

46/74

SUPREME COURT OF VICTORIA

HILL v DUNN; VICK v MARTIN; BARRY v WALKER

Murphy J

29 April 1974

MOTOR TRAFFIC – DRINK/DRIVING – BREATHALYZER USED – SUBMITTED THAT THE EVIDENCE OF THE PATENT NUMBER ON THE BREATHALYZER USED WAS DIFFERENT FROM APPARATUS APPROVED BY NOTICE PUBLISHED IN THE GOVERNMENT GAZETTE – THE LETTERS "No." NOT GIVEN IN EVIDENCE – SUBMISSION UPHeld BY MAGISTRATES – CHARGES DISMISSED – WHETHER MAGISTRATES IN ERROR: MOTOR CAR ACT 1958, S81A.

HELD: Orders nisi in each case made absolute. Dismissals set aside.

1. The submission made in the Magistrates' Court was without substance and ought not to have been upheld. The expression "U.S. Patent No. 2,824,789" which was set out and described as an expression in the notice published in the *Government Gazette* would, when read over to oneself or aloud, be read as though the letters "No." in fact read "number". It was clear that the only reasonable meaning of these letters appearing in the *Gazette* was that they were an abbreviation of the ablative of the Latin "numerus", namely "numero", and meaning "by number", or "with the number", or "in number". It would not be necessary for the tribunal to know the derivation, but the tribunal ought to have found that the letters "No." appearing in the notice were an abbreviation, and as such merely denoted a change from words to figures. Their presence or absence added nothing to the meaning or intent of the expression.

2. In relation to the submission that the Regulations were *ultra vires*, no contrary intention appeared in the *Motor Car Act* and the regulations in question were passed after the passing of Act 8143, although before it came into operation. The power to make the regulations was exercised because it was "necessary or expedient for the purpose of bringing the act into operation at the date of the commencement thereof". The regulations came into operation when the Act came into operation and not before it did so.

MURPHY J: These three orders nisi came on for hearing before me, and by consent they were heard together. Each involved a similar point of construction. In each case the defendant in the Magistrates' Court had been charged with an offence against s81A of the *Motor Car Act*, namely of driving a motor car whilst the percentage of alcohol in his blood exceeded .05 per centum. In each case the submission by defence counsel of no case to answer succeeded on the completion of the informant's case.

The submission in each case was that as the evidence established that the breath analyzing instrument used to analyse the defendant's breath had the word "Breathalyzer", and the further words and figures, "U.S. Patent 2,824,789", appearing on it, it was not shown to be a type of apparatus approved as a breath analyzing instrument by notice published in the *Government Gazette* No. 60 of July 20th, 1972.

The said notice insofar so relevant reads as follows: -

"Approved breath analysing instruments.

Pursuant to the provisions of sub-section (14) of section 80F of the *Motor Car Act* 1958, His Excellency the Lieutenant-Governor of the State of Victoria in the Commonwealth of Australia, by and with the advice of the Executive Council of the said State, doth hereby approve for the purpose of the said section 80F, of apparatus of the types described hereunder for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood.

Types of apparatus.

1. Instrument for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood and bearing thereon (*inter alia*) the word "Breathalyzer" and the expression "U.S. Patent

No. 2,824,789."

2. Instrument for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood and bearing thereon (*inter alia*) the word "Breathalyzer" and the expression "Made in U.S.A. by Rex Metal-Craft, Inc., Indianapolis, Ind., Serial No. BDF 342-G".

The difference between the words and the numbers appearing in type 1 of the types of apparatus specified in the notice, and the words and numbers (according to the evidence) appearing on the instrument in fact used to analyse the defendant's breath in each case was that the letters "No." appeared in the notice before the figures 2,824,789 but they did not appear on the instrument in fact used by the deponent.

In my opinion the submission made in the Magistrates' Court is without substance and ought not to have been upheld. The expression "U.S. Patent No. 2,824,789" which is set out and described as an expression in the notice published in the *Government Gazette* would, when read over to oneself or aloud, be read as though the letters "No." in fact read "number". It is clear to me that the only reasonable meaning of these letters appearing in the *Gazette* is that they are an abbreviation of the ablative of the Latin "numerus", namely "numero", and meaning "by number", or "with the number", or "in number". It would not be necessary for the tribunal to know the derivation, but it seems to me that the tribunal ought to have found that the letters "No." appearing in the notice were an abbreviation, and as such merely denoted a change from words to figures. Their presence or absence add nothing to the meaning or intent of the expression. In the same way, the presence or absence of a comma, though of similar import, would appear to me to be irrelevant. Similarly the use of capitals instead of small letters, or vice versa, would appear to me to be irrelevant.

The Magistrate presumably held that the machine described by the deponent in the Magistrates' Court as having been used to analyze the defendant's breath was not "an apparatus of the types described hereunder", as set out in the *Government Gazette*. He must have held in each case that this was so on the basis that, although it was identical in all other respects it did not have the letters "No." preceding the figures appearing as a patent number.

In my view, he was wrong as a matter of law in so holding. An instrument for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood and bearing thereon the word "Breathalyzer", and the expression, "U.S. Patent 2,824,789" is in my opinion, an instrument of the type described in the notice published in *Government Gazette* No. 66 of July 20, 1972. In my view it would not be open to find otherwise.

In *Wiley v Nicholson* [1973] VicRp 58; [1973] VR 596 at 603, McInerney J said:

"The instrument approved in para 1 of that approval was an instrument with the name "Breathalyzer", and appearing thereon the expression "U.S. patent No. 282789" from which it may be inferred that the instrument was the subject of letters patent granted in the U.S.A and bearing that number."

I agree with His Honour. It will be immediately apparent to anyone reading the report of that decision as set out in the *Victorian Reports* that according to the report His Honour substituted the word "name" for the word "word", as it appears in the notice, and that in the expression as it is set out in the *Victorian Reports* the word "patent" appears with a small letter "p" instead of a capital "P". Moreover, there are no commas appearing in the *Victorian report* after the figures "2" where first appearing and "4", although of course, they do appear in the notice in the *Gazette*. These types of discrepancies are, in my opinion, of a similar nature to the omission of the letters "No.". It is nonetheless the same "expression", and the instrument described is nonetheless of the type described in the notice.

It is to be noted that the opening paragraph of the *Government Gazette* merely describes the type of machine, and not any particular machine. The Magistrates' Courts each appear to have looked rather to find an identity in the words and figures appearing on the instrument used and the instrument described in the notice, than to see if the instrument used, according to the evidence, was of the type described in the notice.

I agree with Mr Tadgell's submission that the Magistrate should have looked at the totality

of the evidence as given by the deponent and as contained in the *Gazette*, and then asked himself whether that evidence satisfied him that the instrument used was of the type approved in the notice. Had he done so he could not have come to any conclusion other than that he was satisfied, and s80F(5) would then have given the deponent's hearsay evidence, the statutory imprimatur of *prima facie* evidence of the facts referred to therein. I agree also that the evidence given in cross-examination confirmed rather than weakened the evidence given in examination-in-chief.

The Magistrate's ruling that there was no case to answer could not then be sustained – see *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671.

Mr Redlich, who appeared to show cause in each case also submitted before me that the *Motor Car (Blood and Breath Samples) Regulations* 1971, as contained in statutory rule No 169 of 1971 were *ultra vires*. He submitted that as a consequence, when the deponent stated that "in relation to the breath analysing instrument all regulations made under section s80F had been complied with", he was stating an untruth, and the Magistrate would accordingly be entitled to reject or question the balance of his evidence.

He submitted that this would at least entitle the Magistrate to say that he was not satisfied beyond all reasonable doubt of the guilt of the defendant: (See *Benney v Dowling* [1959] VicRp 41; [1959] VR 237; [1959] ALR 644). It appears clear from the affidavits that, in each of the cases in question here, the Magistrate was not doubting the evidence given as to readings or as to driving or as to any other matter. Each decision was given because the Magistrate was persuaded by defence counsel's submission that the absence of the letters "No." on the instrument used to analyse the defendant's breath prevented it from being an "approved breath analysing instrument".

It appears also that the tactic adopted by counsel for the defendant of eliciting information, albeit irrelevant in all cases and also hearsay in the case of Martin that a subsequent notice published in the *Government Gazette* of 26th September 1973 omitted the offending letters "No." had the effect of persuading the Magistrate that the Crown recognised that it had made a fatal error in the notice published in the earlier *Gazette*.

In my view, it is immaterial whether the regulations were *ultra vires* or not; they had no bearing on the case in so far as it went. It was not submitted that the *prima facie* character of the evidence as to the matters deposed to and set out in s80F ss5 sub-paragraphs (i) and (ii) would be affected in any way by the failure to comply with any regulations or, indeed, by the absence through invalidity of any regulations.

What was submitted was that, as the regulations contained in Statutory Rule No. 169 were passed on the 27th July 1971 and s80F only came into operation on the 1st August 1971 (when Act No, 8143 also came into operation), the regulations preceded the Act enabling them.

It was, therefore, submitted that the regulations concerning breath samples (Regulations 225 to 228) could not be sustained by reference to s93 ss1 sub-paragraph (p) (contrast *Reddy v Ross* [1973] VicRp 46; [1973] VR 462 at p468 line 40), and that they must be held to be *ultra vires*. Mr Redlich submitted that it did not appear, from the report of *Reddy v Ross* (*supra*) that Mr Justice McInerney's attention had been drawn to the fact that the regulations were passed before Act 8143 (which also contained s80E).

The *Acts Interpretation Act* 1958 s5 ss1 contains the following provision:

"Where an Act passed on or after the first day of August 1890, whether before or after the commencement of this Act, is not to come into operation immediately on the passing thereof and confers power to make any appointment to make grant or issue any instruments that is to say any order in council order warrant scheme letters patent rules regulations or by-laws to give notices to prescribe forms or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of commencement thereof, subject to this restriction. that any instrument made under the power shall not, unless the contrary intention appears in the Act or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation."

In my opinion, no contrary intention appears in the *Motor Car Act* and the regulations in question were passed after the passing of Act 8143, although before it came into operation. The power to make the regulations was, in my view, exercised because it was "necessary or expedient for the purpose of bringing the act into operation at the date of the commencement thereof". The regulations came into operation when the Act came into operation and not before it did so.

This, in my view, is the effect of s5 of the *Acts Interpretation Act* as applied to the *Motor Car (Blood and Breath samples) Regulations 1971*. The regulations themselves contain in Clause 1, sub-clause 1 of Statutory Rule No. 1969, the statement that they "shall come into operation on the first day of August 1971", that is to say on the same day as the Act itself in fact came into operation.

I am confirmed in my view of this matter by the reasoning of the Court of Appeal in *R v The Minister of Town and Country Planning; ex parte Montague Burton Ltd and Ors* (1951) 1 KB 1 to which Mr Redlich properly referred me in the course of his interesting argument. The directions in question in that case were considered as "machinery" and Lord Justice Asquith said of the argument which was advanced which was not dissimilar to that advanced in the instant case,

"He ..." (referring to defence counsel) "... appeared to submit that nothing could be 'necessary or expedient' for this purpose except such an act as fixing the appointed day itself. I cannot agree that the words should receive such a restrictive interpretation. It seems to me that the preservation of the applications made under the Act of 1944 was necessary and expedient for the purpose of giving the Act of 1947 material upon which to operate and that this is enough to satisfy the words 'for the purpose of bringing the Act into operation'."

To similar effect is the decision of the Court of Appeal in *Usher v Barlow* (1952) Ch 255; (1952) 69 RPC 27. In my view, this contention with relation to the regulations made on behalf of the defence in this case, in showing cause, also fails. The orders nisi in each case will be made absolute.
