44/72

SUPREME COURT OF VICTORIA

EVERETT v WESTWOOD

McInerney J

13 December 1972

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT CHARGED WITH EXCEEDING .05 – DEFENDANT UNDERWENT A BREATH TEST – CERTIFICATE OF THE TEST RESULT PRODUCED IN COURT – SUBMISSION THAT THERE WAS NO PROOF THAT THE OPERATOR WAS A PERSON AUTHORISED BY THE CHIEF COMMISSIONER OF POLICE TO OPERATE BREATH ANALYSING INSTRUMENTS – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR; *MOTOR CAR ACT* 1958, S80F.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination according to law.

1. As a matter of construction of the Legislation, the production of the copy of a certificate in the form or to the effect of Schedule 7, given in accordance with s80F(2) of the *Motor Car Act* 1958, constituted *prima facie* evidence that the operator was authorised by the Chief Commissioner of Police to operate the instrument.

2. Accordingly, the Magistrates' Court should have admitted in evidence the copy certificate which was tendered on behalf of the informant.

McINERNEY J: This in the return of an Order Nisi granted by Master Collie on the 12 May 1972 for the review of a decision of the Magistrates' Court at Fitzroy on the 1 March 1972, dismissing an Information dated the 11 January 1972 charging the defendant, the present respondent, Ronald George Westwood, with having at Fitzroy on the 16 October 1971, driven a motor car on a highway, to wit, Nicholson Street, whilst the percentage of alcohol in his blood, expressed in grammes per hundred millilitres of blood was more than .05 per cent.

The evidence adduced by the informant at the hearing before the Magistrates' Court in Fitzroy showed that at 1.30 a.m. on Saturday 16 October 1971 the informant was on duty, with Constable Moore, in a police car in Nicholson Street, Fitzroy, when they were passed by a car proceeding north which, as it ultimately appeared, was driven by the defendant. They followed the defendant's vehicle some distance, observing that he was proceeding at a speed which, as they recorded it in their own car, was 43 miles per hour.

They intercepted the defendant in Heidelberg Road near the Tower Hotel. After some conversation the informant asked the defendant, "Have you been drinking tonight?" The defendant replied, "Yes, I've had a few, probably over .05." The informant said "Are you prepared to have a breath test?". The defendant replied, "If you really want me to," and accompanied the informant and Constable Moore back to the Fitzroy Police Station, where he was introduced to Constable Dettman of the Breath Analysis Section. Constable Dettman conducted a breath test in the presence of the informant.

Whether, on the facts as disclosed in the evidence adduced by the informant at the hearing before the Magistrate, the informant was entitled to require the defendant to furnish a sample of breath for analysis by a breath analysing instrument, may, perhaps, be doubted. The conditions which are required by paragraph (b) of sub-section 6 of s80F of the *Motor Car Act* as inserted by Act 8927 in 1971 may have existed in fact, but the evidence does not, to my mind, make it clear that they did.

However that may be, the defendant in fact agreed to undergo the test and to furnish a sample of his breath for analysis by a breath analysing instrument, and the test was in fact conducted, as I have earlier stated, by Constable Dettman. At the conclusion of the test Constable Dettman handed the informant what the affidavit describes as "two copies of the Schedule 7." It

would appear from the immediately following passages of the affidavit that probably it would be more correct to say that Constable Dettman handed the informant the original and a carbon copy of the certificate prescribed by Schedule 7. The informant compared the two documents, found them to be identical and handed them back to Constable Dettman, who then served the original on the defendant and the duplicate on the informant.

The certificate recorded a reading of .190. The informant asked the defendant what his reason was for exceeding .05 and the defendant said: "I have no reason whatever."

The duplicate certificate was tendered in evidence to the Magistrate and has been exhibited to the informant's affidavit before me as Exhibit "B. It is plainly a certificate in the form prescribed by Schedule 7 of the *Motor Car Act* 1958, as amended by the *Motor Car Driving Offences Act* 1971, Act 8145.

The defendant's counsel cross-examined the informant briefly on matters which, for present purposes, are irrelevant, and the prosecution case then closed. The defendant's counsel then submitted to the Magistrate that there was no case to answer on the charge of exceeding .05, in that the Schedule 7 certificate, before being admitted, required proof that it was a certificate purporting to have been signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments. In support of this submission, Mr Rattray of counsel for the defendant referred to s408(4) of the *Crimes Act* 1958, which deals with evidence of blood tests, and pointed to the provision that "a certificate purporting to be signed by a person who purports to be an approved analyser ... shall be *prima facie* proof of the facts and matters therein contained".

He also drew the Magistrate's attention to the fact that sub-section 2A of s408A of the *Crimes Act* did not read, "purporting to be signed by a person purporting to be authorised by the Chief Commissioner of Police." The informant argued, in reply, that by virtue of sub-section 3 of s80F of the *Motor Car Act* 1958 there was ample proof that the operator was authorised by the Chief Commissioner of Police to operate a breath analysing instrument.

The Magistrate dismissed the information because of the failure of the police to produce the certificate of authorisation of the operator, holding that in the absence of that evidence the Schedule 7 certificate had not been proved, and that in the absence of the Schedule 7 certificate there was no evidence of any offence.

The Order Nisi was obtained on two grounds, namely,

> (1) that the Magistrates' Court was in error in holding that before a copy certificate in the form of schedule 7 of the *Motor Car Act* 1958 (as amended) was admissible as evidence pursuant to sub-section 3 of s80F of the said Act, it was necessary for the informant to prove by other admissible evidence,
>
> > (a) that the signatory of the certificate was actually authorised by the Chief Commissioner of Police to operate breath analysing instruments,
> >
> > (b) that the certificate was signed by a person who was actually authorised by the Chief Commissioner of Police to operate breath analysing instruments;
>
> (2) that the Magistrates' Court should have admitted in evidence the copy certificate which was tendered on behalf of the informant in the circumstances deposed to in the said affidavit and should have convicted the defendant accordingly of the offence with which he is charged upon the said information.

The same points were raised before Crockett J in the order to review of *Winter v Kost* and *Morley v Witheridge*, decided by him on 9 May 1972, and before Gillard J in the case of *Tainsh v Wiggins* [1973] VicRp 23; [1973] VR 245 (19 June 1972); and more recently, before Newton J in the case of *Norris v Peat*, on 29 August 1971.

In the cases of the orders to review of *Winter v Kost* and *Morley v Witheridge* before Crockett J the point now in issue was not ultimately decided because the matter went off on other grounds. The information in *Winter v Kost* charged an offence alleged to have been committed on 4 July 1971. The hearing took place on 31 August 1971. At the hearing there was tendered in evidence a certificate which, on its face, was given in accordance with the provisions of s408A of the

Crimes Act 1958, which had in fact been repealed after the date of the giving of the certificate but before the date of the hearing of the information. The certificate had not, therefore, been given in accordance with s80F of the *Motor Car Act* 1958 (as amended), which, though enacted at the time of the commission of the offence, was not in operation at that date. The case therefore went off on the point that the certificate could not have been given in accordance with s80F(2) of the *Motor Car Act*, and that, therefore, the certificate was not admissible in evidence before the magistrate. In those circumstances Crockett J expressly refrained from expressing any opinion on the matter now raised before me.

The matter, however, arose expressly for decision before Gillard J in *Tainsh v Wiggins*, *supra*, a note of which decision, however, appeared in the *Law Institute Journal* of October 1972 at p432. In that case the Magistrate had convicted the defendant and had, in the course of the hearing, rejected the defendant's submission that before the copy certificate became admissible in evidence it was necessary to adduce evidence other than by the copy certificate to show that the operator was an authorised operator. Gillard J discharged the Order nisi which had been obtained by the defendant, holding that the magistrate was right in deciding the matter was concluded against the defence submission by the Full Court decision in *White v Moloney* [1969] VicRp 91; [1969] VR 705, holding also, as a matter of construction of the Legislation, that the production of the copy of a certificate in the form or to the effect of Schedule 7, given in accordance with s80F(2), constituted *prima facie* evidence that the operator was authorised by the Chief Commissioner of Police to operate the instrument. That decision has since been followed by Newton J in the case of *Norris v Peat* decided on 29 August 1972, as yet unreported.

I have had the advantage reading the reasons for judgment of Gillard J in *Tainsh v Wiggins*, and, this morning, of reading the reasons for judgment of Newton J in *Norris v Peat*, and I have also undertaken a very careful examination of the history of this provision. It is, perhaps, convenient to record that s80F of the *Motor Car Act*, in its present form, traces back to s408A of the *Crimes Act* 1958, as introduced by s2 of the *Crimes (Breath Tests) Act* 1961, Act 6806. The section was amended by the *Motor Car (Driving Offences) Act* 1965, Act 7327, s3(a), by the *Crimes Act* 1967, Act 7546, s10, by the *Crimes (Amendment) Act* 1968, Act 7696, s3, and, later, by the *Crimes Evidence Act* 1968, Act 7782, s2 and s3. Finally the provisions of the *Crimes Act* to which I have referred were repealed and replaced by s80D to s80G of the *Motor Car Act*, that being done by the *Motor Car (Driving Offences) Act* 1971, Act 8143, assented to on 4 May 1971, further amended in 1971, by the *Motor Car (Breath Tests) Act* 1971, Act 8197, assented to on 30 November 1971.

I am not sure that the views expressed by Gillard J as to the operation and effect of sub-section (4) of s80F give full effect to its legislative history — having regard to the fact that sub-section (4) traces back to the 1961 Act, when it appeared as s3(a) in Act 6806 at a time before the enactment of the present sub-section (3). Subject to that one qualification, however, the legislative history which I have briefly summarised indicates an intention on the part of the legislature to facilitate, progressively, the proof of the matters required to be proved in relation to this offence. Progressively, the legislature seems to have been concerned to facilitate, by means of the production of a copy of this certificate under Schedule 7 the making of a *prima facie* case against the defendant. The effect of that progressive extension of the operation and effect of sub-section (3) has been, perhaps to leave less scope for the operation of sub-section (4), although it is not inconceivable that sub-section (4) could operate alongside sub-section (3); that is to say, in cases where the copy certificate is tendered in evidence under sub-section (3) without the defendant having intimated that he requires the operator to attend and give evidence.

I agree with the analysis of the section made by Gillard J in *Tainsh v Wiggins* (*supra*); I agree also with his view that, fundamentally, this point was determined by the decision of *White v Moloney*, *supra*. In *White v Moloney*, the Full Court considered the effect of the amendments made by Act 7782 of the *Crimes Evidence Act* 1968 to the legislation. As appears from p708 of the report, the magistrate had ruled that the amendments effected by Act 7782 had not affected, in any relevant sense, the decision in *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613. The magistrate had, accordingly, held that before the copy certificate could be relied on, evidence was necessary to prove (a) that the operator was an authorised operator, (b) that the machine was an approved machine. As there was no such evidence, the magistrate had dismissed the information.

The Full Court, in making the Order Nisi absolute, must obviously have had its attention

directed to this point. In the course of its judgment observations which appear at p710 of the report were made, which, in my opinion, constituted a rejection of the views expressed by the magistrate in that case.

I would add that — in my view — the legislative history of the section — which I do not propose to deal with in detail — supports the conclusion arrived at by Gillard J in *Tainsh v Wiggins*.

I do not consider that sub-s(3) of s80F is free from difficulties of construction. I can understand the reliance that was placed by counsel for the defence in this case on the differences between the language of sub-s(3) of s80F, on the one hand, and on the other hand, sub-s(3) and (4) of s80D of the Act, each of those sections making a double use of the word "purporting". No such duplication of the word purporting occurs in sub-s(3), and this may have encouraged counsel for the defendant to believe that it was an express requirement of sub-s(3) that there should be actual proof, apart from the contents of the certificate, that the operator was a person authorised by the Chief Commissioner of Police to operate breath analysing instruments.

In *Norris v Peat* (*supra*) Newton J expressed the view that it is undesirable as a matter of judicial policy in a matter of this kind that there should be a discordance of decisions by Judges sitting at first instance. This is legislation which comes daily before the courts of petty sessions. If it is desired to challenge the views expressed by Gillard J, and followed by Newton J, I think that it is preferable that such a challenge should be made before the Full Court rather than before another judge sitting at first instance.

Accordingly I propose, all the more readily because, in the end — and perhaps contrary to first impressions — the views that I myself have formed on the matter are in accord with those of Gillard and Newton JJ — to follow those decisions.

Consequently, the order nisi will be made absolute on grounds 1A and B. Ground 2 reads:

> "That the Magistrates' Court should have admitted in evidence the copy certificate which was tendered on behalf of the informant in the circumstances deposed to in the said affidavit."

So far I consider it made out, but then it proceeds: "And should have convicted the defendant accordingly of the offence with which he was charged on the said information". I cannot agree that that follows, nor indeed did counsel for the informant, in moving the order absolute, seek to persuade me that I should now record a conviction against the defendant. The information was dismissed on a 'no case' submission; the defendant had not gone into his defence. It is conceivable, although perhaps improbable, that he may be able to raise a reasonable doubt about the matter or satisfy the magistrate affirmatively that his blood alcohol content was not as recorded in the instrument. I do not think that I can on the material before me, do otherwise than send the matter back to the magistrate.

The proper course, in my view, is to remit the information to the magistrate, to hear and determine according to the law with a direction that he should hold that a *prima facie* case had been made out against the defendant.

I give the informant leave to amend ground 2 of the order nisi by deleting all the words after the words "said affidavit" appearing in the fourth line and I make the order nisi absolute on grounds 1 and 2 as amended. The order of the Magistrates' Court dismissing the information is set aside, and I order that the information be remitted to the Magistrates' Court at Fitzroy to hear and determine according to law, with a direction that a *prima facie* case has been made out against the defendant. The informant's costs of and incidental to the order to review including any reserved costs must be taxed and when taxed paid by the defendant to the amount of $200.

I have been asked to grant an *Appeal Costs Fund* certificate. I propose, in this instance, to grant it with perhaps a warning to the profession that this point has now been aired sufficiently in the Supreme Court. Although the decision of Gillard J has not yet been reported in the *Victorian Reports*, nevertheless the matter has now been before this court, I think, in reality on three occasions, once in *White v Moloney*, *supra*, (Full Court), once before Gillard J in *Tainsh v Wiggins*, *supra*, and once before Newton J in *Norris v Peat*.

I disregard the fact that it came before Crockett J, in *Winter v Kost* (*supra*) because the point was never actually decided in that case. The point has now been reaffirmed by me and I think that constitutes a sufficient body of judicial opinion to warrant the profession knowing that the point has been decided. Consequently, although I grant an *Appeal Costs Fund* certificate in the present case to the defendant, that is to say an indemnity certificate under s13 of the *Appeal Costs Fund Act* 1964 as amended, it must not be assumed that counsel or solicitors who take this point hereafter will, I think, meet with any sympathetic reception if they apply for an *Appeal Costs Fund* certificate in this court. At all events, they will not get a very sympathetic reception from me.
