8/91

SUPREME COURT OF VICTORIA

BARDELMEYER v WHITELEY
LEE v WILLIAMS
MATOSIC v HAMILTON

Beach J

12 December 1990; 8 February 1991 — (1991) 13 MVR 171

MOTOR TRAFFIC – DRINK/DRIVING – BREATHALYSER OPERATOR REQUIRED TO GIVE EVIDENCE – CROSS-EXAMINED AS TO OPERATION OF BREATHALYSER - OPERATOR UNAWARE OF COMPOSITION OF STANDARD ALCOHOL SOLUTION – OMISSION BY OPERATOR TO MENTION A NECESSARY STEP TAKEN DURING OPERATION – EVIDENTIARY BURDEN ON DEFENDANT – WHETHER BURDEN DISCHARGED – WHETHER DEFENCE MADE OUT: *ROAD SAFETY ACT* 1986 SS49(1)(f), (4), 58(4); *ROAD SAFETY (PROCEDURES) REGULATIONS* 1988 R302.

1. It is not necessary for a Breathalyser operator to establish that all relevant Regulations were complied with during the operation of the Breathalyser. Accordingly, where an operator avers in accordance with s58(4) of the *Road Safety Act* 1986 ('Act') that in operating the breath analysing instrument all relevant Regulations were complied with and that the instrument was in proper working order and was properly operated, all necessary facts are thereby proved unless the defendant elicits or calls evidence of sufficient cogency and weight to satisfy a court that one or more Regulations were not complied with.

***Wyllie v Sewell* MC45/1982; and**

***Binting v Wilson; Clifford v Davis* MC14/1990, applied.**

2. Such a defence is not made out if an operator is unaware of the composition of the standard alcohol solution used at the relevant time or that his evidence-in-chief describes the totality of things done during operation of the instrument but omits to mention a necessary step such as stability of the instrument.

***Lambert v Appleby* [1969] VicRp 80; (1969) VR 641, applied.**

BEACH J: [1] This is the return of three orders nisi to review orders made by the Ballarat Magistrates' court, the Sale Magistrates' Court and the Broadmeadows Magistrates' Court on 10 May 1990, 30 May 1990 and 19 July 1990, respectively. Each applicant was charged with and convicted of the offence of driving a motor vehicle whilst more than the prescribed concentration of alcohol was present in his blood, contrary to the provisions of s49(1) of the *Road Safety Act* 1986 (the Act).

The point that is common to each order to review relates to sub-section (1)(f) and (4) of the Act which state:-

> "49(1) A person is guilty of an offence if he or she—
> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breach analysing instrument under section 55(1) and the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood.
>
> (4) It is a defence to a charge under paragraph (f) sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated."

The case for the applicants is that at the hearing of each of the charges it was proved that the breath analysing instruments used by the various respondents were not in proper working order or properly operated and that the charge against each applicant should have been dismissed. To appreciate the basis upon which the argument is put, it is necessary first to have regard to the provisions of Regulation 302 of the *Road Safety (Procedures) Regulations* 1988 **[2]** which states:-

"302(1) In this Regulation, 'breathalyzer' means the apparatus described in paragraph (a) of the definition of 'breath analysing instrument' in section 3 of the Act.

(2) It is a requirement for the proper operation of a breathalyzer that the breathalyzer—

(a) is, when used to make a breath analysis, operated at a temperature between 45 and 50 degrees centigrade as indicated on the in-built thermometer; and

(b) is, before every analysis, flushed with air; and

(c) is kept stable while in operation.

(3) It is a requirement for the proper operation of a breathalyzer that the authorised operator of the breathalyzer —

(a) before a person's breath is analysed, and after completing such analysis, ascertains that the breathalyzer is in proper working order by testing it with a standard alcohol solution; and before commencing an analysis, sets the scale pointer of the instrument on the starting line; and checks the scale reading of every analysis and records that reading on the certificate required by the Act to be delivered to the person whose breath has been analysed."

A "Standard Alcohol Solution" is defined in Regulation 105 as meaning a solution of ethyl alcohol and distilled water in the proportion of 4.26 millilitres of ethyl alcohol in 1000 millilitres of solution.

The applicants contend that by the cross-examination of each respondent they established that the solution by which the proper working order of the breathalyzer was tested was not a standard alcohol solution within the meaning of Regulation 105. In the case of the applicant Matosic, it is said that he also established that the breathalyzer was not **[3]** properly operated in that it was not kept stable while in operation.

One further statutory provision which is relevant to the matter is s58 of the Act which states:- *[His Honour then set out sub-ss. (1), (2) and (3)] ...*

"(4) Evidence by a person authorised to operate a breath analysing instrument under section 55—

[4] (a) that an apparatus used by him or her on any occasion under that section was a breath analysing instrument within the meaning of this Part;
(b) that the breath analysing instrument was on that occasion in proper working order and properly operated by him or her;
(c) that, in relation to the breath analysing instrument, all regulations made under this Part with respect to breath analysing instruments were complied with—
is, in the absence of evidence to the contrary, proof of those facts.

The statement in any certificate given in accordance with section 55(4) of a person authorised to operate a breath analysing instrument under section 55 or, if he or she is called as a witness, his or her statement on oath that any apparatus used by him or her on any occasion under section 55 had written, inscribed or impressed on some portion of it or on a plate attached to it the expression 'Breathalyser' and the numerals 2824789 in that sequence, whether with or without other expressions or abbreviations of expressions, commas, full stops or other punctuation marks is, in the absence of evidence to the contrary, proof that the apparatus is a breath analysing instrument within the meaning of this Part."

I turn now to the evidence called at the hearing on behalf of each respondent. In each case the respondent called the police officer who had operated the breathalyzer used to take the tests. Each operator swore that he was an authorised operator of breathalyzers and produced his authority to the Court. Each operator then gave evidence of the results of the breath tests carried out on the applicants. Two tests were conducted on the applicant Bardelmeyer. They produced readings of .165 per cent and .160 per cent, respectively. One test was carried out on the applicant Lee. It produced a reading of .110 per cent. One test was carried out on the applicant Matosic. It produced a reading of .110 per cent. **[5]** Each operator swore that the instrument used was a breath analysing instrument within the meaning of the Act and that it was in proper working order and had been operated properly by him. Each operator of the breathalyser was cross-examined by counsel for the applicants concerning the standard alcohol solution he had used to test the breathalyser he was using.

In the case of Bardelmeyer the operator swore that he did not know how or when or by whom the solution had been prepared, that he was not present at the Forensic Science Laboratory when the solution was made up, that the solution came from a bottle kept in the refrigerator at the Ballarat Police Station, that he could not remember the expiry date on the bottle but he would not have used the solution after the expiry date, that he could not say what was in the solution used to standardise the breathalyser and when asked the composition of the solution first said, "4.58 millilitres of alcohol per 1000 millilitres of water" and when queried replied, "It might be 4.25 millilitres of alcohol or it might be around that figure in a litre of water."

Pausing at this stage of these reasons for judgment, I should state that each breathalyzer operator was cross-examined far more extensively than these reasons for judgment might indicate. I consider it is unnecessary to set out the whole of that cross-examination. The passages I include in my reasons for judgment will be sufficient to explain the basis upon which I have determined the matter.

In Lee's case, the operator swore that he did not know who had prepared the solution or when it had been prepared, **[6]** that he did not know the purity of ethyl alcohol in the solution, that ethyl alcohol is lost from the solution each time the stock bottle is opened, that he had used the solution in the equilibrator 12 times, that his practice is to conduct six tests before changing the solution, that the solution in the stock bottle was changed each eight weeks, that it was not necessary to refrigerate the solution, that the solution loses alcohol by having air pumped through it and by exposure to air, that for each solution test he pumped the insulflator 15 times and that the solution he used to conduct the first standardisation test immediately before the applicant's breath test contained one litre of distilled water in 4.6 millilitres of alcohol.

Finally, in Matosic's case the operator swore that he did not know when the solution had been prepared, that he did not see it being prepared, that he did not know how many times the solution in the stock bottle had been used prior to the applicant's breath test, that he made no test of the solution to determine that it was a standard alcohol solution, that the solution goes stale and loses it alcohol, that he did not know the composition of the solution and that a standard alcohol solution meant a solution of 4.26 millilitres of ethyl alcohol in 1000 millilitres of solution. In Matosic's case, the operator also swore that the evidence he had given to the Court during the course of his evidence-in-chief was the totality of everything he had done in compliance with the regulations. In the affidavit filed on behalf of the applicant in support of the application for the order nisi there is no reference to any evidence-in-chief **[7]** given by the operator to the effect that the breathalyzer was kept stable during the test.

It is said therefore that as the operator gave no evidence to the effect that the breathalyzer was kept stable, the magistrate could not be satisfied that it was kept stable and thus could not be satisfied that it was properly operated. However, in an answering affidavit filed on behalf of the respondent the operator has sworn that prior to the close of the Crown case the prosecutor asked him in re-examination whether the breathalyzer was kept stable during the test and that he had sworn that it was. That any such evidence was given is denied by the applicant's solicitor in an affidavit sworn by him in reply to the operator's affidavit. In an affidavit sworn by the magistrate in relation to the matter, the magistrate has said that he is unable to recollect one way or another whether that evidence was given by the operator. I shall return to this aspect of the case shortly.

None of the applicants chose to give evidence at the hearing of the informations. However, in the cases of Bardelmeyer and Williams, Mr Scott Fabb, an analytical consulting chemist was called to give evidence on their behalf. Again I do not propose to set out the detail of Mr Fabb's evidence in these reasons for judgment. I shall advert to those aspects of it which seem to me to be the more significant. Mr Fabb swore that a standard alcohol solution of a known composition was the only means available for the operator to check that the breathalyzer was in proper working order and properly operated, that ethyl alcohol is lost from the standard alcohol solution during **[8]** usage, storage and exposure to air, that tests he had carried out whereby air was passed through the solution demonstrated that after 15 pumps of air from a normal hand pump had been passed through the solution, the ethyl alcohol level dropped from 4.26 millilitres per 1000 millilitres of solution to 4.24 millilitres, and that after 150 pumps of air through the solution it dropped to 4.18 millilitres, and that unless the concentration of ethyl alcohol in the standard alcohol solution is known, the operator cannot be certain that the breathalyzer is in proper working order and is properly operated. The magistrates rejected the submissions made on behalf of the applicants that

in each case the applicant had proved that the breath analysing instrument used on the occasion in question was not in proper working order or properly operated and convicted each applicant of driving a motor vehicle whilst more than the prescribed concentration of alcohol was present in his blood. The applicants now seek to review those decisions.

The grounds upon which each order nisi was granted are somewhat lengthy. I do not propose to set them out in these reasons for judgment. They are all founded on the basic proposition that the magistrates should have found that the applicants had satisfied the onus placed on them by s49(4) of the Act and dismissed the informations.

It is convenient to deal first with the submission made on behalf of the applicant Matosic to the effect that Matosic had established that the breathalyzer used in his case had not been properly operated in that it was not kept stable whilst in operation. **[9]** The first thing to be noted in relation to this aspect of the order nisi is that there is a direct conflict between the operator's affidavit and the applicant's solicitor's affidavit as to what evidence was or was not given concerning the matter. The operator has sworn that he gave evidence to the effect that the breathalyzer was kept stable whilst in operation. The applicant's solicitor has sworn that no such evidence was given. The magistrate has sworn that he cannot remember one way or the other. The general principle applicable in such cases is that an affidavit by the applicant, or on his behalf, contradicting that of the respondent, will not be looked at except under special circumstances, as for instance where the latter raises new matter not referred to in the affidavit in support.

The matter was dealt with very succinctly by Williams J in *Martin v O'Sullivan* [1899] VicLawRp 164; (1899) 24 VLR 856. *[His Honour quoted from this case, referred to other cases on point and continued]* .... **[12]** But in the present case I consider there are grounds for receiving the applicant's solicitor's affidavit in reply. In the affidavit filed by the magistrate, the magistrate has sworn, in para.2:-

> "I can remember a discussion between Mr Clements, counsel for M" – ("M" of course being Matosic) – "and myself as to the effect of an operator's omitting to state in evidence that during operation the instrument was kept stable. I remember expressing the view that even if an operator omitted to give this piece of evidence, it would not follow that the evidentiary burden resting on a defendant would thereby be discharged. The second sentence in para.16 of M's affidavit touches on this point. I can remember discussing with Mr Clements that if I were to uphold the defence in s49(4) of the *Road Safety Act* 1986 on the ground that an operator did not say that the instrument was kept stable during operation, I would be speculating and drawing an inference that the instrument was not kept stable and, accordingly, satisfied that the instrument was not properly operated or not in proper working order. I was not prepared to speculate and draw such an inference."

It is inconceivable that such a debate could have taken place at the end of the case for the respondent if the operator had just sworn, in re-examination, that the breathalyser had been kept stable during the tests. In the light of the material placed before this court by the magistrate, I am not satisfied that evidence to that **[13]** effect was given by the respondent during the course of his re-examination. However, it does not necessarily follow from that finding that the applicant is entitled to have the order nisi made absolute. In para.3 of his affidavit the magistrate has said:-

> "Sentence 4 in para.16 of M's affidavit is also relevant here. The reference to 'cross-examination' arose in this way. I would have said that where in evidence-in-chief an operator stated that in operating the instrument all relevant regulations were complied with, but when asked to set out in detail in cross-examination every step taken in the test and one step was omitted to be given in evidence, such as stability in operation, such omission would not necessarily make out the defence."

In my opinion that view of the magistrate is soundly based. The omission of the operator to swear affirmatively that the breathalyser had been kept stable during the test did not, of itself, justify a positive finding that it had not been kept stable. In his evidence-in-chief the operator swore that in operating the breathalyser he had complied with all appropriate regulations. In the absence of evidence to the contrary, that was proof of all necessary facts, including the fact that the breathalyser had been kept stable during the test. The fact that the operator then stated during cross-examination that what he had said in evidence-in-chief was the totality of everything he had done to comply with the regulations, and in giving that evidence failed to state that the breathalyser had been kept stable, was quite insufficient to justify an affirmative **[14]** finding by the magistrate that the breathalyser had not been kept stable.

In some respects the question put to the operator in cross-examination could be described as a trick question and little weight should have been given to the operator's answer. The affidavit evidence discloses that the operator was refused leave to refresh his memory from his notes, a concession which, in my view, should have been permitted him. It would be most surprising if a witness, deposing to the facts the operator of the breathalyser was deposing to in this case, would be able to accurately state everything he had done in relation to the conduct of a breathalyser test carried out some nine months previously, without reference to his notes. In such circumstances I consider very little weight should be attached to a witness's answer that his evidence-in-chief was the totality of everything he had done.

Where the onus is upon the applicant to establish that the breathalyser was not kept stable, it is incumbent upon the applicant to either obtain that concession from the breathalyser operator during the course of cross-examination, or to call evidence to that effect. In my view it is quite unsatisfactory to ask an operator, "Is the evidence you have given the totality of everything you did?", and in the event he replies, "Yes", and has not made reference in his evidence to the fact that the breathalyser was kept stable during the conduct of the test, to use that answer as the basis for establishing affirmatively that the breathalyser was not kept stable during the conduct of the test. In my opinion, to satisfy the magistrate that the breathalyser was not kept stable during the currency of the test, it was incumbent upon the **[15]** applicant Matosic to elicit or call evidence of sufficient cogency and weight to satisfy the magistrate, on the balance of probabilities, that the breathalyser was not kept stable during the currency of the test. This he failed to do.

The evidence of the operator was to the effect that the breathalyser was set up on a large laminex table at the back of the police station, and that it was balanced before the test was conducted. That evidence, together with the operator's evidence that the breathalyser was in proper working order and had been operated properly by him, and that he had complied with all appropriate regulations, was, in the absence of cogent evidence to the contrary, more than sufficient to justify the magistrate finding that the breathalyser had been kept stable, despite the answer given by the operator during the course of cross-examination. In my opinion, the applicant Matosic has failed to establish the ground in his order nisi relating to the stability of the breathalyser.

I turn then to the grounds in the three orders nisi relating to the standard alcohol solution. What is said on behalf of the applicants is that having regard to the answers given by each operator during the course of cross-examination concerning the solution, and the evidence given by the analyst Fabb in relation to it, the magistrate should have been satisfied in each case that the solution used by the operator did not comply with the regulations and should have dismissed the informations.

It is clear from the cross-examination to which I have referred that none of the breathalyser operators knew what was in the solution they used to test the breathalyser, and **[16]** in the cases of Bardelmeyer and Lee the operators gave evidence which, if factually accurate, demonstrated breaches of Regulations 105 and 302 of the Regulations. It is said, therefore, that the magistrates should have been satisfied, as a matter of probability, that in each case the solution was not a standard alcohol solution within the meaning of Regulation 105, and should have dismissed the informations. It would seem to me that that submission presupposes that a breathalyser operator must possess the necessary expertise to analyse the solution before he uses it to test the breathalyser, and test the solution to ensure it complies with Regulation 105 before he tests the breathalyser, thereby enabling him to swear positively that the solution he used to test the breathalyser complied with Regulation 105. But can that be so? In my opinion the answer to the question posed must be, "No".

By virtue of the provisions of s58(4) of the Act, the operator is empowered to aver that the breathalyser was in proper working order and properly operated by him at the relevant time, and to aver that all regulations made under the Act with respect to breathalysers were complied with. In the absence of evidence to the contrary, that constitutes proof of those facts. It is not necessary for the operator of the breathalyser to have personal knowledge of the composition of the solution before he is able to swear that the breathalyser is in proper working order. That much is clear from the decision of Little J in *Lambert v Appleby* [1969] VicRp 80; (1969) VR 641. **[17]** In that case the defendant was charged that he drove a motor car while the percentage of alcohol in

his blood exceeded .05 per cent. A police constable gave evidence of the taking of the sample of blood and the testing of the breath analysing machine with 'a standard alcohol solution'. Under cross-examination the constable conceded that he was unable to say of his own knowledge what solution he used, but informed the court that he knew the solution was the required mixture by the label on the bottle. A stipendiary magistrate rejected the evidence as hearsay. His Honour held:-

> in order that evidence given by the authorized operator pursuant s408A(3)(b) of the *Crimes Act* 1958 (as amended) should be *prima facie* evidence of the matters referred to therein, it is not necessary for the informant to prove that the operator had personal knowledge thereof.
> (2) (that) the evidence given by the authorized operator in accordance with s408A(3)(b) of the matters therein referred to remained *prima facie* evidence thereof despite the fact that he had no personal knowledge of them."

At p643 His Honour said:-

> "The cross-examination served to show nothing more than that First Constable Lane had no personal knowledge of the constituents in the solution, or the proportions of those constituents in the solution. The informant did not seek to prove that he had such knowledge, and in view of the provisions of the statute it was not necessary for him to prove, in order to provide *prima facie* evidence of the matters referred to in sub-section (3)(b), that the operator did have personal knowledge of them. Section 408A is an evidentiary section designed to facilitate proof of, *inter alia*, the offence created by s81A(1) of the *Motor Car Act* 1958, and s408A(3)(b) of the *Crimes Act* as part of a scheme of a section directed to that end provides that evidence by the authorized operator of the matters therein mentioned shall be *prima facie* evidence of those facts. Accordingly, when effect **[18]** is given to the words of the statute, the position still remained on the material before the stipendiary magistrate that there was *prima facie* evidence of the facts referred to in sub-section (3)(b)."

Nor is it necessary for the operator to establish that all relevant regulations have been complied with. That much is clear from the following passage in the judgment of Gray J in *Wyllie v Sewell*, an unreported decision delivered 23 December 1981. At p14 His Honour said:-

> "Sergeant Dawson gave evidence that he had tested the instrument in accordance with the Regulations. In cross-examination he said that the standard alcohol solution was made up by himself from time to time, and was used approximately ten times before a fresh solution was made up. He said that he believed, from his training, that every time the standard alcohol solution was used to test a breathalyser, the proportions between the ethyl alcohol and the distilled water altered minimally. He was unable to say how many times, if at all, the solution had been previously used in this case. According to the learned magistrate's affidavit, the witness added that if his test has been inconsistent with the required readings, he would have made a fresh solution and repeated the test. It was submitted that it was not open to the learned magistrate to be satisfied, as he was, that the breathalyser had been tested in accordance with the Regulations. It should be noted that it was not necessary for the learned magistrate to be satisfied on this matter in order to convict the defendant. The essential elements of the offence are (i) that an approved instrument was used and (ii) that it gave a certain reading. It has been repeatedly held by judges of this court that in cases of this kind the prosecution does not have to prove that all relevant regulations have been complied with. The authorities on this point are too numerous to refer to, but see particularly *Hindson v Monahan* [1970] VicRp 12; (1970) VR 84; *Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596; *Lloyd v Thorburn* [1974] VicRp 2 (1974) VR 12; and more recently *Huntington v Jupp* (O'Bryan J, unreported 19 May 1978); *Attwood v Lacy* (Gray J, unreported 24 May 1979). It may be that, in a particular case, non-compliance with a regulation may provide a good reason for a court being dissatisfied about an essential element of an offence. But merely because there is no **[19]** evidence of compliance, or some evidence of non-compliance, does not, of itself, lead to the dismissal of an information."

In the present cases, and in particular those of Bardelmeyer and Lee, it is said that the answers given by the operators during the course of cross-examination go further than establishing that the operators did not know the composition of the solution, and establish affirmatively that the solutions did not comply with Regulation 105. I do not agree that that is so. The operators made it clear that they did not know what the solution contained. Their evidence given thereafter as to what they thought it should or even did contain was of such little value that, in my opinion, each magistrate was entitled to disregard it.

In my opinion, once the operator of the breathalyser makes the appropriate averment, that averment retains its validity unless and until the defence has established evidence to the contrary to the satisfaction of the magistrate. It is not sufficient that the defence elicits or calls contrary

evidence unless that evidence has sufficient relevance, cogency and weight to satisfy the magistrate, on the balance of probabilities, that the standard alcohol solution did not comply with Regulation 105, and that the breathalyser therefore was not in proper working order – see *Binting v Wilson*, an unreported decision of Ormiston J, delivered 19 December 1989. In my opinion the evidence of the analyst Fabb did not carry that cogency and weight. In my opinion the magistrate in each case properly rejected the submissions made on behalf of the applicants, and properly recorded convictions against them. **[20]** It follows, therefore, that in my opinion none of the grounds in the orders nisi have been made out. The order of the court is that each order nisi is discharged, with costs to be taxed and paid by each applicant.

APPEARANCES: For the applicants: Mr S Gillespie-Jones, counsel. JA Clements, solicitor. For the respondents: Mr BM Dennis, counsel. Victorian Government Solicitor.
