42/92

SUPREME COURT OF VICTORIA

CHISHOLM v MATHEWS

Hayne J

15, 21 September 1992 — (1992) 16 MVR 447

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST – DEVICE USED – NO EXPRESS STATEMENT THAT A PRESCRIBED DEVICE USED – WHETHER OPEN TO CONCLUDE THAT PRESCRIBED DEVICE USED – EVIDENCE OF ANALYTICAL CHEMIST AS TO INHERENT ERROR FACTOR IN BREATHALYZER – WHETHER SUCH EVIDENCE RELEVANT TO DEFENCE UNDER S49(4): *ROAD SAFETY ACT* 1986, SS49(1)(f), (4), 53, 55.

1. Where a police officer gave evidence that as a result of a request a driver underwent a preliminary breath test which indicated a positive reading (but did not expressly state that the device used was a prescribed device) it was open to the Magistrate to take that evidence as meaning that a preliminary breath test had been conducted under and in accordance with s53 of the *Road Safety Act* 1986 ('Act').

2. Evidence given by an analytical chemist (on a charge under s49(1)(f) of the Act) to the effect that a breath analysing instrument has an inherent error or margin for error cannot be used to show that a particular instrument was not in proper working order or properly operated on a particular occasion.

HAYNE J: [1] On 30th March 1992 the appellant was convicted in the Magistrates' Court of an offence under s49(1)(f) of the *Road Safety Act* 1986 of furnishing a sample of breath for analysis within three hours after driving a motor vehicle and which recorded more than the prescribed concentration of alcohol present in his blood. He now appeals against that conviction on points of law stated in the order made under Rule 58.09 in the following terms (as amended to correct a typographical error in the order as it was authenticated):

> "1. Whether the undergoing of a preliminary breath test in accordance with section 53(1) of the *Road Safety Act* is an element of the offence under section 49(1)(f) of the Act?
>
> 2. Whether on the evidence the Magistrate could properly conclude that the instrument by which the Appellant underwent a preliminary breath test was a prescribed device within the meaning of section 53(1) of the Act?
>
> 3. Whether the Magistrate was in error in failing to consider the evidence adduced by the appellant as to the unreliability generally of breath analysing instruments on the question of whether the subject breath analysing instrument was in proper working order or was properly operated?
>
> 4. Whether the Magistrate was in error in not finding that the subject breath analysing instrument was not in proper working order or was not properly operated?
>
> 5. Whether the Magistrate was in error in finding that the offence had been proved beyond reasonable doubt?"

In order to see how these questions of law are said to arise it is necessary to notice some of the evidence that was given on the hearing below. The informant gave evidence that on 5th November 1991 he intercepted a motor car being driven by the appellant. Observing that the appellant's breath smelt of **[2]** intoxicating liquor he asked whether the appellant had consumed any liquor that evening; the appellant said that he had. The informant testified that he then said to the appellant "I will require you to undergo a Preliminary Breath Test" and went on in his evidence to say that "The defendant subsequently underwent a Preliminary Breath Test which indicated a positive reading". The informant required the appellant to accompany him to Ararat Police Station to undergo a breath test. At the police station an authorized operator of breath analysis instruments conducted a breath test on the appellant which gave a result of 0.07%.

After the operator of the breath analysis instrument had given his evidence the informant closed his case and counsel for the appellant submitted that the appellant had no case to answer.

Among other things counsel for the appellant submitted that it was "an essential ingredient of the offence laid pursuant to s49(1)(f) of the *Road Safety Act* 1986" for the prosecution to prove that a preliminary breath test had been conducted in accordance with s53 of that Act and that there was no evidence before the magistrate identifying what preliminary breath test device had been used. The Magistrate ruled that there was a case to answer saying, in effect, that he considered that it was open to him to conclude that the instrument used to conduct the preliminary breath test was a prescribed device "in the absence of any challenge of that factor".

The appellant then gave sworn evidence himself and called evidence from a friend about the amount that she had seen him drink that day. He also called an analytical and **[3]** consulting chemist who said that he had worked in the field of blood alcohol and breath analysis for about 12 years during which time he had tested more than 3,000 people and had read much of the literature in the area. He said that he owned a breathalyser of the kind used by the Victoria Police. He said that the breathalyser "is an analytical instrument and as such, results coming from it have a margin of error or inherent error". He expressed the view that that error approximated to plus or minus 0.01% but that the breathalyser could over-estimate the amount of alcohol in fact in the blood by up to 0.028% and under-estimate by up 0.067%. He said that in his opinion, had the appellant consumed the amount of alcohol that he said that he had, the appellant should have had a blood alcohol level less than 0.01% (erroneously stated in the affidavit in support of the appeal as 0.1%) at the time of the breath test.

After hearing submissions the Magistrate reserved his decision until 30th March 1992 when he published written reasons in support of his decision that the case had been proved. In his reasons the Magistrate said, amongst other things:

> The final submission is that the information should be dismissed because the prosecution did not prove the device used to conduct the preliminary breath test was a prescribed device. It is conceded by the prosecution that the informant did not give evidence that he used a prescribed device. Further, my notes indicate the informant did not give evidence that he complied with the relevant regulations when he conducted the preliminary breath test. My record of the evidence is that Senior Constable Mathews was patrolling in a marked police divisional van (and I assume in full **[4]** police uniform) when the defendant was intercepted at approximately 8.50 p.m. on 5 November 1991. After a short conversation the defendant was requested to undergo a preliminary breath test and this proved positive. There is no evidence the device was a prescribed device and nor was there any cross-examination of what type of instrument was used. Therefore in the absence of such evidence, is it open to the Court to find the informant used a device that complied with the regulations? I am of the view that it is and I do so. To arrive at any other conclusion would be to say the informant somehow came by a device that was suitable for breath testing and that he went around using the device rather than a prescribed device that would be available to him in the police force. There is no evidence the prosecution would do this. In fact whether or not the device used by the informant was prescribed was never raised by the defence. Nor was the issue of whether or not he complied with the regulations. Therefore, as the evidence before the Court does not establish any departure from the regulations nor indicate anything which suggests a departure from the normal course of events, then I am satisfied there was compliance with the appropriate regulations."

I have quoted from the reasons at such length because at first sight the concession recorded by the Magistrate – "that the informant did not give evidence that he used a prescribed device" – might be taken as a concession that there was no material which bore upon the subject of the nature of the device used for the purposes of the preliminary breath test. In my view when the reasons are taken as a whole, they show clearly that the concession made below was a limited concession – that the informant did not expressly state in evidence that the device used was a prescribed device. The **[5]** Magistrate concluded from the whole of the evidence that in fact the device was a prescribed device.

The appellant argued grounds 1 and 2 together and it is convenient to adopt this approach. The argument advanced was that it is an essential element of an offence under s49(1)(f) that the defendant has undergone a preliminary breath test when required to do so by a police officer, that it must be shown that the preliminary breath test was taken "by a prescribed device" and that there was no evidence from which the Court below could conclude that the informant had in fact taken the preliminary breath test by a prescribed device. So far as presently relevant s49(1)(f) provides that a person commits and offence if:

> "Within three hours after driving ... a motor vehicle [that person) furnishes a sample of breath for analysis by a breath analysing instrument under section 55(1) and—
>
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle ...".

Thus there is express reference in s49(1)(f) to s55(1) of the Act; there is no express reference to s53. Section 55(1) provides (again so far as presently relevant) that:

> "If a person undergoes a preliminary breath test when required by a member of the police force ... under s53 to do so and— **[6]**
> (a) the test in the opinion of the member ... in whose presence it is made indicates that person's blood contains alcohol ...
> the member of the police force ... any require the person to furnish a sample of breath for analysis by a breath analysing instrument ..."

In *Smith v Van Maanen* (1991) 14 MVR 365; (MC 35/1991) Tadgell J said:

> "It seems to me that the necessary ingredients of s49(1)(f) to be proved by the prosecution are these: that the defendant has been driving a motor car within the last three hours relevant to the time of the alleged offence; that a preliminary breath test has been undergone pursuant to sub-s.(1) of s53; that the defendant has been duly required to furnish and has furnished a sample of breath for analysis; and that the result of analysis of the sample as recorded by the breath analysing instrument indicates that more than the prescribed concentration of alcohol was present in his or her blood. The furnishing of the sample has to be proved to be one for analysis by a breath analysing instrument, as defined, and, of course, the requirement must be one to furnish under s55(1)."

Accepting, as I do, this statement of the necessary ingredients of s49(1)(f) that must be proved by the prosecution, a question may yet arise about whether it is sufficient for the prosecution to prove that a preliminary breath test has been required and undergone or whether the prosecution must go on to say not only that a preliminary breath test has been required and undergone but that the test was "by a prescribed device". The reference made in s55 to s53 might be said to be a reference intended only to require identification of the circumstances said to authorize the making of the requirement under one or other of paragraphs (a), (b) and (c) of s53(1) for at least at first sight the words "under section 53" when used in s55 appear to relate **[7]** to the expression "required by a member of the police force" rather than to the expression "undergone a preliminary breath test". Indeed ss53 and 55 appear to treat "a preliminary breath test" and the manner of its administration ("by a prescribed device") as separate matters and thus it might be said that the "test" is distinct from the manner of its taking. However this may be, I do not think it necessary for the purposes of this case to form any final view on this aspect of the matter and I proceed on the basis that it is or may be a necessary element to be established by the prosecution in support of a charge under s49(1)(f) that the preliminary breath test was conducted by using a prescribed device.

In my opinion it was open to the Court below to conclude on the evidence before it that the device used for the purpose of the preliminary breath test carried out on the appellant was a prescribed device. The informant said in evidence that he had told the appellant that he required him to undergo "a Preliminary Breath Test" and that subsequently the appellant "underwent a Preliminary Breath Test which indicated a positive reading". This evidence was not challenged or explored in cross-examination. In my view it was open to the Magistrate to take that evidence as meaning that a preliminary breath test had been required and conducted in the manner required by the *Road Safety Act*. As was pointed out in argument before me, s53 is the only source of power whether in the *Road Safety Act* or otherwise to require a driver to undergo a preliminary breath test. Notwithstanding the references in the reasons of the **[8]** Magistrate to compliance with the regulations, it was common ground before me that the only regulation which touches the subject matter of preliminary breath tests is that regulation which prescribes four devices for use for the purpose of such tests.

Thus, when the informant spoke of requiring a preliminary breath test and spoke of conducting a preliminary breath test I consider that it was open to the Magistrate to conclude

that by that evidence he meant that he had conducted a preliminary breath test under and in accordance with s53. That is, it was open to the Magistrate to conclude that the informant was giving evidence using the expression preliminary breath test as a term of art. (See *Reeves v Beaman*) (Full Court unreported 31 August 1992)). Of course the burden of proving the essential elements of the charge rests upon the prosecution and it may well be thought desirable that a point of this kind is dealt with expressly and directly in evidence but equally I do not think that some unduly narrow construction should be put upon the evidence given by the informant. In my view it was open to the Magistrate to conclude that the "Preliminary Breath Test" of which he spoke was a test of a kind permitted by the legislation.

This is not to pray in aid any presumption of regularity. The application of any such presumption in criminal proceedings is by no means easy. See e.g. *Dillon v R* [1982] AC 484 at 486-7; cf. *Mallock v Tabak* [1977] VicRp 7; [1977] VR 78 at 82-85; and *Robertson v Smith* (Nicholson J unreported 27 July 1983). In my view it is not necessary to consider its application in this case. **[9]** In my opinion the first two grounds relied on by the appellant fail. The appellant also argued grounds 3 and 4 together and again I will treat them in the same way. The principal complaint, as I understood it, which the appellant sought to make in this respect was that the Magistrate did not consider whether the evidence of the analytical chemist might go in support of a defence under s49(4) of the Act that "the breath analysing instrument used was not on that occasion in proper working order or properly operated". The Magistrate said in his reasons that he rejected a submission that the breath analysing instrument "was not properly operated" for reasons which included a reason stated in the following terms:

> "The first is that following cross-examination of [the analytical chemist] by the prosecutor it is open to the Court to find that his knowledge of the practical operation of the breath analysing instrument does not place him in a position to be able to say the instrument was not properly operated. I make that finding."

As I understand that finding the Magistrate did consider whether the evidence of the analytical chemist could be shown to bear at least upon the question of whether the machine was properly operated when the appellant was tested and it may even be that it goes so far as to find that that evidence did not bear upon whether the machine was in proper working order at that time. If that were so, there would be no basis for the appellant's complaint. However that may be, I consider that the grounds fail for another reason, not dependent upon the construction of the Magistrate's reasons.

In my view, evidence of the kind given by the analytical chemist to the **[10]** effect that the machine has an inherent error or margin for error, could not be used (as the appellant sought to say it could) to show that a particular machine was not in proper working order or properly operated on a particular occasion. A statement of the general limitations of accuracy of the type of machine in question says nothing about whether a particular example of that machine was operated properly or was in proper working order on a particular occasion. In my opinion even if the Magistrate did not consider the possible use of the evidence in this way, the evidence could not have led the Magistrate to any different result. Accordingly, grounds 3 and 4 fail. The appellant made no separate submissions in support of ground 5 and I therefore say no more about it. For these reasons I am of the opinion that the appeal should be dismissed.

APPEARANCES: For the appellant Chisholm: Mr P Billings, counsel. O'Driscolls, solicitors. For the respondent Mathews: Mr C Hillman, counsel. JM Buckley, Solicitor for the DPP.
