

29/69

SUPREME COURT OF VICTORIA

SHEIL v MASTROGIANNIS

Smith J

9 December 1969

MOTOR TRAFFIC – SPEEDING – AMPHOMETER USED TO CHECK SPEED – AMPHOMETER CHECKED BEFORE USE – INFORMANT UNABLE TO RECALL WHETHER THIS WAS DONE BY HIM OR HIS ASSISTANT – WHETHER THE REQUIREMENTS OF THE REGULATION SATISFIED – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR (PORTABLE SPEED MEASURING DEVICES) REGULATIONS 1966, R226(i)*.

HELD: Order nisi discharged.

1. It was clear under the Regulation that the test of the two positions must have been made by the person who operated the machine for the purpose of determining the speed at which the particular defendant was travelling. The evidence showed clearly that it was the informant who determined the speed of the defendant's car using the amphometer, but there was no evidence on which it could be found that he was the person who checked the two positions of the indicator needle. Indeed, the evidence, so far as it went, strongly suggested that the informant was unable to say whether it was he or his assistant who made that check of the needle positions.

2. Accordingly, the evidence before the Magistrate did not make out a case and the information was rightly dismissed.

SMITH J: This is the return of an order nisi to review an Order made by a Stipendiary Magistrate in the Court of Petty Sessions at Springvale on 3 September 1969 dismissing an information brought by Anthony Sheil against Leonidas Mastrogiannis charging him with an offence of excessive speed.

The informant, in the Court below, relied upon an amphometer reading to prove the excessive speed and accordingly evidence was given before the Magistrate which was intended to satisfy the evidentiary requirements of the *Motor Car (Portable Speed Measuring Devices) Regulations 1966*. One of those regulations, namely, Regulation 226(i) is in these terms,

"A device shall not be used to determine the speed at which a motor car travels until the operator has checked the speed or time-measuring instrument of the device to see that the indicator needle is at the zero scale position when the instrument is switched off and that the indicator needle is at the fullscale position when the instrument is switched on."

It appeared from the evidence given in support of the information that when the amphometer apparatus was set up, a check such as is described in Regulation 226(i) was made, but that the instrument was then used to check the speed of motorists other than the defendant before it was used to check his speed, and that a check, as required by Regulation 226(1), was not repeated between the time when the defendant's speed was checked and the time when the speed of another motorist was last previously checked.

The Magistrate, in dismissing the information, said that the Police had failed to comply with the *Motor Car Regulations* inasmuch as the machine was not switched off before each speed measure test was made. On behalf of the informant it is contended that the Magistrate was wrong in construing the Regulation as requiring that the machine should be switched off before each speed measure test was made, although as I understand the working of this machine, it would be necessary to switch the instrument off in order to see that the indicator needle was at the zero scale position and so to make one half of the check described in Regulation 226(i).

The ground of the order nisi is that the Stipendiary Magistrate should have found that on the evidence this Regulation had been complied with in that the operator of device, referred to in

the Regulation had, within the meaning of the Regulation, checked the speed or time-measuring instrument of the device to see that the indicator needle was at the zero scale position when the instrument was switched off and that the indicator needle was at the fullscale position when the instrument was switched on.

It appears to me to be a question of some difficulty to decide what is the stage at which the operator is by this Regulation required to have made the check of the two needle positions. In literal terms, no time limit is specified and if the Regulation were construed literally all time before the use of the machine would be available and a check of the two positions made years before would be adequate to satisfy the Regulation's requirements.

In view of the consequences of such a construction it may be thought that some implication needs to be made, and one possible implication would be that the check of the two positions must have been made by the operator while he filled on this particular occasion the role of operator.

Other possible implied limitations were discussed during the course of the hearing of this order nisi. I find it unnecessary, however, to decide this particular question of construction because it appears to me to be clear, on the material before me, that the Magistrate's finding was the right finding, on the evidence, though for what would seem to have been a different reason from that operating in his mind.

It seems clear under the Regulation that the test of the two positions must have been made by the person who operated the machine for the purpose of determining the speed at which the particular defendant was travelling. The evidence shows clearly here that it was the informant who determined the speed of the defendant's car using the amphotometer, but there is no evidence on which it could be found that he was the person who checked the two positions of the indicator needle. Indeed, the evidence, so far as it goes, strongly suggests that the informant was unable to say whether it was he or his assistant who made that check of the needle positions.

The informant gave evidence describing the setting up of the machine, the tubes, cables, and so on, and he said in his evidence,

"The machine was then switched on and off to see if it gave an exact zero reading and an exact fullscale reading on the dial thereof and where necessary adjustment was made by turning the adjusting screw on the amphotometer head".

In cross-examination he was taken through the detail of what was done in this setting up of the machine and he said in general terms,

"the zero reading and the fullscale reading on the dial, the amphotometer head, were both checked at the time of the setting up of the machine, as described in my evidence-in-chief."

If the matter stood there, one, in my view, would not be entitled to find that the informant, who was the operator, had made those two checks and furthermore, in the course of his cross-examination as to what happened on the setting up, he said at one stage "I am unable to recall which one of us two did each particular task on this occasion".

For those reasons, I am of opinion that the evidence before the Magistrate did not make out a case, and that the information was rightly dismissed. The order nisi will be discharged with costs, to be taxed. I doubt that that has any subject matter but I will put it in for formal purposes in case there is some use for it. Is the interpreter there? Mr Interpreter, would you mind telling Mr Mastrogiannis that the Appeal has been dismissed?