22/84

SUPREME COURT OF VICTORIA

OBEID v BURROWS

Crockett J

1 May 1984

MOTOR TRAFFIC – REFUSAL TO TAKE BREATH TEST – REQUIREMENT THAT AUTHORISED OPERATOR WAIT 15 MINUTES BEFORE REQUESTING PERSON TO UNDERGO TEST – DEFENDANT UNDER PERSONAL OBSERVATION OF OPERATOR FOR 11 MINUTES – DEFENDANT IN POLICE CUSTODY FOR PERIOD IN EXCESS OF 15 MINUTES – WHETHER OPERATOR REACHED NECESSARY STATE OF SATISFACTION: *MOTOR CAR ACT* 1958, S80F(11).

Reg 227 of the *Motor Car Regulations* 1966 provides:

> "An authorised operator shall not require any person to undertake a breath analysis until he is satisfied that such person has not consumed any intoxicating liquor for a period of at least 15 minutes prior to the analysis."

At 1.00 a.m., B. was intercepted driving a motor vehicle. He underwent a preliminary breath test – which proved positive – and was taken to a Police Station where, at 2.00 a.m., he was introduced to an authorised operator. When required by the operator at 2.11 a.m. to undergo a breath analysis, B. refused. At the subsequent hearing, the authorised operator gave evidence that he had satisfied himself that for at least 15 minutes before making the formal demand, B. had not consumed any intoxicating liquor. B. did not contradict this evidence; however, the Magistrate accepted that the operator did not "wait for the 15 minutes prior to the demand being made" and dismissed the charge. On order nisi to review—

HELD: Order absolute.
(1) The satisfaction which the authorised operator is required to possess under Regulation 227 need not be derived from evidentiary sources admissible in a court of law. It is enough for the operator to satisfy himself from such enquiries as it is proper for him to make in all of the circumstances.

(2) Without deciding whether the Prosecution had to prove compliance with Regulation 227, it was clear on the evidence, that B. had been in police custody in excess of 15 minutes.

(3) Accordingly the only reasonable finding of fact was that the authorised operator had a well-founded state of satisfaction that B. had not consumed any intoxicating liquor during the relevant period, and it followed that B. should have been convicted.

CROCKETT J: *[After setting out the facts of the case and the grounds of the order nisi, His Honour continued]:* ... **[5]** The first ground upon which the Order Nisi has been granted rests upon the contention that, in the circumstances, the prosecution did not have to prove **[6]** compliance with that particular Regulation in order to sustain the conviction which it was seeking. It was said by Counsel for the applicant that there is a number of authorities in support of that proposition. However, I find it unnecessary to consider them. In my view it is clear that the second ground is made out and for that reason the Order Nisi will have to be made absolute. Because of the firm view I have formed that the applicant must succeed on the second ground, I find it unnecessary to say anything concerning the first and, accordingly, I expressly abstain from doing so.

It is perfectly clear that the evidence as to Arnott's (the authorised operator) satisfaction that the respondent had not consumed any intoxicating liquor for a period of at least 15 minutes prior to his being asked to furnish a sample of his breath for analysis was all one way. Furthermore, it is obvious that his state of satisfaction, if he was to be believed (and there was no suggestion he was not a credible witness), was well-founded. For eleven of the fifteen minutes, the respondent had been in the company of Arnott himself so that Arnott could, in that time, see for himself that the respondent had not consumed any intoxicating liquor. As far as the remaining four minutes are concerned, it would have to be obvious that the respondent was in the custody of the applicant for a period well in excess of those four minutes as at whatever the time it was that the respondent was **[7]** intercepted by the applicant, the time taken for the interrogations at the

point of interception and also at the police station and the trip to the police station would have taken far in excess of four minutes. It was reasonable for Arnott to have enquired as to the time during which the respondent had been in the applicant's custody and whether or not, in that time, the respondent had consumed intoxicating liquor and for Arnott to be given an answer to the effect that the time in question was in excess of four minutes and that, during that time, no intoxicating liquor had been consumed by the respondent. Arnott could not have satisfied himself in any other way about that question in order to have had the necessary degree of satisfaction for the requisite period of the full 15 minutes. In the circumstances for such an inference to be drawn in favour of Arnott's gaining in such a way the necessary knowledge for him to have the relevant state of satisfaction, was irresistibly required by the evidence. That requirement that the inference be drawn was all the greater when the respondent, legally represented as he was, chose not to testify in relation to this matter. Indeed, that such was the conclusion to be arrived at would appear to be so plain that on the face of it, it is difficult to understand the Magistrate's ruling in the terms to which I have already referred.

Although it does not expressly appear so in the **[8]** material before me, Counsel appearing for the applicant has suggested that the explanation for the Magistrate's decision was that the debate before him turned on the question as to whether Arnott's state of satisfaction as required by the Regulation had to be satisfaction based upon personal knowledge. If it did, then, of course, Arnott would have had to wait a further four minutes so that he could have said that he was satisfied, from personal observation, that the respondent had not consumed any intoxicating liquor for at least 15 minutes before being asked to submit a sample of his breath for analysis.

The terms in which the Magistrate expressed himself suggest that this was the question with which he was concerned. Lest that was so, I should add to what I have already said that, on the Regulation's proper construction, the satisfaction which the authorised operator is required to possess need not be a state of satisfaction derived from evidence limited to that which would be admissible in a court of law in accordance with the strict application of the rules of evidence. It is enough for the operator to satisfy himself from such enquiries as it is proper for him to make in all of the circumstances. If it should become relevant, then the question as to whether he has reached the necessary state of satisfaction can be investigated and, doubtless, such an investigation would include an exploration of the material upon which the state of satisfaction is said to be grounded and in turn **[9]** the genuineness of the claimed satisfaction. However, it is enough for the disposal of the present case for me to say that the evidence before the Magistrate shows that the only reasonable finding of fact that could be come to was that Arnott did have a well-founded state of satisfaction that the respondent had not consumed any intoxicating liquor during the relevant period.

In the disposition of this application I have assumed, without deciding, that the word 'analysis' where secondly appearing in the Regulation means an analysis which a person is required to undertake and not an analysis in fact. If the latter construction were correct then the Regulation would, of course, have no application at all in a case such as the present since, *ex hypothesi*, there is no analysis when the charge is one of refusing to provide a breath sample for such analysis. This construction question remains an open one. As the submission with which I have dealt was the only defence to the charge which was relied upon, and as it was not raised as a submission that there was no case to answer, but at the conclusion of the evidence called on the part of the respondent, I think the correct course is to make the Order Nisi absolute and to set aside the order of dismissal and to substitute for it an order of conviction.

APPEARANCES: For the informant Obeid: Mr TA Jordan, counsel. RJ Lambert, State Crown Solicitor. No appearance by or for the defendant Burrows.
