

28/77

SUPREME COURT OF VICTORIA

PEYTON v ROSE

Harris J

10 March 1977

MOTOR TRAFFIC – EXCESSIVE SPEED – PROOF OF SPEED – AUTHORITY FOR PRODUCTION OF AMPHOMETER CERTIFICATE – WHETHER MEASURING TAPE HAD BEEN VERIFIED AND CERTIFIED – WHETHER SUFFICIENT EVIDENCE TO LINK THE TAPE MENTIONED IN THE CERTIFICATE TO THE TAPE USED BY THE POLICE INFORMANT – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: WEIGHTS AND MEASURES (NATIONAL STANDARDS) ACT 1960-1966, SS8, 9, 20; WEIGHTS AND MEASURES (NATIONAL STANDARDS) REGULATIONS, R80; MOTOR CAR REGULATIONS, RR188, 193; MOTOR CAR ACT 1958, S91(A).

On a charge of exceeding 100km/h under Regulation 1001 of the *Motor Car Regulations*, counsel for the defendant objected at the close of the prosecution's case, to the use of the certificate produced relating to the amphotermeter. He submitted in effect, that in the absence of the evidence which the certificate purported to give, the case had not been established against his client and there was no case to answer. The Magistrate ruled there was no case to answer and dismissed the information. Upon Order Nisi to Review—

HELD: Order absolute. Remitted to the Magistrate for hearing and determination according to law.

1. **Regulation 193 of the *Motor Car Regulations* makes provision for the production of a certificate from the technical officer, and the professor, or the reader to be *prima facie* evidence of the testing and sealing of the tape measuring instrument of the amphotermeter referred to in such certificate and the accuracy of such instrument. That method of proof was used in this case and the accuracy of the amphotermeter was therefore proved.**

2. **Having regard to the relevant Legislative provisions it can be seen that the certificate which was tendered to the Magistrate was admissible in evidence. Indeed, counsel for the defendant conceded that that was so and that the objection was taken under a misapprehension as to what the regulations provided. Consequently, the Magistrate was in error in upholding the objection.**

3. **In relation to the submission that there was insufficient evidence to link the tape referred to in the certificate with the tape used by the police informant, the constable actually gave evidence which clearly linked the tape used with the tape referred to in the certificate. There was no reason for thinking he was not able to give that evidence and no objection was, in fact, taken to him giving it in that form.**

HARRIS J: ... "The certificate which gave rise to the objection was a certificate which, omitting the parts which it is not necessary to refer to, recited the *Weights and Measures (National Standards) Act* 1960-1966, and the *Weights and Measures (National Standards) Regulations*. It is stated it was a certificate under Regulation 80 and said: This is to certify that the standard of measurement under the supervision of the person for the time being holding or performing the office of the office of Superintendent of Weights and Measures for the State of Victoria, a verifying authority under the *Weights & Measures (National Standards) Regulations* in relation to the verification of such standards of measurements in accordance with the *Weights and Measures (National Standards) Regulations* and that its value ascertained upon the verification was as stated hereunder. Particulars of standard – description of standard: the interval 0-25 metres on a flexible steel tape marked S.M.63. The date on which verified: 18th November 1975. Value of standard ascertained upon verification at 20 degrees centigrade under a pull of 50 newtons: 25 metres minus three millimetres. Accuracy of ascertained value of standard plus or minus one millimetre. Period within which the standard is to be reverified: two years. The accuracy of the ascertained value of the standard has been expressed on the basis that there is not more than one chance in 100 that the true value of the standard differs from the stated accuracy. This certificate issued for Victoria Police Department, dated 24th November 1975. It has a signature beneath of a Mr Kellett as Superintendent of Weights and Measures for the State of Victoria, verifying authority.

The way in which this matter of evidence arises is this. Under the provisions of s91(A) of the *Motor Car Act 1958* it is provided:

'Where upon proceedings for an offence against this Act or the Regulations or any other Act or law relating to motor cars or the use thereof the speed at which a motor car travelled on the occasion of the alleged offence is relevant in the proceedings evidence of the speed of the motor car as indicated or determined on that occasion by the speed measuring device known as the amphotometer when tested and sealed and used in such manner as is prescribed shall, without prejudice to any other mode of proof, be *prima facie* evidence of the speed of the motor car on that occasion.'

Section 91(B) provides:

'A certificate in the prescribed form to the effect that any device referred to in s91 or 91(A) has been tested and sealed in the prescribed manner, signed or purporting to be signed— ...

(b) in the case of a device referred to in s91(A) by a Technical Officer and by the Professor of Electrical Engineering or the Reader in Electronics at the University of Melbourne—
shall without prejudice to any other mode of proof be *prima facie* evidence that the device has been so tested and sealed.'

Regulation 188 of the *Motor Car Regulations* provides that:

'The manner in which the Amphotometer shall be used for the purpose of providing *prima facie* evidence of the speed of a motor car on any occasion shall be as follows:

"The two detector tubes which form part of a device known as an Amphotometer shall, when used with the speed or time measuring instrument of such device for determining the speed at which a motor car travels on a highway, be placed across the highway approximately parallel at a distance of twenty-five metres apart plus or minus seventy-five millimetres. This distance shall be measured by a measuring tape verified and certified as a standard of measurement pursuant to the Act of the Commonwealth known as the *Weights and Measures (National Standards) Act 1960-1964* and the regulations made thereunder."

Regulation 193 makes provision for the production of a certificate from the technical officer, and the professor, or the reader to be *prima facie* evidence of the testing and sealing of the tape measuring instrument of the amphotometer referred to in such certificate and the accuracy of such instrument. That method of proof was used in this case and the accuracy of the amphotometer was therefore proved.

The point, of course, arises with regard to whether or not the measuring tape used had been verified and certified as a standard of measurement pursuant to the Commonwealth Act and the regulations made under the Commonwealth Act. The *Weights and Measures (National Standards) Act 1960-1964*; provides (in s8) for the appropriate Commonwealth Authority, which is the Commonwealth Scientific and Industrial Research Organisation to keep standards of measurement for the legal units of measurement which are legal units in the Commonwealth of Australia. Standard of measurement means an instrument which is used for measuring, such as a tape or ruler. The unit of measurement is now the metre.

Section 9 of the Commonwealth Act provides for the verification of standards of measurement, that is to say, it provides a way in which persons who have measuring instruments may have them checked by the appropriate authority and verified as being accurate or alternatively verified as to how accurate they are. Sub-section (1) provides:

'A standard of measurement ... in respect of a physical quantity for which there is a Commonwealth standard of measurement may, at the request of the appropriate authority and with the approval of the Commission, be verified and from time to time re-verified by or on behalf of the Organisation by means of, by reference to, by comparison with or by derivation from ... '

and then there are set out the particular standards of measurement against which the standard brought along is sought to be verified. Sub-sections (2) and (3) of that section contain provisions as to how the verification is to be carried out and require the specification of a period within which the standard is to be re-verified.

Section 20 of the Act empowers the Governor-General to make regulations,

"... not inconsistent with this Act, prescribing all matters which are required or are permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect

to this Act, and in particular:

(a) by providing for or in relation to the issuing of certificates in respect of the verification and re-verification of standards of measurement for the reception in evidence of a document purporting to be such a certificate and for such a certificate to be evidence of the matter stated in it; and ...

(b) provides for the other matters that are set out in that paragraph.)

Regulations have been made which are called the *Weights and Measures (National Standards) Regulations*. Regulation 80 of those regulations provides how the verification is to be carried out. Sub-regulation 6 provides,

'Where a standard of measurement is verified or re-verified in accordance with this regulation' –

the appropriate officer 'may sign and issue a certificate under this regulation.' Sub-regulation 7 prescribes in detail the matters which are to be stated in the certificate.

Then Regulation 801, provides,

'(1) A certificate issued under this Part is evidence of the matter stated in it.

(2) A document purporting to be such certificate may be received in evidence in any court (whether exercising Federal jurisdiction or not) or in proceedings before a person authorised by a law of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence.

(3) A certificate purporting to be a certificate under this Part or a document purporting to be a document cancelling a certificate under this Part shall, unless the contrary is proved, be deemed to have been signed and issued by the person by whom it purports to be signed and issued and, unless the contrary is proved, the person by whom it purports to be signed and issued shall be deemed to be a person authorised by, or in pursuance of, this Part to sign and issue the certificate or document.'

That last sub-regulation was inserted by an amendment in Statutory Rule No.150 of 1968 Regulation 9.

Having gone through those provisions it can be seen that the certificate which was tendered to the Magistrate was admissible in evidence. Indeed, counsel for the defendant who has appeared again before me on the return of the order nisi, has conceded that that was so and that the objection was taken under a misapprehension as to what the regulations provided. Consequently, the Magistrate was in error in upholding the objection.

It still remains to be considered as to whether or not the Magistrate could properly have dismissed the information at the close of the informant's case. Counsel for the informant before me has objected to any further point being raised now but in the light of what I am about to say, it is not necessary to say how I would have ruled on that objection if matters had stood otherwise than the way in which I consider they do.

Counsel for the defendant, having conceded the admissibility of the certificate, then took the further point that on the evidence before the Magistrate there was not sufficient evidence to link the tape, which was referred to in the certificate, with the tape that the constable said had been used for the purpose of measuring the distance of 25 metres when the amphotometer was set up.

What the witness had said about that was this:

'I produce a certificate under Regulation 80 of the *Weights and Measures (National Standards) Act* 1960-1966 and *Weights and Measures (National Standards) Regulations* in relation to the flexible tape which was used in accordance with the Regulations.'

That is the evidence of a witness accustomed to giving evidence expressing himself in formal but nonetheless appropriate language. He was undoubtedly saying when he gave that evidence that the tape that was referred to in the certificate was the tape that was used when the amphotometer was set up. It is, of course, quite probable that it was within his competence to give that evidence. The objection that has been raised in this court is that the evidence should not have been given in that form and that, unless the constable was able to state the particular way in which he was able to give evidence that the tape used when the device was set up was the tape referred to in the certificate, the evidence should not have been received. The submission concluded with the

proposition that the consequence was that as that was the situation there was no evidence to enable the reading of the amphotermeter to be used as evidence because it had not been shown it was set up at the proper distance of 25 metres.

In my opinion, there is no substance in that argument. The constable actually gave evidence which clearly linked the tape used with the tape referred to in the certificate. There is no reason for thinking he was not able to give that evidence and no objection was, in fact, taken to him giving it in that form. I am quite unable to see why that evidence and no objection was, in fact, taken to him giving it in that form. I am quite unable to see why that evidence should have been ruled out or excluded then, or why I should now take the attitude that the evidence did not disclose the necessary link between the tape used and the tape inferred to in the certificate. I therefore find that that further point is not sustained.

Counsel for the informant indicated that even apart from the matter of the use of the certificate, he wished to submit that there was sufficient evidence before the Magistrate to show that the proper tape or the required type of tape had been used. This stems from the fact that the witness also gave evidence that the tape that was used was a standard measuring tape. It would seem that what counsel for the informant had in mind was to rely upon the principle that is dealt with in the case of *Mitchell v WS Kimpton & Sons Pty Ltd* [1971] VicRp 70; [1971] VR 583. However in view of what I have said, with respect to the evidentiary value of the certificate and of what the witness said about it, it is unnecessary to consider that point and I express no view upon it.

I have concluded that the order nisi should be made absolute and the order set aside. As the Magistrate has made this ruling at the conclusion of the informant's case when there was a submission of no case to answer, it is inescapable that the matter will have to be sent back to the to the Magistrates' Court to be heard further. Indeed, I am not sure that it should not be reheard, but I will hear what counsel have to say about that particular point.

ORDER: The order is: Order nisi made absolute on grounds (1),(2),(4) and (5). Order below set aside. I will hear counsel as to what order should be made in lieu of that and also hear counsel as to the question of costs. (Discussion ensued.) Order that the case be remitted to the Magistrates' Court to be further heard by the Magistrate who constituted the court on 28 June 1976 or, if that course cannot conveniently be adopted, then to be reheard by the Magistrates' Court at Warrnambool. Order that the defendant pay the informant the sum of \$200 costs. I have been asked to grant an indemnity certificate under the *Appeal Costs Fund Act* but in the circumstances I do not feel that it would be a proper exercise of my discretion to grant that certificate.
