45/82

SUPREME COURT OF VICTORIA

WYLLIE v SEWELL; RADLEY v HANNAH; PATTON v DELAPERRELLE

Gray J

23 December 1981

MOTOR TRAFFIC – DRINK/DRIVING – WHETHER NOTICE IN THE *GOVERNMENT GAZETTE* PURPORTING TO IDENTIFY CERTAIN APPARATUS AS AN APPROVED BREATH ANALYSING INSTRUMENT DOES NOT COMPLY WITH PROVISIONS OF THE *MOTOR CAR ACT* 1958 – COMPLIANCE WITH REGULATIONS – WHETHER PROSECUTION REQUIRED TO PROVE COMPLIANCE WITH REGULATIONS: *MOTOR CAR ACT* 1958, S80D, 80F(3).

S, H. and D. were each convicted of exceeding .05. The grounds for review were common in each order nisi namely, that the notice in the *Government Gazette* purporting to identify certain apparatus as an approved breath analysis instrument did not comply with the requirements of the *Motor Car Act* 1958.

HELD: Orders nisi discharged.
1. There was a sufficient notification of a type of approved instrument where the type was described by reference to the trade name and patent number which was impressed upon the instrument.
***Rose v Livingstone* [1982] 1 NSWLR 299, O'Brien CJ 13.2.81, followed**
***Gosden v Billerwell* [1980] FCA 84; (1980) 31 ALR 103; (1980) 47 FLR 357; 2 A Crim R 1, judgment of Sheppard and Kelly JJ, not followed.**

2. It was not necessary for the Magistrate to be satisfied that the breathalyser had been tested in accordance with the Regulations in order to convict the defendant. The essential elements of the offence are (i) that an approved instrument was used and (ii) that it gave a certain reading. It has been repeatedly held in cases of this kind, that the prosecution do not have to prove that all relevant regulations have been complied with.

GRAY J: *[After setting out the grounds of the orders nisi, the relevant provisions of the* Motor Car Act *1958 and the* Government Gazette*, His Honour continued]* … **[7]** The applicant's argument is that the Governor-in-Council has failed to approve apparatus of a "type" in that he has merely signified apparatus bearing certain words and figures. It was submitted that, by adopting that method, the Governor-in-Council had been guilty of an unauthorised delegation of his duty to approve apparatus of a stipulated type. It was said that it was the person who affixed the words and numbers who approves the apparatus and not the Governor-in-Council. It was contended that what was required by s80F(14) was the approval of, say, "Smith & Wesson Breathalyzer Model No. 1100". The applicant's argument relied upon dictionary meanings of "type" which suggest that the word means something more than an article bearing a certain imprint.

A similar argument found favour with the majority (Sheppard and Kelly JJ) of the Full Federal Court in *Gosden v Billerwell* [1980] FCA 84; (1980) 31 ALR 103; (1980) 47 FLR 357; 2 A Crim R 1. The argument was rejected by Brennan J. The case was an appeal from Connor J in the Supreme Court of the ACT. Connor J had dismissed an appeal from a conviction under s19 of the *Motor Traffic (Alcohol and Drugs) Ordinance* of the ACT. The ACT equivalent of s80F(14) is s5(1)....

There are differences between the language employed in the Victorian and ACT provisions, but, to my mind, the differences are of no importance for present purposes. It was argued by Mr Nash that under the ACT provision the Minister was required to form an opinion, whereas s80F(14) only requires notification of the approved type. It was submitted that the delegation argument had more substance in the ACT context. It was also suggested that the concept of affixing a label is more open to the present attack than the concept of apparatus bearing a stipulated number. But, in my opinion, the reasoning of the majority in *Gosden v Billerwell* would not have been influenced by the considerations I have mentioned.

The majority opinion is expressed in the following passage from the judgment of Sheppard J (at p12);

> "In my opinion it is not an appropriate notification of a type of instrument to specify the instrument, not by reference to its make or model, but by reference to what is on a label which is affixed to it. A consequence of holding that the type of instrument could lawfully be notified (approved) in this way would be to permit a person other than the Minister to select, from time to time, and thus approve, the type of instrument which was to be an approved instrument for the purposes of the legislation. The passive voice is used; the affixing of the label could be carried out by the manufacturer, his agent or someone in the police force. Once the label was affixed the instrument, so long as it could reasonably be described as a breathalyser, would become an approved instrument for the purposes of the legislation."

Both Sheppard J and Kelly J considered that the result would be the same even if the word "affixed" in the notification was construed as "affixed by the manufacturer or distributor". It was said that, in those circumstances, the duty of approving the instrument was carried out by the manufacturer or distributor in affixing the label. Brennan J considered that the Minister, by giving his approval in the terms contained in the notice, accorded to the machine's label the identifying function which is denied to a label by the rules of evidence but which is generally accorded to manufacturers' labels in the ordinary course of dealing with and describing goods. Brennan J construed the Minister's approval as relating to instruments to which are affixed manufacturers' labels in the stipulated terms and not to instruments to which some other label is affixed.

Since the judgment in *Gosden v Billerwell*, the same point has been considered in *Rose v Livingstone* [1982] 1 NSWLR 299 by O'Brien CJ, the Chief Judge of the Criminal Division of the Supreme Court of New South Wales. The legislature provisions in New South Wales and the notification closely resemble the Victorian provisions. The notification describes the type of instrument as being one "bearing thereon, *inter alia*, the word 'Breathalyzer' and the expression US Patent 2,824,789". O'Brien CJ adopted the reasoning of Brennan J, so far as it was applicable to the New South Wales provisions. He considered that there was a sufficient notification of a type of approved instrument where the type was described by reference to the trade name and patent number which is impressed upon the instrument.

In considering the Victorian provisions I find myself in full agreement with the approach taken by O'Brien CJ and Brennan J to what I regard as substantially similar provisions. Mr Wilson and Mr Bassett each argued strenuously for the view that the notification was invalid. In my opinion, there is some substance in the argument. That is evidenced by its adoption by two judges of the Federal Court. But the construction of the notification in a way which gives it validity is, at least, equally open. In construing a provision of this sort, the court should lean towards a construction which makes the provision valid. If an entirely technical point of this sort is taken it has to be given effect to if the language is clear. But, in my opinion, the construction which gives validity is the preferable one in this case and should be adopted. It is worth noting that a notification in these terms has been operating since 1962 and has not, so far as I know, been attacked until the judgment in *Gosden v Billerwell* encouraged defendants to raise the issue. In my opinion, the notification is valid and extends to all instruments which lawfully bear the letters and numbers stipulated in the notification. It would not, as Brennan J points out, extend to an instrument which has had the stipulated markings impressed upon it by an unauthorised person. Each of the three learned Magistrates rejected the defendant's submission on this point and, in my opinion, each was correct in doing so.

I now turn to consider the question whether, in each particular case, there was sufficient evidence that the instrument used to test the defendant's breath was an approved instrument. In the cases of Sewell and Delaperrelle, a Schedule 7 certificate was tendered. This provided *prima facie* evidence that the instrument used was an approved instrument. But in the case of Hannah, the defendant gave notice in writing under s80F(3) requiring the presence of the person who had given the Schedule 7 certificate. This meant that the Schedule 7 certificate ceased to have any effect. At the hearing of Hannah's case, the prosecution led evidence from Sergeant Dawson. He swore that the breath analysing instrument used by him was of an approved type and that all regulations made under s80F of the *Motor Car Act* had been complied with. He further swore that the breath analysing instrument used by him was in proper working order and properly operated by him in accordance with the regulations. Section 80F(5) made this *prima facie* evidence of those

facts. In cross-examination, Sergeant Dawson said that he had been using the machine for some time and that, from time to time, he had looked at the markings on the machine. He said that he believed that the number on the machine accorded with the description in the *Government Gazette*. He said that the number was 2824789. He said that he believed that there were other markings on the machine but was not sure. According to an affidavit sworn by the learned Magistrate, Sergeant Dawson said that he believed that the markings on the breathalyzer were "Stevenson Corporation Breathalyzer Model 900, U.S. (or U.S.A.) Patent No. 2824789".

It was submitted on behalf of the applicant Hannah that the lack of certainty in some areas of Sergeant Dawson's evidence had the effect of displacing the *prima facie* proof. It was said that the state of the evidence was such that it was not open to the learned Magistrate to be satisfied that the breathalyzer used was an approved instrument. It was said that what was required was evidence that the operator has satisfied himself that there is exact conformity between the markings on the machine and the markings prescribed in the *Government Gazette*. Reliance was placed upon *Ross v Smith* [1969] VicRp 51; (1969) VR 411 in which case Winneke CJ upheld an objection that there was no evidence that a Schedule 7 certificate had been delivered as soon as practicable after the sample of breath was analysed, as required by s80F(2). In that case, there was no evidence at all, either direct or circumstantial, as to when the certificate was delivered to the defendant. Understandably, Winneke CJ upheld the objection. But reliance was placed upon the Chief Justice's observation (at p414) that in penal proceedings strict proof beyond reasonable doubt is required of all the essential elements of the offence.

But, in my opinion, the evidentiary picture in this case is quite distinct from that in *Ross v Smith*. In this case the critical factual issue was whether the breathalyzer used was an approved breathalyzer. Sergeant Dawson swore that it was and said that he had used it for some time. He did not depart from that evidence. The best that can be said is that he was unable to be certain in his recitation of the markings on the instrument.

In *Altman v Foley* unreported, judgment delivered 3rd February 1975, the Chief Justice dealt with an almost identical point. The witness had sworn that the instrument used was an approved breathalyzer. He was cross-examined in the same manner as adopted in this case. He displayed the same sort of uncertainty as to the markings on the machine, although rather more so. The Chief Justice, after referring to *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 and *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; (1962) VR 346; (1961) 19 LGRA 232, said that he found it impossible to say that the Magistrate erred in being satisfied that the instrument used was an approved instrument. He said that the cross-examination had not destroyed the evidence-in-chief so as to lead to a situation that the Magistrate could not be satisfied. The Chief Justice pointed out that it was a question of fact to be determined by the Magistrate and unless no reasonable person could make such a finding, it should not be disturbed upon review.

It can be accepted that a point may be reached where a witness in cross-examination displays such uncertainty that a finding can no longer be reasonably based upon his evidence-in-chief. See *McArthur v McRae* [1974] VicRp 43; (1974) VR 353 at 358; *Saxe v Kellett* [1970] VicRp 79; (1970) VR 600. But Sergeant Dawson's evidence was never shaken to the point where a finding could not reasonably be based upon his evidence. His evidence was uncontradicted and was supported by the probabilities. In my opinion, the learned Magistrate's finding was one which was sensible and eminently open to him on the evidence.

The final point only arises in the case of Hannah. It was submitted that the learned Magistrate should not have been satisfied that the breathalyser had been tested with a standard alcohol solution as required by the Regulations. The relevant regulation is regulation 226, which provides:

> 'The authorized operator of a breath analysing instrument shall
> (a) before a person's breath is analysed and after completing such analysis ascertain that the breath analysing instrument used is in proper working order by testing such instrument with a standard alcohol solution. 'Standard alcohol solution' means a solution of ethyl alcohol and distilled water in the proportion of 4.26 millilitres of ethyl alcohol in 1,000 millilitres of solution."

Sergeant Dawson gave evidence that he had tested the instrument in accordance with the Regulations. In cross-examination he said that the standard alcohol solution was made up by himself from time to time and was used approximately ten times before a fresh solution was

made up. He said that he believed, from his training, that every time the standard alcohol solution was used to test a breathalyzer, the proportions between the ethyl alcohol and the distilled water altered minimally. He was unable to say how many times, if at all, the solution had been previously used in this case. According to the learned Magistrate's affidavit, the witness added that, if his test had been inconsistent with the required readings, he would have made a fresh solution and repeated the test.

It was submitted that it was not open to the learned Magistrate to be satisfied, as he was, that the breathalyzer had been tested in accordance with the Regulations. It should be noted that it was not necessary for the learned Magistrate to be satisfied on this matter in order to convict the defendant. The essential elements of the offence are (i) that an approved instrument was used and (ii) that it gave a certain reading. It has been repeatedly held by judges of this court, that, in cases of this kind, the prosecution do not have to prove that all relevant regulations have been complied with. The authorities on this point are too numerous to refer to, but see particularly, *Hindson v Monahan* [1970] VicRp 12; (1970) VR 84, *Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596; *Lloyd v Thorburn* [1974] VicRp 2; (1974) VR 12; and more recently *Huntington v Jupp*, O'Bryan J unreported 19th May 1978; *Attwood v Lacey* (Gray J, unreported 24th May 1979). It may be that, in a particular case, non-compliance with a regulation may provide a good reason for a court being dissatisfied about an essential element of an offence. But merely because there is no evidence of compliance or some evidence of non-compliance does not, of itself, lead to the dismissal of an information.

It is true that in *Gosden v Billerwell* (*supra*) a point of some similarity was upheld. But there is a critical distinction between *Gosden's case* and the present case, apart from marked differences in the evidence. There was in the ACT a Regulation (5) which provided that an analysis "shall be disregarded for the purposes of this Ordinance unless the instrument was tested in the prescribed manner. There is no such regulation in Victoria.

In the present case, it was conceded by Sergeant Dawson that the machine may have been tested with a solution which differed minimally from the prescribed formula. The relevant dictionary meaning of minimal is "very minute", "the least possible". In my opinion, it would have been quite capricious for the learned Magistrate to have disregarded the analysis because of what was conceded by Sergeant Dawson. The learned Magistrate was correct in rejecting the defendant's submission because the point had no substance. In the result, each order nisi will be discharged with costs fixed at $200.
