24/75

SUPREME COURT OF VICTORIA

HOUSTON v HARWOOD

Gowans J

7, 8 May 1975 — [1975] VicRp 69; [1975] VR 698

MOTOR TRAFFIC – DRINK/DRIVING – EXCEED .05% – FAIL TO COMPLY WITH A RED TRAFFIC CONTROL SIGNAL – AT HEARING COPY CERTIFICATE OF ANALYST TENDERED IN EVIDENCE – CERTIFICATE SHOWED THAT NAME OF DEFENDANT MISSPELT – 'HOWARD' INSTEAD OF 'HARWOOD' – WHETHER CERTIFICATE WAS "IN OR TO THE EFFECT OF" THE FORM PRESCRIBED – SUBMISSION OF 'NO CASE' UPHELD IN RELATION TO DRINK/DRIVING MATTER – DEFENDANT CONVICTED IN RELATION TO RED LIGHT MATTER – WHETHER MAGISTRATE IN ERROR IN DISMISSING INFORMATION: *MOTOR CAR ACT* 1958, S81A.

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination in accordance with the law.

1. There was not to be found in s80F(2) of the *Motor Car Act* 1958 or elsewhere a requirement that the name attributed to the person referred to in the certificate as the subject of the analysis must have coincided with some particular established name, or any implication that a certificate which stated a name which did not so coincide was not "in or to the effect of" the schedule. In regard to this matter, it was with the nature of the matter set out and its form, and not the truth or accuracy of what is set out, that the requirement is concerned.

2. The certificate in the present case was admissible and *prima facie* evidence of what it stated. But what it stated was that a person, bearing the name Georgina Maria Howard, of Flat 6, 31 Black Street, Brighton, had had a sample of her breath analysed at the specified time and place with the specified results. But the evidence of the informant was that it was the defendant, about whose driving he had given evidence, who, at that time and place stated in the copy certificate, had had a sample of her breath taken by the operator, who had filled out and signed the Schedule Seven certificate of which he himself had produced a copy, and that it was she to whom the original certificate had been handed by the operator.

3. The magistrate found, on the other information, that the person about whose driving the informant had given evidence was, in fact, the defendant who was charged in the information as Georgina Maria Harwood of Flat 6, 31 Black Street, Brighton.

4. In view of that material, the evidence was all one way to the effect that the person referred to in the certificate as "Georgina Maria Howard" was the defendant, Georgina Maria Harwood, and that the matters set out in the certificate referred to her and to a test taken on her breath. Accordingly, the magistrate could not refuse to act on that view for the purpose of determining the submission that there was no case to answer.

GOWANS J: This is the return of an order nisi to review an order of the Magistrates' Court at Melbourne, dismissing an information charging a woman defendant with driving a motor car while the percentage of alcohol in her blood exceeded .05 per cent, contrary to s81A of the *Motor Car Act* 1958.

The circumstances are not in dispute. According to evidence given at the hearing of the information at the Magistrates' Court at Melbourne on 8 October 1974, by the informant, Constable Denis Osborne Houston, he was on patrol at the intersection of Bourke and King Streets, Melbourne, at 10.15 p.m. on Saturday, 22 June 1974, when he saw a car driven north in King Street and east into Latrobe Street and again north in Elizabeth Street and then east again into Franklin Street, in a manner which led to his intercepting the car in Franklin Street. The driver gave her name as Georgina Harwood and her address as Flat 6, 31 Black Street, Brighton, and she produced her licence. According to the evidence she was the defendant, Georgina Maria Harwood. The constable's observations led her accompanying him to the Bourke Street West Police Station.

Subsequently, there were two informations directed against the defendant, one was of failing to comply with a red light traffic control signal, the other was of driving a motor-car with a percentage of alcohol in the blood which exceeded .05 per cent. The two informations were heard together.

At the police station to which the defendant was taken she furnished a sample of her breath by means of a breathalyser pursuant to s80F(6) of the *Motor Car Act* 1958 to one Senior Constable Jacobs, the operator of the instrument. The latter purported to sign and deliver to the defendant a certificate pursuant to s80F(2). So far as concerns the latter information the relevant provisions of the Act are as follows:–

> "80F.(1) Where the question whether any person was or was not under the influence of intoxicating liquor or where the question as to the percentage of alcohol in the blood of any person at the time of an alleged offence is relevant— ... ...
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> (c) upon any hearing for an offence against ... s81A or ... then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the percentage of alcohol indicated to be present in the blood of that person by a breath-analysing instrument operated by a person authorised in that behalf by the Chief Commissioner of Police and the percentage of alcohol so indicated shall subject to compliance with the provisions of subs(2) be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument;
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> "(2) As soon as practicable after a sample of a person's breath is analysed by means of a breath-analysing instrument the person operating the instrument shall sign and deliver to the person whose breath has been analysed a certificate in or to the effect of Schedule Seven of the percentage of alcohol indicated by the analysis to be present in his blood (which may be by way of an indication on a scale) and of the date and time at which the analysis was made;
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> "(3) A document purporting to be a copy of any certificate given in accordance with the provisions of subs(2) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath-analysing instruments shall be prima facie evidence in any proceedings referred to in subs(1) of the facts and matters stated therein unless the accused person gives notice in writing to the informant a reasonable time in the circumstances before the hearing that he requires the person giving the certificate to be called as a witness."

The copy certificate held by the informant was put in evidence in the course of the informant's case. The informant gave further evidence that after the original of the certificate had been handed to the defendant a conversation took place between himself and the defendant as follows: "I said, 'What is your reason for driving a motor car whilst you have a blood alcohol content in excess of .05 per cent?' She said, "I love my car and wouldn't drive if I thought I was not capable, besides I must think of my job because I'm a driver.' I said, 'From my observations of your driving whereby you failed to stop at a red light situated at the intersection of Elizabeth and Franklin Streets, plus driving your car whilst exceeding .05 per cent blood alcohol content, these matters will be reported. Do you understand?' She said, 'Yes'. I said, 'Do you wish to make a written statement?' She said, 'No'."

No other evidence than that of the informant was given for the prosecution. Counsel for the defendant then submitted that there was no case to answer with reference to the information relating to the percentage of alcohol in the blood as the name set out in the certificate did not accord with that of the defendant. The copy certificate so far as relevant read:

> "I, Frederick Robert Jacobs of Breath Analysis Section, Constable of Police, hereby certify—
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> "1... 2. That on the 22nd day of June, 1974, at 11.55 p.m. at Bourke Street West Police Station I did analyse a sample of the breath of Georgina Maria Howard of Flat 6, 31 Black Street, Brighton, by means of a breath analysing instrument; 3... 4. That the said instrument indicated that the quantity of alcohol present in the blood of the said Georgina Maria Howard at the time and place referred to was 0.140 grams of alcohol per 100 millilitres of blood which expressed as a percentage, is 0.140 per centum; and
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> "5. That as soon as practicable after the completion of the breath analysis namely at 12.10 a.m. on the next day I delivered this certificate to the said Georgina Maria Howard in accordance with the provisions of subs(2) of the said S80F "Dated this 23rd day of June 1974." And then followed the signature over the words "Signature of Authorized Operator."

The information laid against the defendant was in the name of Georgina Maria Harwood of Flat 6, 31 Black Street, Brighton.

The basis for the contention that the difference in the names led to there being no case to answer does not appear from the material. The stipendiary magistrate dismissed the information relating to driving with an excess percentage of alcohol but convicted the defendant of disregarding the red light. It therefore appears that he was satisfied that the defendant was the driver concerned. But his reasons for the dismissal of the other information are obscure. He is said to have stated that the difference in the names could not have been the result of a mis-spelling and he presumably regarded the name in the certificate as a different name from that of the defendant. He said that he considered that the police might have the wrong person or the wrong certificate.

The grounds of the order nisi are as follows:–

> "1. That on the evidence the learned Stipendiary Magistrate was bound to find that the details contained in the Breath Analysis Certificate tendered to him related to the Defendant, Georgina Maria Harwood and to the analysis of the Defendant's breath referred to in the said Affidavit of the informant;
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> "2. That having regard to the evidence of the informant, and to the matters contained in the said Breath Analysis Certificate, the learned Stipendiary Magistrate ought not to have dismissed the information."

These grounds may conveniently be taken in the reverse order, ground No. 2 being taken first. In relation to this ground the point taken by the respondent/defendant is that there were no matters contained in the copy certificate to which the stipendiary magistrate could have regard because the certificate, of which the document tendered purported to be a copy, was not one given in accordance with the provisions of s80F(2) and therefore, the copy document was of no evidentiary value pursuant to s80F(3). The reason relied on was that it was not a certificate "in or to the effect of Schedule Seven".

The point is like that dealt with by Menhennitt J in *Wesson v Jennings* [1971] VicRp 9; [1971] VR 83. But the circumstances there were that the words "which expressed as a percentage is...per centum" were left with the blank unfilled although preceded by a statement of a specified number of grams of alcohol per 100 millilitres of blood.

It was held that the incomplete statement, if filled in, would only have been a repetition, of an obvious nature, of what preceded it, and that the certificate was not thereby deficient.

The question here is whether a certificate which states that a sample has been taken by means of a breath analysis instrument of the breath of a person bearing a particular name, and that it indicated a specified quantity of alcohol in the blood of that person, is a certificate which is "in or to the effect of" a form of certificate as to the percentage of alcohol indicated to be present in the blood of a person whose breath has been analysed, if the particular name set out in the certificate is different from the established name of the person whose breath has been analysed.

It was submitted that the answer to this question must be that such a certificate is not "in or to the effect of" the form, unless, perhaps, the departure from the established name of the person whose breath is tested is to be dismissed as minimal in the process of identification. It may be accepted that when the surname of a person is stated as "Howard" instead of "Harwood", even though in each case it be in association with first names and addresses which do coincide, there is, having regard to the major part which is played by surnames in the process of identification by names, a divergence which cannot be dismissed as minimal. But the basic question is whether such a departure, in a certificate, from the established name of the person whose breath is tested, means that the certificate is not "in or to the effect of" the schedule.

The careful and useful arguments which have been presented have ranged over a much wider area, testing out a number of questions as to what may be left out of a certificate or mis-stated in a certificate without running counter to the requirements of s80F(2). But many of these questions do not directly arise. The only question is whether a certificate which, in fact, sets out the percentage of alcohol indicated by the analysis to be present in the blood of a person stated to

have had a sample of his breath analysed, and sets out the date and time at which the analysis is made, and is otherwise complete on its face, can be said to fail to comply with the requirement of s80F(2), that it is to be "in or to the effect of Schedule Seven", on account of its attributing to the person whose breath is said to have been analysed a name other than that which is established to be his.

The answer to that question is not to be found by resort to such an observation as was made by Gillard J in *Wiggins v Tainsh* [1973] VicRp 23; [1973] VR 245 at p247, that "this form is part of the legislative framework", for at the same time, that learned Judge said:

> "There are several matters that the operator must attend to. He must use a form in or to the effect of the prescribed form....The form in Schedule Seven commences with a name and description of the person certifying it, and then proceeds to certify a number of various facts, namely...(2) At a specified time and date the operator analysed a sample of breath of a named person by means of a breath analysing instrument..."

After careful consideration, during which my mind has vacillated at times, I have come to the conclusion that there is not to be found in s80F(2) or elsewhere a requirement that the name attributed to the person referred to in the certificate as the subject of the analysis must coincide with some particular established name, or any implication that a certificate which states a name which does not so coincide is not "in or to the effect of" the schedule.

In regard to this matter, it is with the nature of the matter set out and its form, and not the truth or accuracy of what is set out, that the requirement is concerned. It was that kind of distinction which McArthur J had in mind when, in *Putz v The Registrar of Titles* [1928] VicLawRp 52; [1928] VLR 348; 34 ALR 224; 49 ALT 237, the Full Court having under consideration s121 of the *Transfer of Land Act* 1915, he said, at p359:

> "It may be said that in the building society cases the certificate lodged with the transfer is a notification to the Registrar that the consideration stated in the transfer is not the true consideration, and that therefore the Registrar ought not to register the transfer. But the answer to that, I think, is that the transfer is in the form in the Seventh Schedule, and, that being so, it comes under and is in strict compliance with the first part of s121, and for that reason it is no concern of the Registrar whether the consideration is truly stated or not. It is only when the transfer is not in the form of the Seventh Schedule that it becomes necessary to consider whether that consideration is truly stated or not."

That last observation is a reference to the terms of s121.

I feel the more comfortable in coming to the conclusion I have expressed because it was the position which appears to have been reached by Pape J in *Clements v Bretlove* (unreported, 22 February 1972) in a case not distinguishable from the present, where the certificate showed the name "Herbert George Bretlove" when the defendant's name was "Herbert George Pretlove". In his judgment, his Honour said:

> "Subs(2) provides that the certificate shall state the percentage of alcohol indicated by the analysis to be present in the blood and the date in time at which the analysis was made. These matters are essential to the validity of the certificate and were clearly set out in the certificate, but the sub-section also requires the certificate to be in or to the effect of Schedule 7A to the Act, and provision is made in the form in the Schedule for the name and address of the person whose breath was analysed. I am of opinion that the certificate was in or to the effect of Schedule 7A..."

As I read these remarks they did not depend upon any view that the difference in the names was minimal. That remark appearing later in the judgment appears to be addressed to a different issue.

I do not think that this conclusion should be rejected because of the dire consequences of giving erroneous matter an evidentiary value. The statute only makes the matter in the certificate *prima facie* evidence. It would be curious, I think, that it should be given the effect of *prima facie* evidence if the true consequence of mistakes in the matter set out were that it was inoperative and ineffective as evidence at all.

I therefore conclude that the certificate in the present case was admissible and *prima facie*

evidence of what it stated. But what it stated was that a person, bearing the name Georgina Maria Howard, of Flat 6, 31 Black Street, Brighton, had had a sample of her breath analysed at the specified time and place with the specified results. But the evidence of the informant was that it was the defendant, about whose driving he had given evidence, who, at that time and place stated in the copy certificate, had had a sample of her breath taken by the operator, who had filled out and signed the Schedule Seven certificate of which he himself had produced a copy, and that it was she to whom the original certificate had been handed by the operator.

The magistrate found, on the other information, that the person about whose driving the informant had given evidence was, in fact, the defendant who was charged in the information as Georgina Maria Harwood of Flat 6, 31 Black Street, Brighton.

In view of that material, in my opinion, the evidence was all one way to the effect that the person referred to in the certificate as "Georgina Maria Howard" was the defendant, Georgina Maria Harwood, and that the matters set out in the certificate referred to her and to a test taken on her breath. I share the view expressed by Pape J in the case cited, with respect to a similar situation, as to the possibility of the fact being otherwise. In my opinion, the magistrate could not refuse to act on that view for the purpose of determining the submission that there was no case to answer. As was said by the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at p658; [1955] HCA 38; [1954] ALR 671,

> "When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether, on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law."

On the material before him, it was not open to the magistrate to decide that question against the informant. It was submitted that the magistrate may have been determining the ultimate question of guilt and that he was entitled to entertain a reasonable doubt as to whether the test and the certificate related to the defendant. On the material adduced before this Court in the affidavit filed this was not the question raised by the submission, and it is therefore unnecessary to determine whether such a view was open on the evidence. It follows that ground 2 is made out, and, incidentally, so is ground 1.

As the defendant had not indicated whether she wished to go into evidence or not, the matter must go back. The order nisi will be made absolute. The order dismissing the information will be set aside and the information remitted to the Magistrates' Court at Melbourne to be determined in accordance with law. Since the trouble arose out of the filling in of the certificate, with a substantial error in the name, I make no order for costs. Orders accordingly.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: Campbell and Shaw.
