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## SUPREME COURT OF VICTORIA

**WOODGATE v RUSSELL**

Murphy J

10 June 1976

**MOTOR TRAFFIC – DRINK/DRIVING – POWER OF POLICE TO REQUIRE DRIVER TO UNDERGO PRELIMINARY BREATH TEST – CHARGE DISMISSED ON THE GROUND THAT THE INFORMANT'S PERSONAL OBSERVATIONS OF THE DEFENDANT MUST RELATE TO THE DEFENDANT'S DRIVING – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S80E(1)(a).**

The Magistrate having dismissed an information for refusing a preliminary breath test, an order nisi was granted on the grounds that the magistrate was in error in holding that:—

- (i) the personal observations made by the informant must relate to the defendant's driving, and
- (ii) the personal observations made by the informant if the defendant after he had ceased to drive were of less importance than the observations of the defendant's driving. Upon Order Nisi to Review—

**HELD: Order absolute. Remitted to the Magistrates' Court to be dealt with in accordance with the law. It is made perfectly clear by the decision in *Airs v Manville-Smythe* (FC) [1973] VicRp 30; [1973] VR 304 that it is not necessary that the observations which the member of the police force makes and which form the basis of the reasonable grounds that he had for believing that the driver of a motor car has consumed intoxicating liquor and that the ability of such driver to drive a motor car may be impaired thereby be of behaviour which occurs in connection with the actual driving of the motor vehicle or motor car. The behaviour may be behaviour which occurs whilst he is driving the motor car or it may be behaviour which occurs after he ceases to drive the motor car.**

*Airs v Manville-Smythe* (FC) [1973] VicRp 30; [1973] VR 304, followed.

**MURPHY J:** ... I have read the affidavit material which has been submitted in support of the order nisi and have been assisted by Mr Gaffy's reference to a recent Full Court decision in *Airs v Manville-Smythe* [1973] VicRp 30; (1973) VR p304.

This decision related to s80F of the *Motor Car Act*, but in so far as there is a difference between that section and s80E, it is immaterial to the present points which I have to determine. The Full Court comprised Smith ACJ and Little and Nelson JJ, and the decision of the Court was delivered by Nelson J with whose judgment Smith ACJ and Little J agreed. It is made perfectly clear by the decision that it is not necessary that the observations which the member of the police force makes and which form the basis of the reasonable grounds that he had for believing that the driver of a motor car has consumed intoxicating liquor and that the ability of such driver to drive a motor car may be impaired thereby be of behaviour which occurs in connection with the actual driving of the motor vehicle or motor car. The behaviour may be behaviour which occurs whilst he is driving the motor car or it may be behaviour which occurs after he ceases to drive the motor car.

The Full Court in the decision of *Airs v Manville-Smythe* (*supra*) went to some trouble to outline the history of s80F of the *Motor Car Act* which, as Mr Gaffy points out, was introduced in the same Act as that in which s80E was introduced; and those two sections replace s408A of the *Crimes Act*.

The differences are set out in the decision given in *Airs v Manville-Smythe* (*supra*). They are most material and ought, of course, to be read and appreciated by magistrates who are frequently dealing with cases involving the point in question.

In fact, after Nelson J indicated that he decided that the magistrate was in error in holding that s80F required that the behaviour of the defendant which indicated an impairment of his ability to drive must be behaviour contemporaneous with his driving, and therefore the order nisi should be made absolute. His Honour then went on to set out his views on further questions which were adverted to in argument in the case before the Full Court.

His Honour said he did this because the matter would be one which would be remitted to the Magistrates' Court for re-hearing, and he thought it therefore desirable that some view should be expressed upon these further questions.

It was perfectly clear that the Full Court hoped that, by setting out in some detail their reasons for making the order nisi absolute, they might assist magistrates who, in the future, would have to deal with similar arguments thus enabling them to avoid falling into what was, perhaps, a pitfall resulting from some familiarity they may have had with the earlier section, 408A of the *Crimes Act*, and with its particular requirements, which did require that the behaviour upon which the constable relied occurred whilst the person in question was driving or in charge of a motor car.

The present provisions of s80E of the *Motor Car Act*, are in contra-distinction to the provisions of s408A; and, for the reasons set out in the decision of Nelson J — which were agreed with by the other members of the Full Court and with which reasons I respectfully agree — the order nisi in this case shall be made absolute on grounds 1 and 2. I prefer not to interfere with what will be the decision of the magistrate who, in the future, comes to deal with this matter.

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