28/69

SUPREME COURT OF VICTORIA

TIMOTHY v BROPHY

Smith J

11 December 1969

MOTOR TRAFFIC – DRINK/DRIVING – BREATH ANALYSING INSTRUMENT USED – WRITTEN NOTICE GIVEN REQUIRING THE ATTENDANCE OF THE OPERATOR AT COURT – QUESTIONS ASKED OF OPERATOR ABOUT HIS USE OF THE AMPOULES AND THE CONTENTS THEREOF – WHETHER CONTENTS OF THE AMPOULE CONTAINED CHEMICALS IN THE RIGHT PROPORTION AND IN GOOD CONDITION – NO CASE SUBMISSION MADE – UPHELD BY JUSTICES – CHARGE DISMISSED – WHETHER JUSTICES IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Order nisi discharged.

1. In relation to the 'no case' submission, it was open to the justices at the end of the informant's case, to say that though there was a *prima facie* case against the defendant on which he could lawfully be convicted, nevertheless they were not satisfied beyond reasonable doubt of his guilt, and they would not call on him to give evidence but would dismiss the information.

***Benney v Dowling* [1959] VicRp 41; [1959] VR 237; [1959] ALR 644, applied.**

2. Upon the evidence given by the operator of the instrument, it was plain that there were substantial possibilities of the contents of the ampoule into which the defendant's breath was injected not consisting at the time of the test, of chemicals in the right proportion and in good condition. To many minds doubts as to the contents and quantity of the ampoule would seem unreasonable doubts; but the question here was whether it was fairly open to the justices to entertain reasonable doubts, having regard to the evidence given.

3. There was nothing unreasonable in the justices holding that they were left with a reasonable doubt as to the contents of the ampoule, and on that footing they were entitled to exercise the discretion vested in them by saying that they would dismiss at the end of the informant's case. In that regard it was perhaps of some significance that it must have seemed to them to be extremely improbable that, if the defendant were called upon to go into his case, he would be able to throw any further light in this question of the contents of the ampoule into which the breath was injected.

3. Accordingly, the decision of the justices could not properly be interfered with.

SMITH J: This is an Order Nisi to Review which was obtained by the informant in a prosecution under the *Motor Car Act* 1958 to challenge the order of the Court of Petty Sessions dismissing his information.

The information charged that the defendant drove a motor car whilst the percentage of alcohol in his blood expressed in grams per hundred millilitres of blood was more than .05 per centum contrary to s81A of the Act.

Evidence was called in support of that information and at the end of the informant's case the magistrates were asked to dismiss the information and, as already stated, they did so.

The Order Nisi to Review was obtained on three grounds expressed in these terms:

(1) that the learned Justices of the Peace failed to give proper effect to the provisions of s408A(2)(a) of the *Crimes Act* 1958 as amended,

(2) That the learned Justices of the Peace failed to give proper effect to the provisions of s408A(3)(b) of the *Crimes Act* 1958 as amended,

(3) That in failing to be satisfied that the ampoules used were those prepared by First Constable Genardini and that the ampoules used contained the prescribed solution and that the breath analysing

instrument was in proper working order, the learned Justices of the Peace failed to give proper effect to the provisions of s408A(2)(a) and/or s408A(3)(b) of the *Crimes Act* 1958 as amended.

For the purpose of making out his case against the defendant, the informant desired to take advantage of the provisions of s408A(1) of the Act, under which, subject to compliance with the provisions of subsection (2) of the same section, the percentage of alcohol indicated to be present in the blood by a breath analysing instrument will, in certain circumstances, be evidence of the actual percentage of alcohol present in the blood.

The informant also desired to take advantage of the provisions of subsection (2)(b) of the section which provides that evidence by a person authorised to operate a breath analysing instrument pursuant to the Section;

> (1) that an apparatus used by him on any occasion pursuant to the section was a breath analysing instrument within the meaning of the section,
>
> (2) that the breath analysing instrument was on that occasion in proper working order and properly operated by him,
>
> (3) that in relation to the breath analysing instrument all regulations made under this section with respect to breath analysing instruments were complied with, shall be *prima facie* evidence of those facts.

The informant was not in a position to rely upon sub-section(2)(a) of the section to provide evidence in support of his case because that subsection does not provide such evidence where the accused person gives a certain notice in writing, and here, it is common ground that such a notice was given.

The informant called as a witness, First Constable Genardini who produced a certificate that he was authorised to operate breath analysing instruments, and an extract from the *Gazette* relating to the types of breath analysing instruments that were approved under the legislation. He went on to describe the making of a test upon the defendant on one of these machines. He swore, amongst other things, that the instrument upon which he made the test was an approved analysing instrument within the meaning of the Act and that it was in proper working order and properly operated by him in accordance with the regulations, and that after making the analysis he tested the instrument with a standard alcohol solution and the readings read correct.

It will be observed that in giving that evidence he did not follow out the formulations of possible evidence that are specified in sub-section (3)(b) of s408A. Instead of saying that the instrument was properly operated by him and that in relation to it all regulations made under the section with respect to breath analysing instruments were complied with, he said,

> "It was in proper working order and properly operated by me in accordance with the regulations."

It may be that evidence in that form is not sufficient to constitute *prima facie* evidence of the matters specified in the relevant portions of sub-section (3)(b). The language used by the witness might, for example, be construed as meaning not that the instrument was operated in the way in which it was designed to be operated, but merely that in its operation the regulations relating to the operation were complied with. But for the purposes of this Order Nisi to Review, I will assume, without expressing any final opinion on the matter, that the evidence given was sufficient to constitute *prima facie* evidence of the facts that are specified in sub-section (3)(b).

On that assumption, it clear in my view, that there was here a *prima facie* case against the defendant — a case upon which he could lawfully have been convicted.

The Order Nisi seems to proceed upon the view that the magistrates thought that there was not a *prima facie* case, but when one looks at the language that they used, the proper conclusion is, in my view, that they were not addressing themselves to one question of the sufficiency or insufficiency of the evidence to constitute in law a *prima facie* case. What they were

addressing themselves to was whether the case made by the informant satisfied them that the defendant in fact had the blood alcohol content that the informant alleged. The language used by the magistrates was as follows:

> "We accept the evidence of Police Officer Genardini stating the regulations were complied with, except that we are not satisfied that the evidence established that the ampoules used were those prepared by First Constable Genardini and that the ampoules used contained the prescribed solution. Case dismissed."

It was pointed out by O'Bryan J in the case of *Benney v Dowling* [1959] VicRp 41; [1959] VR 237; [1959] ALR 644 that it is open to magistrates at the end of an informant's case, to say that though there is a *prima facie* case against the defendant on which he could lawfully be convicted, nevertheless they are not satisfied beyond reasonable doubt of his guilt, and they will not call on him to give evidence but will dismiss the information.

His Honour, at p242 of the report, quoted the following passage from the decision of the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671:

> "When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted This is really a question of law."

His Honour proceeded,

> "That proposition in my opinion was never intended to carry with it the proposition that a magistrate has no discretion to say, at the end of the informant's case whenever there is, technically speaking, evidence upon which the defendant could lawfully be convicted, that he does not want to hear the defendant but will dismiss the information."

His Honour went on then to refer to the magistrate's words and said

> "It is common practice, both in Courts of Petty Sessions and in trials before a jury, at the end of the case for the informant or prosecution, although the evidence as it stands might justify a conviction, for the magistrate, or a jury very often at the suggestion of the trial judge, to say that he or it does not require to hear any evidence for the defence and to acquit at that stage. That is a very convenient practice and I do not think that the passage I have cited from *May v O'Sullivan* was intended to say that there is anything improper in such action."

His Honour accordingly said that he would not be prepared, in that case that he was considering, to make the Order Nisi absolute on the particular grounds to which those observations related.

Now having reached the conclusion here that what the magistrates in the present case were doing was to act in the way described by O'Bryan J, the question remains whether that was a lawful reasonable course for them to take on the evidence before them.

The evidence included a pamphlet which explained the working of the kind of breath analysing instrument that had been used in this case, and from that pamphlet and other evidence it appeared that the machine, before being used to test a subject, had to be loaded with two ampoules; and into one of those ampoules the operator, in the course of testing the subject, caused some of the subject's breath to be injected. The colour of the chemical contents of that ampoule would then change if there was alcohol in the breath, and a comparison then of the light passing through that ampoule into a photo-electric cell, with the light passing from the other ampoule into another photo-electric cell, gave a reading as to the alcoholic content of the blood of the subject.

It was clear, as I follow the evidence, that the ampoule into which the breath was injected by the operator was not tested either before or after use as to its chemical constituents. The machine was tested before and after use, but the nature of its operation appears to me to make it clear that that test would not involve a test of the particular ampoule into which the breath of the subject was injected.

Accordingly, it was of critical importance, when seeking to assess the reliability of the test, to know what grounds there were for thinking that the ampoule into which the breath was injected contained the right chemical contents. The evidence indicated that that ampoule ought to contain three millilitres of a solution of .025 potassium dichromate and 50 percent sulphuric acid. The material before me shows that the operator, in cross-examination, was asked;

"It is accordingly necessary if the apparatus is to record accurately that the potassium dichromate ampoule be accurately made up in accordance with formula?" He said, "Yes". He was asked, "The ampoules are not part of the breathalysing apparatus but are freshly inserted each time a breathalyser test is to be done?" He replied, "Yes". He then went on to give this evidence,

> "There are other breathalyser operators besides myself at the Warrnambool Police Station. The ampoules that are used in the breathalyser are kept in a box which is kept in a locked cupboard in the police station. The other three operators have a key to this cupboard. I don't know if other people have keys; I don't think so. We made up the ampoules in the box ourselves and we all use the same box to get our ampoules from when tests are conducted. I am not able to say if the ampoules which are used were made up by me, but they would have been made up by one of the four officers. We go to Melbourne together when we get another batch of ampoules – when we want another batch of ampoules, to the Forensic Science Laboratory. We get the chemicals from a chemist at the laboratory. We each make up the ampoules. I am not able to say that the ampoules I used in the breath testing of the defendants (sic.) were ampoules I made up. They were from the box. The other operators also made them up. We brought back about 120. I agree that the reading of the instrument would, I suppose, depend on what the potassium dichromate solution was. We had these ampoules approximately two months. I am not in a position to say whether the solution deteriorates. I am not able to say the ampoule that I used was one of the ampoules made up by me. They may have been made up by one of the others. When we brought the ampoules back from Melbourne, any old ampoules would be destroyed. I am not able to identify the ampoules as ones made up by me at the Forensic Science Laboratory. There are no markings on the ampoules which enable me to say who made them up, or how they were made an, or when."

The material before me also indicates that the witness did not at any time give evidence that the ampoules had been made up under supervision, and that he did say that he and the others had made up the ampoules from chemicals and solution provided by a chemist at the Forensic Science Laboratory.

Now upon that evidence, it is plain, I think, that there were substantial possibilities of the contents of the ampoule into which the defendant's breath was injected not consisting at the time of the test, of chemicals in the right proportion and in good condition. To many minds, I think, doubts as to the contents and quantity of the ampoule would seem unreasonable doubts; but the question here is, in my view, whether it was fairly open to the magistrates to entertain reasonable doubts, having regard to that information which I have read and which was elicited in cross-examination.

In my view there was nothing unreasonable in the magistrates holding that they were left with a reasonable doubt as to the contents of the ampoule, and on that footing I consider that they were entitled to exercise the discretion vested in them by saying that they would dismiss at the end of the informant's case. In that regard it is perhaps of some significance that it must have seemed to them to be extremely improbable that, if the defendant were called upon to go into his case, he would be able to throw any further light in this question of the contents of the ampoule into which the breath was injected.

For these reasons I consider that the decision of the Magistrates can not properly be interfered with. The Order Nisi will be discharged with costs to be taxed.

APPEARANCES: For the applicant/informant Timothy: Mr LR Hart, counsel. Thomas F Mornane, Crown Solicitor. For the respondent/defendant Brophy: Mr EW Gillard, counsel. Harwood & Pincott, solicitors.
