43/86

SUPREME COURT OF VICTORIA

BOLTON v GLOVER

Tadgell J

27 August 1986 — [1986] 4 MVR 463

MOTOR TRAFFIC – BREATH TEST – REFUSAL TO TAKE BREATH TEST – REQUEST TO FURNISH SAMPLE MADE IN POLICE STATION – MUSTER ROOM – WHETHER "GROUNDS OR PRECINCTS OF A POLICE STATION" – WHETHER PARTICULAR PRIVACY TO BE AFFORDED: *MOTOR CAR ACT* 1958, S80F.

Section 80F(10) of the *Motor Car Act* ('Act') 1958 provides:

"Where a sample of breath is required to be furnished within the grounds or precincts of a police station the person operating the breath analysing instrument shall do so in circumstances affording the greatest practicable privacy."

Having regard to the context of s80F(10) and its legislative history, a distinction is to be drawn concerning requests made to furnish a sample of breath of analysis between those made at or in police station premises and those made in the grounds or precincts of a police station. Accordingly, the provisions of s80F(10) of the Act concerning privacy do not apply where a request is made in a muster room at a police station.

TADGELL J: [1] This order to review seeks to call in question the dismissal of an information by the Magistrates' Court at Melbourne on 8 August last year. The information was not elegantly framed. Its purport, however, was to charge the defendant, John Raymond Glover, under section 80F(11)(a) of the *Motor Car Act* 1958 with a refusal on 2 March 1985, to furnish a sample of his breath for analysis when required by a member of the police force to do so pursuant to section 80F(6)(b)(2) of that Act. *[His Honour then referred to relevant provisions of s80F and continued]:* ...

[3] The evidence before the Stipendiary Magistrate was in substance this. The defendant was observed by police at about a quarter past two in the morning on Saturday 2 March 1985 to have driven a motor car easterly in Flinders Street, Melbourne in a generally erratic fashion and without headlights burning. After some difficulty the police, travelling in their own vehicle, attracted the defendant's attention and ultimately intercepted him. The defendant got out of his car with difficulty and showed signs of having consumed intoxicating liquor. He was thereupon conveyed to the Russell Street Police Station and questioned. He there admitted that he had been drinking champagne for several hours until about 2 o'clock that morning. He also said that he was a diabetic and used insulin.

[4] At about 2.30 a.m. the defendant was required to furnish a sample of his breath for analysis by an approved breath-analysing instrument. The requirement was imposed in the presence of Senior Constable Karklins, a member of the Breath Analysis Section, in a room at the police station called the muster room, where various members of the police force were conducting other police business. In answer to the requirement the defendant said "I want my doctor to be here". Senior Constable Karklins then said to him "Are you aware that if you have no reason of substantial character for refusal it is compulsory by law to furnish a sample of your breath for analysis and if you refuse to do so without some reason of substantial character you may be charged with this offence?" The defendant replied, "I want my doctor to be here". Karklins, then said "What is your reason for refusing to furnish a sample of your breath for analysis?", to which the defendant said "I am a diabetic and I am strange". In cross-examination by Mr Goldberg, counsel for the defendant, Senior Constable Karklins said that be believed there were probably numerous rooms available in which to conduct breath tests in more private circumstances within the police station, but that he did not consider making any inquiries as to the availability of any such room because, in effect, he did not know of any obligation on his part to do so.

[5] At the end of the informant's case Mr Goldberg submitted that there was no case to

answer. He apparently made his submission on two bases. First, it was said that compliance with section 80F(10) of the *Motor Car Act* was mandatory and had not been complied with here, as might have been concluded from the answers given in cross-examination by Senior Constable Karklins. Secondly, it was apparently submitted that non-compliance with sub-section (10) gave rise to a defence under sub-section (12) in that it provided a reason of a substantial character for the defendant's refusal to comply with the requirement which had been imposed upon him to furnish a sample of his breath for analysis.

The Stipendiary Magistrate upheld Mr Goldberg's submission, apparently upon the first of those two bases. According to the affidavit sworn on behalf of the informant, with which part the defendant in his affidavit did not take issue, the magistrate stated that he considered that sub-section (10) of section 80F imposed a mandatory requirement and that in this case it was a requirement that had not been satisfied. According to the affidavit on behalf of the informant, the magistrate further stated that he considered that the mischief to which sub-section (10) was directed was the possible embarrassment to the defendant that might be caused if all practicable privacy were not afforded and also the possible interruption to tests which might be occasioned if the requirement of **[6]** the sub-section were not satisfied. On that basis the magistrate dismissed the information.

The primary question raised for my decision is whether the Stipendiary Magistrate was right to hold that it was necessary for the informant to prove that subsection (10) of section 80F had been satisfied. Sub-section (10) needed to be satisfied only if a sample of the defendant's breath was required to be furnished "within the grounds or precincts of a police station" in terms of that sub-section. Reduced, then, to its simplest form, the question appears to be whether the muster room of the Russell Street Police Station is "within the grounds or precincts" of that police station within the meaning of the subsection.

It is no doubt obvious, as a matter of ordinary language, that a room inside a police station is capable of being described as "within the precincts of a police station". Counsel for the defendant relied upon such a interpretation of sub-section (10). He referred to what were said to be the evident purposes of the sub-section as indicated by the Stipendiary Magistrate, and provided some elaboration of the circumstances in which privacy would be consistent with fairness. Counsel referred also to the undoubted fact that section 80F is a privative provision, calculated to require persons to provide evidence incriminating them, and that it should, according to well-accepted **[7]** principles, be strictly construed in favour of a defendant to the extent that it involves any ambiguity. Counsel referred to Mr Justice Sholl's remarks in *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579 at pages 580-581 to that effect. Counsel for the defendant also pointed to the mandatory character of sub-section (10) and contended – to use his word – that it would be "absurd" to restrict in any artificial fashion the circumstances for affording the privacy which sub-section (10) is calculated to procure.

On behalf of the informant, the applicant here, I was usefully referred to a number of dictionary definitions of the words "precinct" and "precincts". I need not refer to those. The assistance they afford does not, I think directly assist me to interpret sub-section (10). The definitions are, however, helpful in demonstrating the diversity of meaning of the words and emphasize, if it were not already clear, that the word "precincts" depends very much indeed for its meaning upon its context. The word "precincts" originally had a meaning in the sense of something girded about or encircled or surrounded. It is also capable now of conveying much the same meaning of "environs" or "surroundings", whether enclosed or not. I am not here, however, concerned so much to select one of the various dictionary meanings given **[8]** of the word "precincts" as to interpret it in the context in which I find it in section 80F of the *Motor Car Act*.

The submission for the informant was that both the context in which sub-section (10) is found and its history show that a distinction is drawn between the police station premises on the one hand and the grounds or precincts thereof on the other. The submission was that sub-section (10) does not apply where the sample of breath is required to be furnished by a defendant within a building forming part of a police station. In my opinion that submission is correct.

I consider first the context of sub-section (10), apart from its historical derivation. I note first that sub-section (6) enables a member of the police force to require a suspect to furnish a

sample of breath for analysis and that it also enables a member of the police force further to require a suspect to accompany him to a police station or the grounds or precincts thereof. Then sub-section (8)(b) provides that a suspect shall not be obliged to furnish a sample of his breath except at or in the vicinity of the place where the driving or being in charge of the motor car occurred, or at a police station or within the grounds or precincts thereof, or at a place where he is taken for medical treatment. Sub-section (10), it is to be noted, is restricted in its operation to cases where the sample is required to be furnished **[9]** within the grounds or precincts of a police station. The omission from sub-section (10) of any reference to its application at a police station, or anywhere else for that matter except within the grounds or precincts of a police station, is striking and, as I would construe it, deliberate.

Without more, I should be disposed to interpret the legislation as drawing on its face a distinction of the kind for which counsel for the informant contended. When one looks at the history of sub-section (10), however, I think that conclusion becomes plain beyond much argument. The legislation which is now to be found in section 80F of the *Motor Car Act* derived from the provisions of section 408A of the *Crimes Act* 1958. In particular, what is now sub-section (8)(b) of section 80F derived from section 408A(4)(b) of the *Crimes Act* 1958, which originally provided that "a person who is required as aforesaid to furnish a sample of his breath for analysis shall not be obliged to do so except ... at or in the vicinity of the place where his said driving or his said being in charge of the motor car occurred or at the police station nearest to the place".

Mr Justice Newton had occasion to consider that provision in the case of *Mintern-Lane v Kercher* [1968] VicRp 71; [1968] VR 552. That was a case in which a defendant was requested by a police officer to furnish a sample of his breath for analysis by a breath **[10]** analysing instrument which was in a police car parked outside the Laverton Police Station. At the time in question the Laverton Police Station was locked up and access to it could not be obtained. The question was whether the defendant's refusal to furnish a sample of his breath involved an offence inasmuch as the refusal took place "at the police station nearest to" the place where he had been driving his motor car. Mr Justice Newton held that the word "at" in the context of the expression "at the police station nearest to that place" meant "in" the police station. For that reason the information was held to have been rightly dismissed.

Now, an amendment was made to section 408A of the *Crimes Act* not long after that decision of *Mintern-Lane v Kercher* was pronounced. It was made by Act 7782, which was assented to on 18 December 1968. By section 2 of that Act the words "at the police station nearest to that place" were deleted from section 408A(4)(b) and for them were substituted the words "at the police station nearest to that place or (if that police station is then locked and entry cannot readily be obtained therein) within the grounds or precincts thereof". Additionally, there was inserted as sub-paragraph (c) of section 408A(4) a provision expressed in essentially the same words as the present section 80F(10).

Looking simply at the legislation one would be pardoned for inferring that the amendment effected **[11]** by section 2 of Act 7782 was precipitated by Mr Justice Newton's decision and enacted in order to overcome it. When one looks, however, (as nowadays one may by virtue of section 35 of the *Interpretation of Legislation Act* 1984) at the Parliamentary debate which preceded the enactment of Act 7782, the inference becomes a certainty. In volume 293 of the Parliamentary Debates, pages 2564, one finds that in the speech introducing the Bill in the Upper House of the relevant minister referred to *Mintern-Lane v Kercher* and to the effect of it. It is very clear that as a consequence of that decision the amendments made by section 2 of Act 7782 were enacted in order to add a new category of places at which a sample of breath for analysis might be required to be furnished. At the same time there was added a provision designed to afford a measure of privacy when samples were furnished at places within that new category, namely within the grounds or precincts of a police station, but not at other places.

Interestingly enough, the debate reported at page 2955 of the volume reveals the manner in which the actual words which were to be inserted into section 408A(4)(b) were formulated. The relevant Bill having been returned from the Lower House, the responsible minister in the Upper House said this -

> The House will recall that there was certain discussion earlier today concerning the location for the

> taking **[12]** of breathalyzer tests, and as it is Christmas, I refrain from saying, "I told you so!" An amendment was carried there providing that an alternative location for the taking of breathalyzer tests was "any police station". The Assembly considered the matter and amended the clause by omitting the words "at a police station" and inserting "at the police station nearest to the place or (if the police station is then locked and entry cannot readily be obtained therein) within the grounds or precincts thereof". As a further safeguard, the amendment provided that where a sample of breath is required to be furnished by any person within the grounds or precincts of a police station the person operating the breath analyzing instrument shall do so in circumstances affording the greatest practicable privacy.
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> I understand that this has resulted from a great deal of hard thinking and application by a number of people. It seems to me – and I submit to the House – that it deals with the problem sensibly. It restores the safeguard which has always been in the Act that the breathalyzer test must be conducted at the nearest police station, not at any police station, but it does allow that if the police station is locked and cannot be entered readily the grounds or precincts may be used. There is the further safeguard that the greatest possible privacy must be ensured. I believe this is a sensible compromise.

As I say, the legislation itself would lead me to the conclusion that what is now sub-section (10) was intended to apply in cases where a breath sample was required to be furnished otherwise than at a place at which it might have been required to be furnished before the amendment effected by Act 7782. Privacy, by way of what is described in the speech of **[13]** the minister as a further safeguard, was intended to be provided in cases where the sample was not required to be furnished at or in a police station, but within the grounds or precincts of a police station. No privacy of a particular kind is guaranteed where the sample is required to be furnished at or in the vicinity of the place where the driving or being in charge of a motor car occurred, and no particular privacy, other than that which might be afforded within the building itself, is afforded when the sample is required to be furnished at a police station, as was the case here. For the reasons given I am of the opinion that the Stipendiary Magistrate was in error to have concluded that sub-section (10) of section 80F was applicable.

I heard further argument which centred around sub-section (12) of section 80F. Mr Kendall, for the informant, argued that even if section 80F(10) did apply that was not necessarily an end of the matter. It was said the non-compliance should only result in a dismissal of the information if that non-compliance afforded a reason of a substantial character for a defendant's refusal other than a desire to avoid providing information which might be used against him.

I think it is unnecessary for me to decide the question whether non-compliance with sub-section (10), where it applies, will of itself provide a ground for a dismissal of an information laid under sub-section **[14]** (11). I would say only that in this case the defendant did not purport to refuse to provide a sample of his breath upon the footing that sub-section (10) had not been complied with. It would seem, therefore, that the second basis for the submission made on behalf of the defendant before the magistrate was not made out. At least there was no evidence before the magistrate which would have entitled him to have upheld the submission.

There was also some discussion of the question whether there was other evidence which might have entitled the defendant to have made out a defence by virtue of sub-section (12) of section 80F. The defendant, of course, called no evidence and I ought not to anticipate what any evidence that he might be able to call would amount to. I think I should say no more about sub-section (12).

For the reasons I have given, the order will be made absolute. I shall remit the information to the Magistrates' Court at Melbourne for re-hearing in accordance with these reasons for judgment.
