the charge and would thus have justified the Magistrate's conclusion to that effect. I have been asked, however, to say that I ought not to rely upon that evidence. It has been supplemented by a short affidavit sworn by Sergeant Thomson, which, I think, on analysis, really does not contradict the applicant's affidavit in any material way altogether I find it equivocal. The general rule is that an answering affidavit that supports the finding of the court below ought, where it contradicts material in affidavits filed in support, be preferred. The rule is not a mandatory one and the Court should not feel it is subject to the tyranny of any rules acting in an automatic way, so that, their it application might lead to an injustice. See *Aherne v Freeman* [1974] VicRp 17; (1974) VR 121.

On a perusal of the whole of the material, and having heard it analysed by counsel appearing for each of the parties, I am quite satisfied that the internal evidence of the affidavits themselves renders it highly improbable that the evidence given by Senior Constable Kent was as he deposes to in his answering affidavit. If he had sworn to the matters that he says in his affidavit he did swear to then it is inconceivable I think, that he would have been re-examined in the way the applicant says he was re-examined and as to which there is no suggestion in the affidavits, either of Kent or Thomson, that the witness Kent was not re- examined if the witness Kent had testified as he says he did, it seems to me to be inconceivable that the applicant's counsel would have made a submission in the terms that the applicant has sworn counsel did or that the Magistrate would have dealt with it in the terms that the applicant has sworn the Magistrate did. Yet neither Kent nor Thomson have suggested in their affidavits that any matter other than some part of the applicant's affidavit dealing with Kent's evidence is in any way in error.

Accordingly, there is no reason why I ought not to accept all of the applicant's affidavit, leaving aside for the moment that part of it dealing with Kent's evidence, as being correct. If I do that, and treating it as correct, it shows as extremely unlikely to have occurred the giving of evidence by Kent in the form that he says it was given in his affidavit. Altogether, therefore, taking the view that I do, that the material put before the Magistrate was substantially as set out in the applicant's affidavit, I think that it was unsatisfactory and fell short of establishing the ingredient

that had to he made out to the court's satisfaction beyond reasonable doubt. Even if one or two isolated passages in the evidence of the witness could be taken as suggesting that they afforded sufficient proof if looked at in isolation, it would not, I think, be right in all the circumstances, to examine them in such isolation and I do not think any reasonable court, looking at the whole of the evidence, could reach a state of mind that allowed it to be said that the matter had been proved beyond reasonable doubt.

The Magistrate, I think, appears to have fallen into error by misdirecting himself as to what it was that he had to examine in order to determine whether this question had been established beyond reasonable doubt. It was not, contrary to what he said, necessary to call evidence on the part of the defendant to establish the machine was not an approved machine. The defendant by his counsel could attempt to do that by cross-examination of witnesses called on the part of the prosecution and that, indeed, is the course that was adopted.

Although misdirection as to the relevant matters to be considered to determine whether there was a case to answer was not made one of the grounds of the grant of the order nisi, does appear to be the explanation for the error into which I am satisfied the Magistrate fell. The result is, therefore, that the Order nisi will be made absolute, the conviction and sentence in the court below will be set aside and in lieu thereof there will be entered an order of the dismissal of the information.
