57/89

SUPREME COURT OF VICTORIA

HEWETT v HARMS

Marks J

3 November 1989 — (1989) 10 MVR 63

MOTOR TRAFFIC – DRINK/DRIVING – REFUSING TO UNDERGO PRELIMINARY BREATH TEST – EVIDENCE BY POLICE INFORMANT AS TO IDENTITY OF BREATH TEST DEVICE – WHETHER SUCH EVIDENCE ADMISSIBLE – REGULATIONS NOT TENDERED BY PROSECUTOR – CASE FOR PROSECUTION CLOSED – WHETHER MAGISTRATE CORRECT IN PERMITTING RE-OPENING TO ENABLE TENDER OF REGULATIONS – WHETHER A BOND FOR DRINK/DRIVING OFFENCE A PRIOR CONVICTION: *ROAD SAFETY ACT* 1986, SS48(2), 49(1)(c), 50(1)(b); *MOTOR CAR ACT* 1958, S81A.

1. Where a police officer, by reason of training and experience, is able to describe the purpose of a preliminary breath test device and how it is known not only to the officer but generally, such evidence as to identity of the device is admissible for the purposes of s49(1) of the *Road Safety Act* 1986 ('Act').

2. No error in the exercise of a Magistrate's discretion was shown where, after hearing submissions of counsel on the matter the prosecution was permitted to re-open its case for the purpose of tendering the relevant Regulations.

3. A previous offence under s81A of the *Motor Car Act* 1958 whereby the offender was released on a bond without conviction cannot be regarded as a prior conviction for the purposes of s49(1) of the Act.

MARKS J: [1] At about 1 a.m. on 16th April 1988, the defendant was driving a motor vehicle in or near Mount Street, Heidelberg, when he was intercepted by the informant and another police constable named Cavanagh, both of whom were on mobile patrol. The defendant was charged on that day with three offences, the shorthand description of which may be, refusing to undergo a breath test, careless driving and ignoring a "No Entry" sign.

The informations were heard on 3 and 6 April 1989 at Heidelberg Magistrates' Court. The defendant pleaded guilty to the third information, but not guilty to the others. Nevertheless he was convicted of all three. On 8 March 1989, Master Barker granted an Order Nisi, to review the conviction for refusal to undergo a breath test, on six grounds:

> "(a) The learned Magistrate ought not to have allowed the informant to give evidence that he knew the Preliminary Breath Test device to be an "Alcotest Model 80A".
>
> (b) The learned Magistrate ought to have upheld the submission of that there was no case to answer on the grounds that the Prosecution had not proved the device to be one prescribed by choosing not to tender the regulations.
>
> (c) The learned Magistrate ought not to have insisted that the regulations be tendered when it was not desired by the prosecution to tender such regulations and as such act as prosecutor.
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> (d) The learned Magistrate ought not to have invited the prosecution in those circumstances to reopen its case.
>
> **[2]** (e) The learned Magistrate ought to have upheld the submission of no case to answer on the grounds that the prosecution had not proved that the device that the defendant was required to blow into was a device prescribed under the Act.
>
> (f) The learned Magistrate ought not to have held that my adjourned bond under the *Motor Car Act* 1958 required him to deal with the defendant as a subsequent offender for the purpose of the defendant's disqualification from obtaining a licence but not a subsequent offender for the purpose of imposing a Community Based Order."

Mr Priest, of counsel for the defendant did not seek to support ground (c) and having

regard to the contents of the answering affidavit and what seems to be an absence of any basis for upholding this ground, it may be speedily rejected at this stage. Ground (c) fails.

Mr Priest submitted that the remaining grounds in effect rest on four propositions for which he contended:

> "1. The evidence of informant that he knew the instrument, called Alcotest Model 80A, to be a known breath testing device, or, that the breath testing device was so known, was inadmissible.
>
> 2. That the failure of the prosecution to tender the *Road Safety (Procedures) Regulations* 1987, during the prosecution case was fatal to that case.
>
> 3. The Magistrate was in error in allowing the prosecution to reopen the prosecution case after the Prosecutor had closed it and to tender or produce, the regulations referred to in the second proposition.
>
> 4. That, as regards penalty, the Magistrate was in error in holding that he could not disqualify the defendant from holding a driving licence for less than four years.

[3] It might be observed at this point that the penalty imposed by the Magistrate included a disqualification for four years, provided for as he thought, by s50(1)(b). To understand the propositions said to support the defendant it is necessary to say a little of the precise offence of which the defendant was convicted and what occurred at the hearing. The offence with which the defendant was charged, was contrary to s49(1) (c) of the *Road Safety Act* 1986, he was a person found driving a motor vehicle, and having been required to undergo a preliminary breath test by a prescribed device, he did refuse to undergo that test. Section 49(1)(c) provides that:

> "A person is guilty of an offence, if he or she refuses or fails to undergo a preliminary breath test in accordance with s53, when required under that section to do so."

Section 53(1)(a) provides:

> "A member of the police force may at any time require any person he or she finds driving a motor vehicle, or in charge of a motor vehicle, to undergo a preliminary breath test by a prescribed device."

The informant gave evidence that on the morning in question at the place of interception, he took out the preliminary breath test device which consisted of a plastic bag, mouthpiece and a glass tube with "Alcotest" and "R" in a circle, written on it. He swore that it was known to him as the "80A". He said that he asked the defendant to please blow into the device and was told by him, "No, I don't have to do that. I want to know what's going on." The informant said to the defendant, "At approximately 1 a.m. I saw you drive your car. I would like you to blow into the device," and **[4]** was told by the defendant "Why? I know my rights, I want to know what I am doing?" There was evidence of further conversation which concluded with the following exchange. The informant said, "Will you please blow into the bag? You will be charged if you do not, you may be fined $1,200 and you may lose your licence for two years. Are you refusing to undergo a preliminary breath test?" The defendant replied, "Yes, I am." He was then asked by the informant whether he was suffering from asthma, or any other disease that may prevent him from undergoing the test and the defendant said he was not.

In support of his first proposition, Mr Priest submitted that at the hearing, as in fact was the case, a concession was made by the Prosecutor that the informant was not an expert and that it followed that the evidence he purported to give about the device being known to him as an Alcotest Model 80A, was not admissible. In the answering affidavit it is deposed that the evidence given by the informant was that the preliminary breath test device was known to him as "Alcotest 80A".

It is also said in that answering affidavit that the informant in evidence described the device as an "Alcotest 80A, which comprises a glass tube with the word 'Alcotest' and the letter 'R' in a circle, an inflatable plastic bag and a plastic mouthpiece," and that he detailed his experience in the use of the device. There was other evidence to the effect that the informant had been a member of the police force for some two years and that he had had some experience with this device and it had been part of his training to ask motorists to undergo a test with it.

[5] I am of the opinion that the evidence which the informant gave was admissible. The witness was qualified to say what he did from his experience of the device. The evidence went merely to identify the device and its purpose. The witness was able to say that from his training and experience as a police officer what it was that he had in his possession, what its purpose was, and accordingly how it was known, not only to him, but generally.

Accordingly, it seemed to me that the Magistrate was right in ruling the evidence to be admissible. It must be borne in mind that there is a distinction between admissibility and weight of evidence. However there was no challenge, as it turned out, to the evidence about the identity of the device of which the witness purported to speak.

My view in this regard appears to be supported by that expressed by three judges of the Queen's Bench Division, in *Miller v Howe* (1969) 3 All ER 451; [1969] 1 WLR 1510. The facts there were similar, but if anything weaker. The point at issue was virtually identical. I do no more than refer to what Lord Parker (with whom the other members agreed) said at p454:—

> It seems to be that if, for instance – it is not this case – the police constable had said "I remember this device very well from my knowledge and experience over a number of years, it was an Alcotest R80" and went on to describe the particular device, what it looked like, its nature and the fact that "Alcotest 80" was stamped on it, that would be perfectly good evidence from which the Justices could, if they thought right, hold that proof of identity had been given."

Those observations, I think, are apt in this case. It seems to me a matter of commonsense that the police constable must be taken to have had experience of the **[6]** device to which he was referring and was well able to identify it. I do not accept therefore, Mr Priest's first proposition. The grounds which might be said to support it fail.

The second and third propositions might conveniently be dealt with together, as they seem interrelated. The second proposition appears to rest on the assertion that the failure to produce or prove the regulations during the prosecution case was incurable by the grant of an application to tender or produce those regulations after the closure of the case. It is accordingly bound up with the proposition that the Magistrate was in error in allowing the Prosecutor to produce the regulations after he had already closed his case. If the Magistrate did have a discretion, and I think he did, to allow the reopening of the case for the purpose of tender of the regulations, it seems to be that Mr Priest has failed to point to any error in the exercise of that discretion.

I consider that the discretion was properly exercised. If that is so of course, the second proposition must fail because the regulations were in fact tendered and became part of the prosecution case. If there was power to accept the regulations when produced after the close of the prosecution case by leave, and after hearing submissions of counsel on the matter, then both these propositions, second and third, fail.

It is perhaps pertinent to point out that by virtue of s8 of the *Subordinate Legislation Act*, regulations such as **[7]** those here relied on do not have to be proved. It is sufficient if they are produced and comply with the preconditions in that section. It was not suggested that the section of the *Subordinate Legislation Act* did not apply and it seems to be that what was lacking, if anything, was merely a formal tender. However, the Magistrate possibly considered, as indeed do I, that it was not necessary as part of the prosecution case to prove these regulations at all, nor to prove that the defendant had in his possession at the particular time, a prescribed device. I think the evidence in this case, including that to which particularly I have referred, was such that the Magistrate was capable of being satisfied that the offence was proved without there being proof that at the time the informant indeed possessed a prescribed device.

The offence was refusal to undergo a test by a prescribed device. The evidence was that the defendant refused. If not, the evidence entitled the inference that the defendant refused to undergo a test by any device at all, which must be taken to include a prescribed device. The prosecution was not, in my opinion, although it is perhaps unnecessary for my decision to say so, required to prove that a prescribed device was produced to the defendant and that the defendant specifically refused to be tested by it. For these reasons the first three propositions fail.

There is less contention about the fourth proposition, for both counsel agree that as regards

penalty, the Magistrate fell into error. I think that the concession made by Mr Ginnane on behalf of the informant in this regard, was properly made and he is to be commended for **[8]** making it after analysis of the relevant sections was made by counsel for the defendant. I might also observe that counsel for the defendant is equally to be commended as he pointed out to the Court what he, as responsible counsel, thought what the law required. Although he considered that it would have been in the interest of his client to argue for a different result if that argument was at all sustainable. However, he conceded that when one analyses the relevant sections of the statutes, the Magistrate was in error in thinking that the conviction was for a subsequent offence. The background of the problem is that a previous offence under s81A of the *Motor Car Act* had been committed by the defendant, but in place of a conviction the proceeding was adjourned on the defendant being bound over. He fulfilled the conditions of his bond and apparently no conviction was recorded. I have referred to s50(1)(b) which also provides:

> "On conviction for an offence under s49(1)(a), (c), (d), (e), the Court must, if the offender holds a driver licence or permit, cancel that licence or permit, and whether or not the offender holds a driver licence or permit, disqualify the offender from obtaining one for such time as the Court thinks fit, not being less than—
> (a) in the case of a first offence 2 years;
> (b) in the case of a subsequent offence, 4 years."

It is perfectly clear that the offence, under the *Motor Car Act* 1958, could not be regarded as a subsequent offence under s49(1)(c) of the *Road Safety Act* 1986. If the offence under s81A of the *Motor Car Act* 1958 resulted in conviction, s48(2) of the *Road Safety Act* 1986 might have been relevant to make it a first offence within the meaning **[9]** of s50(1)(b). I do not set out s48(2) as it is conceded by both counsel that s48(2) can only make an offence a first offence within the meaning of s50(1)(b) if there had been a conviction in respect of it. As I have said, there was no such conviction, and accordingly, the proof of the offence under the *Motor Car Act* 1958, which did not result in a conviction, cannot be regarded as a first offence so as to make the present one under consideration a subsequent offence, calling for a minimum disqualification of four years.

The Magistrate apparently considered that the offence under the *Motor Car Act* 1958 was a first offence and that the present conviction was a subsequent offence, but strangely enough proceeded on a different footing in holding that he was not empowered to make a Community Based Order, under s28(1) of the *Penalties and Sentences Act*. That power is only granted where a person has been convicted of an offence which carries a penalty of a term of imprisonment which the present conviction would have carried if it were for a second offence.

There is power to make a Community Based Order, anomalously enough, where a person on a conviction is vulnerable to punishment by imprisonment. The anomaly is that a person may have his driving licence saved by virtue of s39 of the *Penalties and Sentences Act* when he has such a conviction, while a person who has been convicted of a first offence cannot achieve the advantage of s39 of the *Penalties and Sentences Act* and is subjected to a minimum of two years disqualification.

[10] Be that as it may, my task here is to apply the law as it stands. It would seem, as both counsel concede, that the minimum term of disqualification was two years. Of course, the sentencing tribunal is entitled, under s50, to impose a greater period of disqualification but I do not propose to do that. It follows that the Order Nisi shall be made absolute. The conviction is confirmed, the sentence is set aside and in lieu thereof, the defendant is disqualified from holding a licence or permit to drive a motor vehicle for a period of two years.

APPEARANCES: For the plaintiff Hewitt: Mr P Priest, counsel. Ralph W Lloyd & Co, solicitors. For the defendant Harms: Mr T Ginnane, counsel. Victorian Government Solicitor.
