21/01; [2001] VSC 482

SUPREME COURT OF VICTORIA

DPP v JAMIESON

Ashley J

7 December 2001 — (2001) 126 A Crim R 353

MOTOR TRAFFIC – DRINK/DRIVING – BRIEF OF EVIDENCE SERVED ON DEFENDANT – NO APPEARANCE OF DEFENDANT AT HEARING – MATTERS DETERMINED IN DEFENDANT'S ABSENCE – CHARGES DISMISSED DUE TO LACK OF EVIDENCE – WHETHER EVIDENCE THAT POLICE OFFICER REQUIRED DEFENDANT TO ACCOMPANY HIM TO A POLICE STATION – WHETHER EVIDENCE THAT OPERATOR AUTHORISED TO OPERATE BREATH ANALYSING INSTRUMENT – WHETHER MAGISTRATE IN ERROR IN DISMISSING CHARGES: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f), 55(3), 58(3); *MAGISTRATES' COURT ACT* 1989, S37.

Pursuant to s37 of the *Magistrates' Court Act* 1989, the prosecution served on J. a brief of evidence in relation to charges under the *Road Safety Act* 1986 ('Act') s49(1)(b) and (f). This brief included a pro-forma document parts of which were not completed and alternatives were not suitably crossed out. There was no Certificate of Authority but there was a Certificate of Analysis in the brief. When the defendant failed to appear on the return date, the magistrate decided to hear and determine the charges. After considering the material contained in the brief of evidence, the magistrate dismissed the charges on the basis that there were two deficiencies of proof in the prosecution's evidence. The magistrate said that there was no evidence that a police officer required J. to accompany him to a police station for the purposes of a breath test. Further, there was no evidence that the operator of the breath analysing instrument was an authorised operator of such an instrument. Upon appeal—

HELD: Appeal allowed. Dismissals set aside. Remitted for further consideration.
1. The Certificate of Analysis contained the prescribed particulars in relation to the authority of the operator. By reason of the interlinking of s55(4) and s58(2) of the Act this certificate stated that the person who operated the instrument was authorised to do so by the Chief Commissioner of Police. Further, when recourse was had to the pro-forma statement, there was some evidence that J. had been required to accompany a police officer to a police station.

2. The matter should be remitted to the magistrate for further consideration, the parties being at liberty to make submissions concerning the admissibility and effect of the material contained in the brief of evidence.

ASHLEY J:
1. This unusual appeal brought under s92 of the *Magistrates' Court Act* 1989 concerns a final order made by the Magistrates' Court at Melbourne on 11 April this year dismissing charges brought against the respondent under s49(1)(b) and (f) of the *Road Safety Act* 1986 ("RSA").

2. Dismissal of such charges immediately causes one to think of the powerful remarks of the Court of Appeal in *DPP v Sher*[1] and of the strong response to those remarks made in the Victorian Bar News under the heading, "No Technical Defences for Unworthy Accused"[2]. But in this case that controversy is not in point. What happened is that the learned Magistrate dismissed the charges in the respondent's absence on the footing that there were two deficiencies of proof in the prosecution's evidence. After his Worship had done so the prosecutor applied to adjourn the matter in order to adduce further evidence to fill in the supposed gaps. His Worship refused the application saying that it was made too late, that the charges had already been dismissed.

3. By this appeal the Director, for the Informant, contends that the Magistrate erred in that, contrary to his conclusion, there was evidence of the two matters concerning which His Worship in substance concluded that there was no evidence. He further contends that his Worship erred in his determination of the prosecutor's adjournment application. This last contention could only be relevant if in fact there was a gap in the proofs.

4. It is necessary to set the appeal in context. The prosecution had served a brief of evidence on the respondent; see s37 of the *Magistrates Court Act* 1989 ("MCA"). Service was proved.

5. By s41(2)(b) MCA the Magistrates' Court has a discretion, if a defendant does not appear in answer to a summons or answer to a charge for a summary offence, to "proceed to hear and determine the charge in the defendant's absence in accordance with Schedule 2." That is not the only option available to a Magistrate in such a case. See sub-s.(2)(a) and (c).

6. If a Magistrate decides to take the course set out by s41(2)(b) then Schedule 2 comes into play. I think that Cl 5(1) and (2) of Schedule 5 is intended to mark out the boundaries of the evidence that may be called in the circumstances described. It is otherwise if no brief of evidence has been served in accordance with s37; see Cl 5(3). The sense of s37 read together with Cl 5 (1) and (2) is that a defendant will be put clearly on notice what evidence may be led against him or her, specifically in the case of that person's non-appearance.

7. There is good reason why a Magistrate in a case of the type now under consideration should be astute to consider whether necessary proofs are contained in the material placed before the court. The obligation of proof of guilt cast upon an informant is not the less because the defendant does not attend court. In my opinion, the learned Magistrate was not to be criticised in principle for examining the material closely. But the question remains where either or both of the evidentiary gaps perceived by his Worship were in truth present.

8. His Worship concluded that, in substance, there was no evidence that a member of the Police Force had required the respondent to accompany him to a police station or other place where a sample of breath was to be furnished. See s55(1) RSA. That was not so. See Question 9 and the answer thereto contained in a document headed, "Exceed PCA-Intercept." That document, part of the brief of evidence, was a pro forma. That said, it was at least for the most part relevantly completed and it certainly provided some evidence pertinent to the issue now under consideration.

9. Before I pass to the other evidentiary deficiency identified by his Worship I should make this observation: This appeal raises no question of alleged misdirection. But the learned Magistrate perhaps considered it a necessary element of the prosecution case to prove that a member of the police force required the respondent to accompany him to a police station or other pertinent place. As to that matter see *DPP v Foster*[3].

10. I turn to the second of the perceived gaps in the prosecution case. His Worship considered, in substance, that there was no evidence that the operator of the breath-analysing instrument was an authorised operator of such an instrument.

11. It is necessary to identify relevant statutory provisions. Section 55(3) RSA provides that an operator must be authorised. Section 58(1) provides for the evidentiary use of a certificate in certain circumstances. One of those circumstances pertains to charges laid under s49. By sub-s(2)(c) a certificate is admissible in evidence in any proceeding referred to in sub-s(1) to prove the fact of authorisation of the operator. There is provision for a defendant to give certain notice under sub-s(2), the giving of which impacts upon the evidentiary significance but not the admissibility of the certificate. Importantly, if a notice is given then the certificate stands only as evidence of the matters contained therein. Those matters do not include an averment that the operator was suitably authorised.

12. I should refer also to s58(3) RSA. It provides that a certificate purporting to be signed by the Chief Commissioner of Police that a person named in it is authorised by the Chief Commissioner under s55 to operate breath analysing instruments is admissible evidence of the authority of that person.

13. In the brief of evidence served upon the respondent there was certain material touching upon the question of authority. The pro forma document headed, "Exceed PCA-Intercept" referred to the Informant introducing the defendant to an operator being "an authorised breath-analysing instrument operator." See that part of the pro forma immediately following Question 29. That assertion was plainly hearsay and objectionable as such. It was susceptible of rejection by the learned Magistrate under Clause 5(2) of Schedule 2 MCA.

14. Beyond that, there was a document headed, "Summary Offence" in the brief of evidence. It had been completed by the operator, Senior Constable Deehan. That document was also a pro

forma, intended to be filled in as was appropriate. It contained the following averment: "I produce a Certificate of Authority signed by the Chief/Deputy Commissioner of Police authorising me to operate breath analysing instruments and issued in accordance with the provisions of s55 of the *Road Safety Act* (1986)." That averment did no more than describe what was to be produced.

15. Section 37(1)(e) MCA required service on the respondent of: "A copy of any document which the informant intends to produce as evidence." The brief did not contain a copy of the Certificate of Authority. Section 37(1)(g) required service on the respondent of "A list of any things proposed to be tendered as exhibits." The list of exhibits did not identify the Certificate of Authority.

16. The learned Magistrate paid considerable attention to the fact that there had been no production of a Certificate of Authority though the same had been referred to in Mr Deehan's statement. That did not conclude the question whether there was any evidence before his Worship bearing upon the authorisation of the operator.

17. According to page 1 of the brief of evidence one of the exhibits to be produced at the hearing was the Certificate of Analysis. Such a certificate was in fact part of the brief of evidence. According to Mr Deehan's statement the copy of the Certificate had been provided to the respondent. There is an obligation under s55(4) RSA to provide a respondent with a copy of such a certificate.

18. The decision of Beach J in *Buzzard v Walsh & Anor*[4], shows that the certificate referred to in s55(4) and the certificate referred to in s58(2) are one and the same.

19. Regulation 203 of the Road Safety (General) Regulations 1999 prescribes the requirements of a certificate for s55(4) purposes. It appears that the certificate, a copy of which was in the brief of evidence, did contain the prescribed particulars. By reason of the interlinking of s55(4) and s58(2), it can therefore be said that the certificate was at least capable of meeting the description of a document purporting to be a certificate containing the prescribed particulars for the purposes of s58(2). It would follow, by operation of s58(2)(c), that there was evidence which in the absence of notice being given by the respondent was conclusive proof of the fact that the person who operated the instrument was authorised to do so by the Chief Commissioner of Police under s55.

20. In this case the defendant gave no notice as is contemplated by s58(2). In the circumstances, it simply cannot be said that there was no evidence susceptible of proving that the operator was pertinently authorised. Indeed it is difficult to see — subject to any unforeseen submission — that his Worship could have held otherwise than that the necessary proof of authority had been made out.

21. I think it likely that his Worship was distracted from consideration of the impact of the Certificate of Analysis by the averment by Mr Deehan that a Certificate of Authority would be produced in circumstances where no such certificate was in fact produced. The significance of the Certificate of Analysis was not drawn to his Worship's attention by the prosecutor.

22. In the course of argument I questioned why it was necessary for RSA to contain both s58(2)(c) and s58(3). An explanation was given by Mr Reynolds of counsel for the appellant as to how the provisions fitted together. I consider that the explanation was cogent. There is, in the event, nothing that would lead me to conclude that s58(2) lacks efficacy in circumstances where a Certificate of Analysis is provided and the notice contemplated by the sub-section is not given.

23. In the circumstances it is not necessary to consider upon the appellant's third complaint, directed to the refusal of the learned Magistrate to adjourn the proceeding.

24. Two matters, however, remain to be mentioned. The first of them is this: I said a little earlier that it was right for the Magistrate to carefully examine the material provided for his consideration in the brief of evidence. It could not be said that the material provided, in the most part by completion of pro forma documents, was satisfactory. Parts of those documents were not completed. Alternatives were not suitably crossed out. It ill behoves informants to prepare briefs of evidence in such a form.

25. The second matter concerns the relief that ought be granted in circumstances where the

appellant has made good its primary complaints. It does not follow because it has done so that the prosecution must then succeed. The matter must be remitted for consideration by the Magistrates' Court.

26. I took up with counsel the material upon which reconsideration ought take place. Ultimately, the respondent's counsel submitted upon instructions that reconsideration should take place on the material that was before the learned Magistrate at the time when the charges were dismissed – that is the brief of evidence served on the respondent in reliance upon s37 – and none other. Counsel for the appellant was content that this should be so. I consider that it is the proper course in the circumstances. I consider that the parties should not be precluded from addressing the Magistrate as to the consequences of that material but that otherwise that material and none other ought be the material upon which the fate of the prosecution is determined.

27. I consider in the circumstances of this particular case that the remitter should be to the Magistrate who first considered the matter. I am not persuaded by the submissions of counsel for the appellant to the contrary.

28. Finally I deal with the issue of costs. Counsel for the appellant indicated to me that he had obtained instructions not to seek costs in the event that the appeal was successful. Such instructions in the circumstances of this particular case were properly given. I intend to make no order for costs.

29. The orders I make are:

1. Appeal allowed.

2. Final order of the Magistrates' Court made at Melbourne on 11 April 2001 set aside.

3. Remit the matter for further consideration by Mr P. Goldberg Magistrate upon the material contained in the brief of evidence served on the respondent under s37 of the *Magistrates' Court Act* 1989 and none other, the parties being at liberty to make submissions to the Magistrate concerning the admissibility and effect of that material.

4. No order as to costs.

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[1] (2001) VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585.
[2] Vol. 118 Spring 2001, pp5-6.
[3] [1999] VSCA 73; [1999] 2 VR 643 at 657-658; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[4] (1996) 24 MVR 568, 5 September 1996.

APPEARANCES: For the appellant DPP: Mr P Reynolds, counsel. Victorian Government Solicitor. For the respondent Donna Marie Jamieson: Mr W Walsh-Buckley, counsel. Kelly & Chapman, solicitors.
