

20/01; [2001] VSC 366

SUPREME COURT OF VICTORIA

DPP v JAMIESON

Balmford J

18 September, 5 October 2001 — (2001) 34 MVR 464

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE TAKEN BY MEDICAL PRACTITIONER – CERTIFICATE OF PRACTITIONER ADMITTED INTO EVIDENCE – FINDING BY MAGISTRATE THAT CERTIFICATE DID NOT CONTAIN PRESCRIBED PARTICULARS – CERTIFICATE DID NOT SPECIFICALLY REFER TO THE REGULATIONS – REFERENCE IN CERTIFICATE TO ‘COLLECTION’ OF BLOOD RATHER THAN ‘TAKING’ – CHARGES DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986 S49(1)(b), (g), 57(3); ROAD SAFETY (GENERAL) REGULATIONS 1999, R206.

On the hearing of charges under the *Road Safety Act* 1986 ('Act'), s49(1)(b) and (g), a magistrate admitted into evidence a certificate of a medical practitioner concerning the taking of a blood sample from the defendant. However, the certificate did not refer specifically to the Regulations and the word "collected" was used rather than "taken". Accordingly, the magistrate held that the certificate was of no effect and dismissed the charges. Upon appeal—

HELD: Appeal allowed. Dismissals set aside. Remitted for further hearing and determination.

The certificate, by stating that "all regulations relating to the collection of such sample were complied with" must be taken to have stated that the relevant Regulations which fall within that description were complied with. The words "taking" and "collection" are, in this context, interchangeable. Section 57(3) of the Act makes the proof of certain facts follow, in the absence of evidence to the contrary, from the signature by the medical practitioner of a certificate containing the prescribed particulars. No evidence to the contrary was called. Accordingly, the certificate was admissible pursuant to s57(3) of the Act and the magistrate was in error in dismissing the charges.

BALMFORD J:

1. This is an appeal under section 92 of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act") from a final order made on 3 April 2001 in the Magistrates' Court at Melbourne dismissing two charges against the respondent under section 49(1)(b) and (g) respectively of the *Road Safety Act* 1986 ("the Act").

2. On 1 June 2001 Master Wheeler ordered that the questions of law raised by this appeal are:

Did the Magistrate err in holding that the Certificate of Medical Practitioner of the taking of a blood sample (Exhibit AMC4 and TMcG-10 in these proceedings) ("the certificate"):

(a) did not comply with Regulation 206 of the *Road Safety (General) Regulations* 1999 ("the Regulations")?

(b) did not by its terms, inter alia, state that the medical practitioner who signed that document had complied with the requirements of [the Regulations]?

(c) was not admissible pursuant to section 57(3) of [the Act]?

The certificate bears an exhibit note from the Magistrates' Court and it is clear from the transcript of the proceeding in that Court that the Magistrate did in fact admit the certificate into evidence. Ms Cannon, for the appellant, submitted, and Mr Reynolds, for the respondent accepted, that question (c) should be read with the insertion of the underlined words:

(c) was not admissible as a certificate pursuant to section 57(3) of [the Act]?

3. In *Pettet v Readiskill* [1999] VSC 195 I adopted a passage from the judgment of Ashley J in *Popovski v Ericsson Australia Pty Ltd* [1998] VSC 61. His Honour, having formed the view that the parties should not be shut out from making certain specific contentions which were not available under the order of the Master, continued at [30]:

The way in which the issue(s) could be entertained appeared to be by my giving a direction under Rule 58.13. That was the course taken in *DPP v Hinch* (Supreme Court of Victoria, unreported, judgment 5 August 1994) where Mandie J said this:

Mr Graham submitted that Rule 58.13 broadly empowered the Court to deal with questions that arise at the hearing whether by way of amendment of the order or by simply directing that the matter be dealt with in the light of the arguments that had been advanced. I doubt that this power would extend to directing the amendment of the Master's Order having regard to the rules and practice in relation to the amendment of orders (see Rule 36.01(1) and Rule 36.01(9) and Rule 36.07). I am satisfied, however, that the Rule does empower the Court to direct in an appropriate case that the appeal be decided upon the questions of law identified and canvassed in the arguments advanced, where this is necessary to achieve the effective, complete and economic determination of the appeal and is otherwise just and convenient.

See also *Buckman v Barnawartha Abattoirs Pty Ltd* (Supreme Court of Victoria, unreported, judgment 14 July 1994), where Smith J adopted the same course.

... It was not suggested that the formal direction could not be given in the course of final disposition of the appeal.

4. In the light of the same considerations as moved Ashley J in *Popovski*, given the agreement of counsel, and being satisfied that no injustice would thereby be done to either party, I directed that the appeal be decided on the basis that question (c) read as if the underlined words had been inserted.

5. On 11 May 1999 a blood sample was taken from the respondent pursuant to section 55(9A) (b) of the Act. That provision read at that date, so far as relevant:

(9A) The person who required a sample of breath under sub-section (1) or (2) from a person may require that person to allow a registered medical practitioner ... to take from him or her a sample of that person's blood for analysis if it appears to him or her that—

(a) ...; or

(b) the breath analysing instrument is incapable of measuring in grams per 100 millilitres of blood the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever.

6. Section 57(2) and (3) of the Act read, so far as relevant:

(2) If the question whether any person was or was not at any time under the influence of intoxicating liquor or any other drug or if the question as to the presence of alcohol or any other drug or the concentration of alcohol in the blood of any person at any time or if a finding on the analysis of a blood sample is relevant—

...

(c) on a hearing for an offence against section 49(1) of this Act; or

...

then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the taking, within three hours after that person drove or was in charge of a motor vehicle, of a sample of blood from that person by a registered medical practitioner ...

(3) A certificate containing the prescribed particulars purporting to be signed by a registered medical practitioner is admissible in evidence in any proceedings referred to in sub-section (2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

The respondent was charged with two offences under section 49(1) of the Act. There was material before the Court which indicated that the blood sample, when tested, showed a blood alcohol content of .139%.

7. Regulation 206 of the Regulations provided at the relevant time:

A certificate under section 57(3) of the Act must contain the following prescribed particulars—

(a) a statement by the registered practitioner that the requirements of these Regulations for the taking of blood samples have been complied with; and

(b) the name of the person from whom the blood sample was taken; and

- (c) the time and date the blood sample was taken; and
- (d) the name and signature of the registered practitioner.

Regulation 204 was headed "Procedure for taking blood sample" and Regulation 205 "Procedures after taking blood samples". It was common ground that there were no other provisions in the Regulations which prescribed requirements for or after the taking of blood samples. By virtue of Regulation 103, the Regulations had come into operation on 1 May 1999, ten days before the events with which this matter is concerned. Regulation 105 defined "registered practitioner" as including a registered medical practitioner within the meaning of the *Medical Practice Act 1994*.

8. The registered medical practitioner who took the blood sample from the respondent was Dr Wells. He completed and signed the certificate ("the certificate") on a printed form headed "Certificate of medical practitioner of the taking of blood sample". As completed, the certificate began with the words:

I, David Wells of 57 Kavanagh St Southbank A registered medical practitioner hereby certify that with his express consent I collected a sample of the blood of James Jamieson of 141 Macorna St Watsonia at 2230 on 11/5/99 Location Marine Pde Elwood;

The printed form then continued:

... and that the code of practice and all the regulations relating to the collection of such sample were complied with ...

and concluded with other material not here relevant.

9. The Magistrate found that the words "all the regulations relating to the collection of such sample were complied with" did not meet the requirement of Regulation 206(a). Accordingly the certificate was of no effect under section 57(3) because it did not contain "the prescribed particulars". It did not refer specifically to the Regulations, and the word "collection" was not the same as the word "taking".

10. Regulation 206 requires a statement that "the requirements of these Regulations for the taking of blood samples have been complied with". The view of the Magistrate apparently was that the only means of referring to the Regulations in such a statement was to name them specifically. This seems to me to be the kind of point of law described by the Court of Appeal in *Sher v DPP* (unreported, decided on 2 August 2001) as bringing the law into disrepute.

11. The expression "all the regulations relating to the collection of such sample", which appears in the certificate, must be taken as including Regulations 204 and 205, which concern, as has been said, the procedure for taking blood samples and the procedure after taking blood samples. It cannot be said that Regulations 204 and 205 do not "relate to the collection of" blood samples under the Act. I note that the *Oxford English Dictionary* contains a number of definitions of the expression "relate to", the relevant definition here being "have reference to".

12. If there are any other regulations relating to the collection of blood samples, that expression must include those other regulations also, but that question does not arise here. The words "taking" and "collection" are, in this context, interchangeable. To repeat, the certificate, by stating that "all the regulations relating to the collection of such sample were complied with" must be taken to have stated that Regulations 204 and 205, which fall within that description, were complied with.

13. As the Court of Appeal said in *Sher* at paragraph 2:

Parliament does its best to keep drunk drivers off the streets. But the hydra of technicality is a many-headed beast, and as one unattractive point is cut off another rears up in its place. The Courts must do their best too.

14. Mr Reynolds, for the respondent, relied on authorities as to the contents of certificates under section 57(3) and similar provisions. Nathan J in *Bregazzi v Kilby* ((1996) 25 MVR 285,

decided on 18 October 1996) said at 2-3:

Undoubtedly a certificate must accord with, and contain all of the information set out in the Regulations, near enough is not good enough is the common sense epithet which applies.

The Full Court of the Supreme Court of the ACT (Blackburn, Connor and Smithers JJ) said in *Novacic v Cooper* (1973) 1 ACTR 99 at 111; (1973) 21 FLR 436 of provisions analogous to those with which I am here concerned:

... the legislature, in framing these provisions to deal with a grave social evil, has properly had regard to the preservation of the liberty of the subject by laying down strict procedural requirements for the conduct and proof of breath tests. If any of these procedural requirements is not observed, the law – and indeed the public interest – requires that the accused be acquitted.

However, the point of the present case is that the certificate does contain, by virtue of the meaning of the words used, all of the information prescribed by Regulation 206. The procedural requirement of Regulation 206 was thereby observed.

15. Mr Reynolds submitted, if I understood him correctly, that because the word "collection" was used in earlier legislation, but had been replaced by "taking" shortly before the relevant time, Dr Wells might have had in his mind the requirements of the earlier provisions, which were less onerous than those in force at the relevant time. Thus the court could not be satisfied that he had had in his mind the terms of the current regulations.

16. That is the kind of argument which section 57(3) is intended to foreclose. That provision makes the proof of certain facts follow, in the absence of evidence to the contrary, from the signature by the medical practitioner of a certificate containing the prescribed particulars. No "evidence to the contrary" was called before the Magistrate. No enquiry is required as to what was in the mind of the registered medical practitioner.

17. I note that section 47(c) of the Act provides that one of the purposes of the Part of the Act in which the relevant provisions occur is to "provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol". Section 35 of the *Interpretation of Legislation Act* 1984 provides that in the interpretation of a provision of an Act a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object.

18. It is not necessary for me to consider those of the submissions made by Mr Reynolds which were based on the assumption that the certificate did not comply with Regulation 206 and therefore did not have the effect conferred by section 57(3) on a certificate containing the prescribed particulars.

19. For the reasons given, the answer to each of the questions in the Master's order (including question (c) with the addition of the underlined words) must be Yes. The appeal is allowed. The decision of the Magistrate will be set aside and the matter remitted to the Magistrates' Court to be heard and determined according to law.

APPEARANCES: For the appellant DPP: Ms G Cannon, counsel. Solicitor for Public Prosecutions. For the respondent James Reid Jamieson: Mr P Reynolds, counsel. Voitin Walker Davis, solicitors.