21/92

SUPREME COURT OF VICTORIA

DPP v HART

Hampel J

25 March 1992 — (1992) 16 MVR 433

MOTOR TRAFFIC – DRINK/DRIVING – DEFENCE THAT BREATHALYSER NOT PROPERLY OPERATED – WAITING PERIOD DURING OPERATION OF INSTRUMENT – NO EVIDENCE THAT PERIOD OBSERVED BY OPERATOR – WHETHER DEFENCE MADE OUT – ONUS OF PROOF: *ROAD SAFETY ACT* 1986, S49(4).

Upon the hearing of a charge under s49(1)(f) of the *Road Safety Act* 1986 ('Act'), a magistrate was unable to find whether a Breathalyser operator (1) omitted to give evidence that in operating the instrument he waited for a period of 90 seconds after flushing the instrument; or (2) had not, in fact, waited for the 90-second period. After hearing expert evidence called by the defence, the magistrate held that the prosecution had not shown that the instrument had been properly operated and dismissed the charge. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted to the Magistrate for further hearing.
1. In relation to the provisions of s49(4) of the Act, the prosecution is not required to establish that the breath analysing instrument was properly operated. It is incumbent on the defendant to prove that it was not properly operated.

2. As the magistrate was unable to find whether (in relation to the 90-second waiting period) the operator omitted to say so or do so, it was not open to the magistrate to conclude that the instrument had not been properly operated and dismiss the charge.

HAMPEL J: [1] This is an appeal by the Director of Public Prosecutions pursuant to s92 of the *Magistrates' Court Act* against a decision by the Magistrate sitting at Werribee who dismissed an information for driving a motor vehicle with more than the prescribed concentration of alcohol. The respondent to this appeal, Ronald John Hart, has been served but has chosen not to appear.

The circumstances in which this matter came to be heard are fully set out in the affidavit of William John Stevens, who was the prosecutor at the Magistrates' Court. It is not necessary to set out all of the circumstances of the alleged offence and the hearing of the information, because the point which I have to consider is a narrow one. It relates to the operation of s49(4) of the *Road Safety Act* 1986. That section provides that it is a defence to a charge such as the one which was heard by the Magistrate for the person charged to prove that the breath analysis instrument used was not on that occasion in proper working order or properly operated.

At the conclusion of the evidence by the breath test operator at the Magistrates' Court the witness was cross-examined and asked to repeat the procedure which he followed in chronological order. He did so. At the end of the evidence, the details of which are set out in paragraph 19 and 20 of the affidavit, a submission was made on behalf of the respondent which is set out in paragraph 24 of the affidavit. It was submitted that the prosecution could not prove that the breath analysing instrument was properly operated because there had been no reference to a waiting period of ninety seconds after **[2]** flushing the instrument and before continuing with the test. There was no suggestion during the submission that the operation was not in accordance with the regulations, but that the ninety second requirement was a requirement provided for in the instructions as to the operation of the instrument.

Prior to that submission, evidence was called by the defence from an expert to the effect that such a waiting period would be necessary following the flushing of the instrument and that was indicated by the instruction manual for the instrument. Unfortunately, counsel for the defence did not specifically draw the attention of the operator when he was cross-examining him to this question of the ninety second delay, but simply relied on the fact that, in reciting the procedure, the witness had said nothing about the ninety second delay.

After hearing the submission, the Magistrate indicated that he accepted it. He said that he was unable to find whether the breath analysing instrument operator had merely omitted to say that he waited for the ninety seconds or that he had not, in fact, waited for that period. Dismissing the information he held that the breath analysis instrument had not been shown by the prosecution to have been operated properly within the requirements of s49(4) of the *Road Safety Act* 1986.

It is clear from that brief analysis of the matter by reference to what occurred and what is set out in the affidavit that the Magistrate did not apply the correct onus of proof which is clearly enunciated in sub-s.4. It was not for the prosecution to establish that the **[3]** instrument was properly operated, but for the defence to prove that it was not. The problem is compounded because the Magistrate's factfinding that he could not say whether that was simply an omission to say so or an omission to do so (i.e. to wait for ninety seconds) means that there was no basis for the Magistrate to make any finding as to the correctness of the operation of the instrument.

It seems, therefore, that if upon a re-hearing of this matter it transpires that the operator simply omitted to say that he waited ninety seconds when he recited the procedure and gives evidence that he did, in fact, wait for ninety seconds, that would, of course, be a matter which the Magistrate could take into account and, unless some other difficulty was demonstrated by the defence as to the operation of the instrument, no doubt the submission would fail. On the other hand, if it appeared that the operator had not, in fact, waited for ninety seconds, it will be for the Magistrate to decide whether that amounts to a defence under s49(4) after directing him or herself properly as to the onus of proof.

It follows that the correct approach to this appeal is to set aside the orders dismissing the information and awarding costs and to remit the matter back to the Magistrate for rehearing, and I do so.

APPEARANCES: For the appellant DPP: Mr D Just, counsel. Mr JM Buckley, Solicitor for the DPP. No appearance for the respondent Hart.
