

38/90

SUPREME COURT OF VICTORIA

BAKKER v O'CONNOR

Marks J

17 September 1990 — (1990) 12 MVR 468

MOTOR TRAFFIC – DRINK/DRIVING – EXCEEDING PRESCRIBED CONCENTRATION – BREATH TEST – "BREATH ANALYSING INSTRUMENT" – MEANING OF DEFINITION OF – EVIDENCE OF DIFFERENCE BETWEEN INSTRUMENT USED AND PATENT SPECIFICATION – WHETHER PROOF THAT INSTRUMENT WITHIN DEFINITION: ROAD SAFETY ACT 1986, SS3, 49(1)(f), 55(1), 58.

On the hearing of a charge against s49(1)(f) of the *Road Safety Act* 1986, a magistrate accepted the evidence of a witness to the effect that the heating element in the breath analysing instrument used was different from that in the Patent Office specifications and accordingly, dismissed the charge on the ground that the instrument used on the relevant occasion was not within the definition of "breath analysing instrument" in s3 of the Act. Upon order nisi to review—

HELD: Order absolute. Remitted for further hearing.

The question to be decided by the magistrate was not whether there was a difference between the instrument used and the Patent Office specifications, but whether the specifications of the instrument conformed to the description of the Patent Office specifications. As there was no evidence as to the description, the magistrate was in error in finding that the instrument used was not within the definition in s3 of the Act.

Bogdanovski v Buckingham [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257, distinguished.

MARKS J: [1] On 5 May 1988 the plaintiff, a senior constable of police, intercepted the defendant, who was driving a motor vehicle on the Princes Highway, Kilmany. After noticing that the defendant's breath smelt of intoxicating liquor and the defendant admitted that he had been drinking, the plaintiff conducted a preliminary breath test. It proved positive. The defendant then underwent two breath analysis tests on a machine operated by a Constable John William Jee, a person authorised under Section 55 of the *Road Safety Act* 1986 (to which I shall refer as "the Act"), to operate a breath analysing instrument. The results showed the presence of .110 grams of alcohol per 100 millilitres of blood in the blood of the defendant. The defendant was duly charged with an offence under Section 49(1)(f) of the Act which provides:

"A person is guilty of an offence if he or she—

(f) within three hours after driving or being in charge of a motor vehicle, furnishes a sample of breath for analysis by a breath 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."

It is not disputed that .110 exceeds the prescribed concentration. The information was heard by a magistrate constituting the Magistrates' Court at Sale on 25 October 1988. At the conclusion of the evidence the magistrate upheld a submission on behalf of the defendant that the prosecution had not proved that the samples of breath of the defendant were analysed by a [2] 'breath analysing instrument' within the meaning of Section 49(1)(f), and accordingly Section 55(1), and dismissed the information. This is the return of an order nisi granted by Master Barker on 25 November 1988 to review the order for dismissal. The order nisi was granted on two grounds, the second of which was here abandoned by Mr Hansen of Queen's Counsel for the defendant. There remains the single ground which is as follows:

"breath analysing instrument" means—

(a) the apparatus known as the 'Breathalyser', a description of the specifications of which is to be found in the Patent Office of the United States of America under the reference number 2824789 or ..."

A certificate containing the facts and matters referred to in Section 58(4) and made admissible in aid of the proof of the prosecution was received pursuant to section 58(2) and

Section 55(5) respectively. It meant that the magistrate was provided with proof on behalf of the prosecution that the instrument on which the defendant was tested indeed was a breath analysing instrument within the meaning of the above definition. The proof included the statements for which the above sections provide concerning the reference number of the US patent and the above definition of the instrument. However, the proof relied on is governed by Section [3] 58(5) which is, according to the sub-section, "in the absence of evidence to the contrary". Mr Hansen, senior counsel for the defendant, submitted that evidence to the contrary was provided, and that the magistrate was entitled to conclude, as he did, that the burden of the plaintiff had not been discharged. The alleged evidence to the contrary was provided by a witness called on behalf of the defendant named Young. He was an expert, so counsel has informed me from the Bar table, in chemistry; but his qualifications do not appear in the material. As to any expertise he might have had in relation to a breath analysing instrument, the evidence is silent. However, it may be assumed that he did have some such expertise as his evidence was not the subject of any objection and is included in the material. Mr Young was given two opportunities to give evidence. Having concluded his evidence and cross-examination, he was recalled on behalf of the defendant, and without objection by the prosecution he said that -

"the Patent breathalyser design authorised by the *Road Safety Act* 1986 as found in the Patent Office of the United States of America under the reference number 2824749 contains a heating element which is different to that contained by the breathalyser instrument used in this case and being the Model '900'."

It was on this evidence that counsel for the defendant submitted to the magistrate that the breathalyser used by Constable Jee was not authorised by the Act and that, therefore, the blood alcohol concentration reading was a nullity. [4] In upholding this submission the magistrate stated that he -

"accepted the prosecution evidence that the Patent numerals on the breathalyser instrument used on this occasion were as prescribed by the *Road Safety Act* 1986."

It is first to be observed that, unlike the evidence before Ormiston J in *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257, there was no evidence before the magistrate, therefore none before me, of the actual US patent documents to which the definition in Section 3 refers. The statement of the witness Young as to its contents, if indeed that is what his evidence amounted to, was strictly inadmissible as secondary evidence of the contents of a written document. Even so, there was no evidence that Young had seen the patent documents or had direct knowledge of their contents. However, the evidence was not objected to and received. It was acted on, so it seems.

In my opinion, however, accepting, as it may be presumed I must, that it was proper for the magistrate to take it into account, the evidence did not, contrary to the conclusion of the magistrate, constitute evidence [5] which contradicted the evidence on behalf of the plaintiff. This was the submission of Mr Maguire of counsel for the plaintiff, and I uphold it. The evidence did not constitute evidence that the presence of a different heating element meant that the instrument used by Constable Jee was not a "breathalyser", a description of the specifications of which is to be found in the Patent Office of the United States of America under the reference number 2824789. In a sense, instruments with different heating elements might be said to be different from each other. But that is not the question here. The question here is not necessarily one of mere difference, as appears from what Ormiston J said in *Bogdanovski*, the question arguably concerns only a description of specifications.

There was no evidence that the specifications of the breath analysing instrument used by Constable Jee did not conform to "the description of the specifications" in the US Patent Office under the stated reference number. Accordingly, there was no evidence before the magistrate which was contrary to the evidence clearly establishing the conformity of the machine used by Constable Jee with the definition in the act. The order nisi is made absolute with costs. The information is remitted to the Magistrates' Court at Sale for hearing and determination according to law.

APPEARANCES: For the plaintiff Bakker: Mr GJ Maguire, counsel. Victorian Government Solicitor. For the defendant O'Connor: Mr HR Hansen QC with RJR Cleary, counsel. FJ Clareborough & Associates, solicitors.