15/75

SUPREME COURT OF VICTORIA — FULL COURT

MULDOON v JOHNSTONE

Young CJ, Barber and Murphy JJA

25 June 1975

MOTOR TRAFFIC – DRINK/DRIVING – REFUSING PRELIMINARY BREATH TEST – STATUTORY RULES 169 OF 1975 – WHETHER GOVERNOR-IN-COUNCIL HAD POWER TO MAKE REGULATION 229: *ACTS INTERPRETATION ACT* 1958, S5.

In this matter the defendant was charged with refusing preliminary breath test (S80E *Motor Car Act* 1958). The Magistrate dismissed the charge after accepting a submission made on behalf of the defendant that S.R. 169 of 1971 was invalid since the 1971 Act, which, *inter alia*, inserted S80E into the Act came into force on 1st August 1971, whereas S.R. 169 of 1971 was made on 27 July 1971. Upon Order nisi to review—

HELD: Order nisi discharged.
There was no power in the Governor-in-Council to make Regulation 229 on 27th July 1971, and that the decision of the Magistrate was correct. The order nisi was discharged with costs.

THE COURT: ... In order to understand the question which arises for decision it is necessary to set out the relevant statutory provisions. The *Motor Car (Driving Offences) Act* 1971 (No. 8143) received the Royal Assent on 4th May 1971. Section 1(3) provided that the Act should come into operation on a day to be fixed by proclamation of the Governor-in-Council published in the *Government Gazette*. A proclamation was made on 27th July 1971, fixing 1st August 1971, as the day upon which the Act should come into operation and that proclamation was published in the *Government Gazette* on 28th July 1971, Section 7 of Act No 8143, *inter alia*, inserted into the *Motor Car Act* 1958 s80E, sub-ss(1) and (3) of which read as follows:- (S80E recited).

Statutory Rule No. 169 of 1971 is entitled *Motor Car (Blood and Breath Samples) Regulations* 1971. These regulations prescribe in Reg 1(1) that they are to come into operation on 1st August 1971. In substance they amend the *Motor Car Regulations* 1966 and *inter alia* insert Regulation 229 which under the heading 'Preliminary Breath Test' reads as follows:

> "229. The device prescribed for the purpose of Section of the Act shall be a device comprising an inflatable plastic bag with the word 'Drager' imprinted thereon a mouthpiece and a glass tube with the word "Alcotest" printed thereon."

The Regulations were made on 27th July 1971, four days before Act No. 8143 came into operation. The part of s7 of Act No. 8143 which has been set out, i.e. part of the new s80E, shows that in order to enable s80E to operate it would be necessary to 'prescribe' a device. However, Act No. 8143 noes not itself confer any power on any body to prescribe a device. What the draftsman was looking to, no doubt, was the regulation-making power in the Principal Act, the *Motor Car Act* 1958. Section 93(1) of that Act provides that the Governor-in-Council may make regulations for or with respect to a large number of matters including 'p) generally, any matters whatsoever necessary or desirable for the purpose of giving effect to this Act.'
'

In addition to these provisions two definitions in s3(1) of the Principal Act should be noted, viz. 'Prescribed' means prescribed by this Act or any regulation made pursuant to this Act and "Regulation" means regulation made by the Governor-in-Council pursuant to this Act.

It is, we think, clear that the only regulation-making power that can be relied upon is that contained in s93(1)(p). There is no regulation-making power in Act No. 8143 which would authorise the prescribing of a device for the purposes of s80E. Moreover, it is clear that some 'prescribing' must be done before s80E can have any effective operation. Thus *prima facie* the regulations were made without power and are invalid.

However, Mr Graham who appeared for the applicant sought to avoid this result by submitting that s5(1) of the *Acts Interpretation Act* 1958 authorised the making of the regulations before Act No 8143 came into operation.

But it is not immediately clear that this subsection provides the answer. In the first place it is not clear that Act No 8143 'confers power to make ... regulations' within the sub-section. Mr Graham sought to overcome that difficulty by submitting that Act No. 8143 impliedly conferred power to prescribe a device since it was manifestly necessary to do so in order to give s80E any effective operation. Of course, such a submission did not go far enough because no basis appears for an implication as to how and by whom the device should be prescribed. Accordingly, Mr Graham went on to submit that it was permissible to look at the Principal Act in order to see how and by whom the prescribing was to be done. It is, however, at this point that the argument breaks down, for once it becomes necessary to have regard to the terms of the Principal Act, it ceases to be necessary to imply a power to prescribe from the terms of s80E. It is common ground that s93(1)(p) of the Principal Act is wide enough to authorise the Governor-in-Council to prescribe a device for the purposes of s80E after Act No 8143 came into operation. (Cf. *Reddy v Ross* [1973] VicRp 46; [1973] VR 462 at p468.)

Alternatively, Mr Graham submitted that since Act No. 8143 was an amending Act what one had to look at for the purposes of s5 of the *Acts Interpretation Act* was Act No. 8143 together with the existing provisions of the *Motor Car Act*. So regarded the Act clearly gave power to the Governor-in-Council to make the regulations. But this argument also breaks down, for if the whole of the *Motor Car Act* as amended by Act No. 8143 is looked at, it ceases to be an Act that is 'not to come into operation immediately on the passing thereof' within s5(1) of the *Acts Interpretation Act*. To speak of Act No 8143 together with the existing provisions of the *Motor Car Act* must be to refer to the same thing as the *Motor Car Act* 1958 as amended by Act No. 8143.

Mr Graham also submitted that independently of the *Acts Interpretation Act* s93(1)(p) of the *Motor Car Act* was couched in wide enough terms to authorise the making of Regulation 229 in anticipation of the commencement of Act No. 8143. We cannot accept this argument. Under the power conferred by s93(1)(p) regulations may be made which are necessary or desirable for the purpose of giving effect to 'this Act'. The words 'this Act' refer to the Act as from time to time in force and cannot, in our view, be given a meaning which includes future amendments not yet in operation even though they have been passed by Parliament and have received the Royal Assent.

Finally Mr Graham reverted to the submission that Act No 8143 itself by enacting s80E conferred a power to make a regulation such as Regulation 229. If this argument were to succeed it would, of course, bring s5 of the *Acts Interpretation Act* into play. On this argument Mr Graham submitted that before the passing of Act No. 8143 there was no power in the Governor-in-Council to make a regulation prescribing a device for taking a preliminary breath test. Section 93(1)(p) of the Principal Act would not have authorised such a regulation, for there were no provisions in the Principal Act for persons to undergo a preliminary breath test and no such regulation was necessary. However, after Act No. 8143 was passed, the reference to the "prescribed device" is s80E(1), the definitions of "prescribed" and "regulation" in s3(1) of the Principal Act and the provisions of s93(1)(p) of that Act together authorised the making of a regulation such as Regulation 229. Thus the only new element added by the passing of Act No. 8143 was the provisions of s80E(1) and therefore insofar as s80E is concerned what the Legislature did by passing Act No. 8143 was to add to the topics upon which the Governor-in-Council has power to make regulations. Thus it is only after the passing of Act No. 8143 that there is any power by regulation to prescribe a preliminary breath testing device. Therefore, it is said, Act No. 8143 confers the power to make a regulation prescribing a preliminary breath tasting device.

However, we have come to the conclusion that this argument ought not to be accepted. It involves going outside Act No. 8143 in order to find the power to make the regulations for that power cannot be found in s80E as enacted by Act No. 8143. It can only be found in the Principal Act or, perhaps more accurately, in the Principal Act as amended by Act No. 8143. But the Principal Act is not an Act which is "not to come into operation immediately on the passing thereof" within s5(1) of the *Acts Interpretation Act*. Nor is Act No. 8143 an Act which confers power to make any ... regulation" within that sub-section.

In November 1971, Parliament passed the *Motor Car (Breath Tests) Act* 1971 (No. 8197). That Act received the Royal Assent on 30th November 1971. Amongst other amendments, that Act added sub-s(6) to s80E of the *Motor Car Act*. That sub-section reads:

> "(6) The Governor in Council may make regulations for or with respect to prescribing devices for the purposes of this section, the handling storage use and maintenance of such devices, and the precautions to be taken and the procedures and methods to be employed in the use of such devices for ensuring that the devices give accurate and reliable results."

But it was not, of course, argued that that sub-section which only came into operation on 30th November, 1971, could support the regulations made on 27th June 1971. Cf: *Reddy v Ross* [1973] VicRp 46; [1973] VR 462 at p466. It must, therefore, follow that there was no power in the Governor-in-Council to make Regulation 229 on 27th July 1971, and that the decision of the Magistrate was correct. The order nisi should be discharged with costs.
