04/78

SUPREME COURT OF VICTORIA — FULL COURT

BENWELL v GOTTWALD

Starke, Crockett and Gray JJ

12 December 1977 — [1978] VicRp 26; [1978] VR 253

MOTOR TRAFFIC – DRINK/DRIVING – PERSON AUTHORIZED ON BEHALF OF CHIEF COMMISSIONER OF POLICE TO OPERATE BREATHALYSER – SIGNATORY ON AUTHORISATION A DIFFERENT PERSON FROM THE CURRENT CHIEF COMMISSIONER – MEANING OF THE WORDS "AUTHORISED IN THAT BEHALF BY THE CHIEF COMMISSIONER OF POLICE" – "AUTHORISE" – "APPOINT" – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F(1).

On the hearing of an information for exceeding .05% it was argued that at the time of the test the operator was not authorised by the Chief Commissioner of Police. The signatory on his authorisation was Reginald Jackson but, at the relevant time, Sinclair Miller was Chief Commissioner of Police. It was argued that the only feasibly possible construction that can be placed upon the words 'authorised in that behalf by the Chief Commissioner of Police' were, either that the words meant the Chief Commissioner at the time of the test having been taken by the person purportedly authorised or that 'Chief Commissioner' means the Chief Commissioner at the time that the authority was given. The magistrate upheld the submission of the defendant and dismissed the charge. Upon appeal—

HELD: Order of dismissal set aside.
It was clear that on the correct interpretation of the section the power authorised to be conferred was a general power. The contention which succeeded in the court below was more attractive if the authority which the legislation allowed to be committed was an authority to permit the performance of a single act. But with a power which was general, as this authorisation clearly was, support was to be found for the argument that it was the Chief Commissioner at the time of the conferring of the authorisation to which the section referred. In other words, there was no need for a temporal co-existence between the occupancy of the office of Chief Commissioner of Police by the grantor of the relevant authority and the period of due authorisation to the grantee of that authority. The relevant question was whether the grantor of the authority was at the time of its grant empowered so to act and not whether at the time of the exercise of the authority by the grantee the grantor was still in office.
***Wood v Pfeiffer* [1925] VicLawRp 18; (1925) VLR 167; 31 ALR 79; 46 ALT 153, distinguished.**

CROCKETT J: *[After quoting s80F(1) of the* Motor Car Act *1958 His Honour continued]* … Before us it has correctly been pointed out that the only feasibly possible construction that can be placed upon the words 'authorised in that behalf by the Chief Commissioner of Police' are, either that the words mean the Chief Commissioner at the time of the test having been taken by the person purportedly authorised (a construction for which the defendant contended in the Court below), or that 'Chief Commissioner' means the Chief Commissioner at the time that the authority was given. Of course it is this latter construction for which counsel appearing on behalf of the informant before us contended.

In my view, the latter construction is the only reasonable and sensible one which the words used can permissibly bear. There are a number of indications as to why this is so.

It is plain that the authorisation of which the section speaks is not an authorisation for the purpose of conferring an agency. What is sought to be done is to make an appointment so that acts so numerous that which it would not be possible as a matter of practicality for the Chief Commissioner himself to perform them, may be performed by some other person. In this sense the term 'authorise' means 'to appoint' rather than to establish a relationship of principal and agent. There are many instances, some of which the learned Solicitor-General referred to in the course of argument, of a power of appointment's being vested in the Chief Commissioner by other sections of the *Motor Car Act* and in a number of other sections the Chief Commissioner is empowered to authorise some person to carry out certain duties or to perform certain stipulated activities. It is plain, by reference to those sections, that the scheme of the legislation touching upon the authority and duties of the Chief Commissioner involves power's being conferred upon him in certain respects to appoint others to perform duties and to carry out activities which he

himself would not be able to perform. In such circumstances an appointee (although perhaps not an agent) might reasonably claim that he remains such notwithstanding that the appointor might no longer hold the office of Chief Commissioner.

Then again, in my view, it is clear that on the correct interpretation of the section the power authorised to be conferred is a general power. The contention which succeeded in the court below would be more attractive if the authority which the legislation allowed to be committed was an authority to permit the performance of a single act. But with a power which is general, as this authorisation clearly is, in my view, support is to be found for the argument that it is the Chief Commissioner at the time of the conferring of the authorisation to which the section refers. In other words, in my opinion, there is no need for a temporal co-existence between the occupancy of the office of Chief Commissioner of Police by the grantor of the relevant authority and the period of due authorisation to the grantee of that authority. The relevant question is whether the grantor of the authority was at the time of its grant empowered so to act and not whether at the time of the exercise of the authority by the grantee the grantor is still in office.

The authorities that bear on a similar question, appear with one exception to support that construction of the legislation. In *Seaton v Chen Fong Yan* [1908] St RQd 195; 2 QJPR 177 the Full Court adopted a construction of a section where a similar point arose for consideration that is confirmatory of the view which I have expressed. And in *Dore v Gormley* (1962) 9 LGRA 187; [1963] QWN 38; 58 QJPR 21 Gibbs J, who was then a Member of the Supreme Court of Queensland, expressed himself as concurring in that view. Then again, in *Larcher v Dunleavy (No. 2)* (1938) 37 SR (NSW) 548, the Full Industrial Court, in upholding a decision of Ferguson J, expressed a like view for reasons not dissimilar from those which commend themselves to me.

The only authority (the existence of which was responsible for the order nisi's being returnable before this Court) to which we have been referred and which would suggest that the view which prevailed in the court below might be correct is a decision of this Court in *Wood v Pfeiffer* [1925] VicLawRp 18; (1925) VLR 167; 31 ALR 79; 46 ALT 153. However, having examined the report of the case, I am persuaded that the Court was there dealing with a different section and a different Act, and, in consequence, it can afford no binding authority as to the correct interpretation of the section which now falls for construction. In any event, it appears that the view which was expressed by the Court in this connection was clearly *obiter* and, apparently, expressed without argument having been heard upon the matter.

In consequence, I should not be disposed to accept the opinion referred to in that case as governing the question that is for determination in the present motion. Being of the opinion that the decision in the Court below was wrong, I consider that the order of dismissal must be set aside.
