14/90

SUPREME COURT OF VICTORIA

BINTING v WILSON; CLIFFORD v DAVIS

Ormiston J

9 November, 16 December 1988; 2 June, 19 December 1989

MOTOR TRAFFIC – DRINK/DRIVING – EXCESSIVE BLOOD/ALCOHOL CONCENTRATION – EVIDENCE GIVEN BY OPERATOR IN EACH CASE – STANDARD ALCOHOL SOLUTION - SLIGHTLY CHANGED WITH EACH TEST – WHETHER SUFFICIENT TO SHOW NON-COMPLIANCE WITH REGULATIONS – PROPER TEST RE COMPLIANCE – SOME FORMAL PROOFS NOT GIVEN – WHETHER LEAVE TO RE-OPEN SHOULD BE GRANTED: *ROAD SAFETY ACT* 1986, SS49(1)(f), 58(4)(5); *ROAD SAFETY (PROCEDURES) REGULATIONS* 1987, RR104, 302.

1. B. v W. B. was charged under s49(1)(f) of the *Road Safety Act* 1986 ('Act') (reading .210% BAC). The breathalyzer operator was called to give evidence and said that each time air was pumped through the standard alcohol solution (SAS) some ethyl alcohol would be lost. At the close of the prosecution case, it was submitted B. had no case to answer on the ground that the operator had not stated that the instrument used on the relevant occasion was a breathalyzer within the meaning of the definition in s3 of the Act. The magistrate granted the prosecutor's application to re-open in order to lead the necessary formal evidence. For the defence, a consulting chemist gave evidence that the SAS lost approximately 0.7 mgs of alcohol each time it was used and that after 10 standardizations the alcohol content of the SAS decreased by 1.5% approx. In finding the charge proved, the magistrate held that although the *Road Safety (Procedures) Regulations* 1987 ('Regs') were not complied with, the breathalyzer reading could not be disregarded and it would be capricious to dismiss the charge in those circumstances. Upon order nisi to review—

HELD: Order absolute. Conviction quashed.
1. In view of the magistrate's finding that the breathalyzer had not been tested with a SAS in compliance with the Regs (although such a conclusion was open to doubt in that the effect on the reading may have been mathematically insignificant) the magistrate was in error in concluding that the breathalyzer reading could not be disregarded and accordingly should have dismissed the information.

2. Whilst courts should not encourage persons to call additional evidence following an unsuccessful 'no case' submission, in the present case the magistrate was not in error in allowing the prosecutor to call further evidence.

2. C. v D. C. was charged under s49(1)(f) of the Act (.170% BAC). The operator was called, and also the consulting chemist, and as in the previous case, both witnesses gave evidence concerning the loss of ethyl alcohol from the SAS each time it was used. In finding the charge proved, the magistrate held that although the SAS did not contain the components required by the Regs, the question was whether there had been substantial compliance with the Regs and was not satisfied the operator had produced an unreliable result. Upon order nisi to review—

HELD: Order absolute. Conviction quashed.
1. Whilst minute differences concerning compliance with the requirements of the Act and Regs may in certain circumstances be overlooked, a defence will be made out if there is anything other than an insignificant departure from the prescribed standard. The test is not whether there has been substantial compliance with the Regs.

2. In view of the finding that the SAS was not as was required, the magistrate was in error in concluding that substantial compliance with the Regs was sufficient to find the charge proved. Such a finding amounted to non-compliance of a kind which amounted to proof of the defence and accordingly, the information should have been dismissed.

ORMISTON J: [*After setting out the facts of each case, His Honour continued*] … **[7]** In each case an order nisi to review the Magistrate's decision was granted on numerous grounds, but in the light of my judgment in *Bogdanovski's Case* [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257 only three matters were argued in the first case and two issues in the second.

As to the first of the issues in each case, the informant's evidence did not attempt to satisfy the requirements I referred to in *Bogdanovski's Case* as to proof that the breath analysing instrument came within the terms of the definition in s3(1) of the *Road Safety Act*, but there

was evidence, called at various stages of each case, which purported to satisfy the provisions of subss(4) and (5) of s58 of the Act. The operator's evidence **[8]** intended to satisfy paragraph (a) and subs(4) was in each case somewhat loosely expressed and arguably did not conform with what I held to be essential in *Bogdanovski's Case*: see at pp15-16 of the unreported judgment. However, each operator stated in substance that the instrument used to test the applicant's breath had written, inscribed or impressed on some portion of it or on a plate attached to it the expression "Breathalyzer" and the number or numerals 2 824 789. Thereby proof was attempted pursuant to sub-s(5) of s58 that the apparatus was a breath analysing instrument for the purposes of the Act. No submission was made that the precise language of sub-s(5) should have been employed or that any differences in the language used by the witnesses were significant.

The primary contention on behalf of each applicant was that there was "evidence to the contrary" within the meaning of the sub-section, so that the evidence of each operator was not sufficient proof in each case that the apparatus used was a breath analysing instrument. Sub-section (5) of s58 is set out in the earlier judgment (at pp12-13), but the critical part is that which provides that a statement on oath as to the prescribed elements "is, in the absence of evidence to the contrary, proof that the apparatus is a breath analysing instrument within the meaning of this Part". The argument conceded that the required averment had been made in each case, but said that as there was some evidence to the contrary, whether or not that evidence was or should have been accepted, then the evidentiary effect of the sub-section was spent and the prosecution was obliged to go into evidence to show that **[9]** the apparatus has satisfied either paragraph (a) or (b) of the definition. No authority was cited for this remarkable proposition, which would have the effect that, once the defendant has put forward any contrary evidence, however slight or unworthy of belief, the prosecution would have to call new evidence, or even seek to re-open its case, because, on this construction, the averment relating to the Breathalyzer and the patent number could no longer be relied upon.

This conclusion was said to flow from the abandonment of the expression "*prima facie*", which has had a settled interpretation and which in numerous cases has been interpreted as casting the burden on the defendant to prove the contrary. However, to say that the present sub-s(5) of s58 abandoned the expression "*prima facie*" is not precisely accurate. Sub-section (4) contains a similar provision and indeed its predecessor, s30F(5) of the *Motor Car Act* 1958 simply stated that evidence to like effect should be "*prima facie* evidence of those facts". However the direct predecessor of sub-s(5) was sub-s(15A) of s80F which stated that evidence similar to that still permitted "shall be sufficient evidence" that the apparatus satisfied the definition in the former s30F(14). Little can be gained, therefore, by a comparison of the two provisions, although one can understand why the legislature chose to alter the expression "sufficient evidence".

In my opinion the averment by each of the operators retained its validity unless and until the defence has established evidence to the contrary to the satisfaction of the Magistrate. It is not sufficient that **[10]** the defence elicits or calls contrary evidence, unless that evidence has sufficient relevance, cogency and weight to satisfy a Magistrates' Court, on the balance of probabilities, that the apparatus was not a "breath analysing instrument" as defined.

Counsel for the applicants also relied upon evidence similar to that elicited or called in *Bogdanovski's Case* to the effect that there were three items in the apparatus used to test each of the applicants' breath which differed from those described in that part of the U.S. patent specification which I have called "the preferred embodiment". If it were not apparent from the cross-examination, the consultant analytical chemist called on behalf of each applicant said that, because the three items differed in the way described, the apparatus was not a breath analysing instrument within the meaning of the definition. However, as I explained in the earlier case, the witness was addressing his mind to an irrelevant part of the specification, not the description of the apparatus contained in the claim in that patent specification. Therefore, although the Magistrate may have accepted as correct in each case what the expert had said about the breath analysing instrument, upon a proper analysis the expert's evidence was irrelevant in the sense that it was not directed to the relevant part of the specification, that is, the claim, which forms an essential part of the definition in the Act. It follows that it could not have amounted to "contrary" evidence.

The second issue raised in the matter of Binting v Wilson, but not in the other order to review, is whether **[11]** the Magistrate was wrong in allowing the informant to re-open his case to

permit the giving of formal evidence by way of averment under s58 of the Act. Reliance was placed on *R v Chin* [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495 as supporting the proposition that the prosecution should not have been allowed to re-open its case. Similar arguments were advanced in *Bogdanovski's Case*, and I referred to some of the relevant considerations in my judgment. There, however, the further evidence was called in rebuttal of the defence case. Here the evidence was called after a no case submission had been argued. There is no suggestion that the solicitor appearing for the applicant announced that he proposed to call no evidence. However, instead of dismissing the information, the learned Magistrate allowed the informant to mend his hand by calling evidence of the relevant formal matters pursuant to s58.

There is therefore a distinction to be drawn between this case and those described in the High Court judgment in *R v Chin*, in that the judgments in that case clearly refer to the discretion to allow evidence to be called after the close of the defence case. That may be seen to be a formal distinction between cases such as *Chin's Case* and the present, and I would not wish it to be thought that the prosecution is generally at liberty to call new evidence after it has closed its own case or, in particular, when a no case submission has been made out. Essentially, as Dawson J said in *Chin's Case* at p685, the question is one of fairness. One of the relevant factors there stated was the opportunity to determine what counsel for the accused may wish to ask in cross-examination, **[12]** but that factor is of great relevance in a jury trial than on a summary hearing, for in the latter case there is no obligation on the prosecution to provide depositions or statements. In cases such as the present the defendant has to anticipate all possible evidence and the question of cross-examination is not as significant.

However, both as a matter of fairness and as a matter of the proper use of court time, courts should not encourage persons to call additional evidence after the hearing of a no case submission. That being said, the question is largely one of discretion depending on the nature of the matter sought thereafter to be proved. In a sense what was omitted were purely formal proofs, such as were excepted from the general rule even in *Chin's Case* (cf. per Gibbs CJ and Wilson J at p677), but that might not be a correct characterization of the evidence in a case such as the present which depends almost entirely on formal proofs. Nevertheless the Magistrate had a discretion to allow this evidence to be called and unless this Court is satisfied that that discretion miscarried or that there has been prejudice or other manifest unfairness in its exercise, it would not be proper to allow the exercise of discretion to be overturned on review. Apart from inconvenience I can see no basis for prejudice or unfairness, for the defendant had an expert witness ready and willing to give his evidence and in no other way was it demonstrated that any unfairness was caused to the defendant. In those circumstances I am not satisfied that the learned Magistrate's direction miscarried and thus this ground relied on by the applicant has not been made out.

[13] The last ground raised for consideration on each order to review was reformulated in terms which appears as ground 3 in *Bogdanovski's Case* (at pp43-44). Essentially it claimed that in each case the solution used to test whether the breathalyzer was in proper working order had not been a "standard alcohol solution" within the meaning of regulation 105 of the *Road Safety (Procedures) Regulations* 1987 and thereby a defence had been made out under sub-section (4) of s49 of the Act that the instrument was not on each occasion in proper working order or properly operated.

In argument the applicants placed reliance upon my opinion expressed in *Bogdanovski's Case* (at p51) that proof that the requirements of regulation 320(3)(a) had not been fulfilled would be sufficient, among other matters, to establish that the breathalyzer had not been properly operated. Unfortunately the evidence in each case was confused by an interminable cross-examination of the witnesses directed largely to matters of little relevance, so that it is difficult now to understand the course of the evidence and precisely what each witness was asked. Moreover, as is not infrequent, the version of the evidence and arguments given in the affidavits is incomplete to the extent that much of it is neither consistent nor clearly set out. Doubtless the Magistrate's reasoning is likewise incomplete, for in each case it is also difficult to follow. The answering affidavits are of relatively little use. I must therefore make the best of this material, but resolving, as I am required to, any inconsistency so as to uphold the finding made below.

[14] It is necessary to deal with each separately. In Binting v Wilson the learned Magistrate's reasons, on their face, are insupportable. I doubt that he used the language ascribed to him, but

neither he nor the respondent has put in any other version. It would appear that he accepted as a matter of fact that the loss of ethyl alcohol was in the range of 1.5 percentum so that the test conducted by the operator did not satisfy the requirements of the regulations, in that the solution used did not come within the definition of a standard alcohol solution in regulation 105. It is said that he concluded his reasoning on this point by asserting that he could not disregard the breathalyzer reading "because the regulations are not complied with" and that it would be "capricious" to dismiss the information on this ground. He made reference to an earlier unreported judgment of Gray J in *Radley v Hannah*, given on 23rd December 1981, distinguishing a decision of the Full Federal Court in *Gosden v Billerwell* [1980] FCA 84; (1980) 31 ALR 103; (1980) 47 FLR 357; 2 A Crim R 1, an appeal from the Supreme Court of the Australian Capital Territory. Although the offence considered by the Federal Court was similar to that under s49(1)(f), the other statutory provisions and regulations were significantly different in form and effect.

Unfortunately also the offence with which Gray J was concerned was different from the present offence, being in respect of a charge pursuant to s81A of the *Motor Car Act* 1958, the equivalent provision to the offence pursuant to paragraph (b) of the present s49(1). More importantly neither legislative scheme considered in those decisions had a provision similar to sub-section (4) of s49. That **[15]** subsection, although reversing the onus of proof provides a defence if it can be shown that the breathalyzer used was not then "in proper working order or properly operated".

Gray J's observations, which I have no reason to doubt, were not directed to such a provision, but to the method of proving an offence of having in excess of the prescribed percentage of alcohol in a person's blood. What Gray J said was thus irrelevant to a case were the statutory provision recognizes a defence based upon proof of improper operation. Moreover, for this and other purposes, regulation 302(3)(a) lays down one of the "requirements" for that proper operation, namely ascertaining that the breathalyzer is in proper working order by testing it with a standard alcohol solution.

It was to establish that this particular breathalyser was not in proper working order that some of the cross-examination and other evidence was directed. It was argued that the loss of ethyl alcohol was as minimal as it was in *Bogdanovski's Case* but, although the matter was stated to be unnecessary for my ultimate decision, my tentative finding in that case was to the effect that the defence was not made out and the evidence on the issue was minimal.

In the present case I am by no means happy about the state of the evidence, but the matter was tackled in a number of ways which appeared to demonstrate a concession on the part of the operator in relation to testing the machine. Further I believe it implicit in the learned Magistrate's findings that he accepted that the breathalyzer had not been tested with a standard alcohol **[16]** solution and thereby the regulation had not been complied with. In these circumstances his conclusion that he could not "disregard" the breathalyser reading was wrong and inconsistent with the scheme of the legislation, so that he should have dismissed the information. Although I have some doubts as to whether his factual conclusions were correct, in that the effect on the reading may have been mathematically insignificant, his apparent conclusion was open to him on the facts and this Court cannot retry such an issue upon review.

In Clifford v Davis the evidence presented a similar picture, a number of confused admissions being made by the operator in cross-examination. The learned Magistrate reached not dissimilar conclusions on the facts, but did not misunderstand the case law, correctly refusing to follow *Gosden v Billerwell*. However, because of his view that strict compliance with regulation 302(3)(a) was impossible, he concluded that all that the regulation required was "substantial compliance". The latter expression he explained by saying that "unless it can be shown that the actions of the operator have produced an unreliable result" there had been "substantial compliance" with the regulations.

Again I am faced with a factual conclusion: "The standard alcohol solution used was not as is required in its components". I doubt that there was little more basis for this conclusion than in *Bogdanovski's Case*, but again the evidence is more detailed and the operator's concession more explicit. Thus it is not appropriate on an order to review for this Court to conclude that there was no **[17]** evidence to support the Magistrate's finding. However I cannot accept that the test is whether there has been substantial compliance with the regulations, at least in the way

the learned Magistrate expressed it. It is one thing to conclude that the difference between the prescribed contents and that of the actual solution is minimal or insignificant, but it is another to apply a general rule that the defendant must establish that the alteration would have produced an unreliable result.

I have already said in *Bogdanovski's Case* (at p51) that the object of the requirements of the Act and the regulations is that those matters prescribed by the regulations should be observed. It would be unreasonable to read down those requirements by insisting only on some indefinable lesser standard, namely substantial compliance, for that would be to disregard the language of the Act and the regulations. Again I emphasize that minute differences may in certain circumstances be overlooked, but if there is anything other than an insignificant departure from the prescribed standard, then the defence will be made out under s49(4). Having regard to his factual findings the learned Magistrate could, as I read the evidence, only have found non-compliance of a kind which amounted to proof of the relevant defence. He should therefore have dismissed the information on this amended ground.

For these reasons both orders to review should be made absolute and the convictions below quashed. For reasons to which I adverted in *Bogdanovski's Case* I am prepared to order each respondent pay to each respective **[18]** applicant only three quarters of the costs of and incidental to this application.

APPEARANCES: For the applicants Binting and Clifford: Mr R Gillard QC with Mr S Gillespie-Jones, counsel. RC Sheen, solicitor. For the respondents Wilson and Davis: Dr RA Sundberg QC with Mr MJ Colbran, counsel. Gordon Lewis, Victorian Government Solicitor.
