

IN THE COURT OF APPEAL

[1997] QCA 239

SUPREME COURT OF QUEENSLAND

Appeal No. 229 of 1997

Brisbane

Before Davies J.A.
 McPherson J.A.
 Byrne J.

[Pearce v. Dennis]

BETWEEN:

AL JAMES PEARCE
(Applicant)

AND:

COLIN JAMES DENNIS
(Respondent)

Ex parte : AL JAMES PEARCE

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 8 August 1997

This is an appeal by way of order to review the decision of the stipendiary magistrate at Hervey Bay dismissing a complaint against the respondent that, contrary to s.16(1) of the *Traffic Act 1949*, on 31 May 1996 he drove a motor vehicle on a road while he was under the influence of liquor.

The facts are that at 1.40 a.m. on that date the respondent was driving a car on McLiver Street, Hervey Bay, when he was stopped by police. His physical appearance was such that it was decided that a breathalyser test should be administered. He was taken to the police station and after some demur provided a specimen of his breath by blowing into a breathalyser device operated by Senior Constable Sparkes.

This done, Sparkes prepared and signed a certificate under s.16A(15) of the *Traffic Act 1949*, and gave a copy to the respondent. It was admitted at the hearing as ex.1. Apart from other details the certificate records that the instrument he operated was a breath analysing instrument and that it was on that occasion “in proper working order and properly operated by me”; and, further, that the percentage of alcohol indicated by the analysis was .215 per cent, “which is a concentration of 215 mg. of alcohol per 100 ml. of blood”.

The evidentiary effect of such a certificate is stated in s.16A(15G) of the Act. It provides that a copy of a certificate referred to in subsection (15) purporting to be signed by an authorised police officer of the concentration of alcohol indicated to be present in the blood of a person by a breath analysing instrument operated by the officer is “conclusive evidence of the concentration of alcohol present in the blood of the person in question at the time ...”. The certificate ex.1 was such a certificate as is referred to in subsection (15) if it satisfied the description in s.16A(15D). It provides that a certificate purporting to be signed by an authorised police officer is “evidence ... and until the contrary is proved ... conclusive evidence” of the matters referred to in paras.(a), (b) and (c) of that subsection. These are that the instrument operated by the officer was in proper working order and properly operated; and that all regulations made pursuant to the section with respect to that instrument were complied with.

Exhibit 2 contained statements of those matters, and so, until the contrary was proved, was conclusive evidence of each of them. Section 16A(15G) of the Act is, however, expressed to be subject to s.16A(15H), which provides:

“The defendant may negative such evidence as aforesaid if the defendant proves that at the time of the operation of the breath analysing instrument it was defective or was not properly operated.”

The result of these provisions was held in *Corry v. Dorron, ex parte Corry* [1985] 1 Qd.R. 31, 34, to be that “a court must accept the reading on the certificate unless the evidence is such as to justify a finding that the defendant has discharged the onus of establishing that the machine was defective or not properly operated at the relevant time”.

In the present case the magistrate found that the respondent had succeeded in discharging that onus. He did so out of deference to the decision in *Pavich v. Carroll-Walden* (no. 115 of 1995) delivered in the District Court at Brisbane on 27 March 1996. In that matter, his Honour Judge Morley held that the expression “defective” in s.16A(15H) included anything which rendered plant and machinery unfit for the use for which it is intended when used in a reasonable manner and with reasonable care. So much may, for present purposes, be accepted. His Honour also held that an improper operation of a machine, as contemplated in s.16A(15H), would be proved once it was shown that some aspect of its management, use or application was less than apt, fit or suitable for its accurate adaptation to its function. Again, this description may, for the present, be accepted.

It is, however, with the ultimate conclusion arrived at by his Honour in *Pavich v. Carroll-Walden* that issue is taken by the complainant in this case. It was that the prosecution in *Pavich* had failed to prove that the breathalyser device used there had been so calibrated that it could perform, and could continue to perform, its function of properly measuring blood-alcohol content from a sample of human breath. To achieve this, it would have been necessary to use a thermometer and scales to measure a standard alcohol solution. For that purpose the thermometer and scales used would have needed to be verified or authenticated under s.10 of the *National Measurement Act 1960* (Cth.). There was in *Pavich v. Carroll-Walden* no evidence that that had been done. Accordingly, his Honour concluded that the defendant had established that the breathalyser in that case was, within the meaning

of s.16A(15H), defective or not properly operated. The respondent to the charge was therefore entitled to be acquitted.

With great respect, however, the reasoning involved in the final step in *Pavich v. Carrol-Walden* cannot be sustained. The fact that at the hearing of a charge under s.16(1) the breathalyser or breath analysis instrument used to produce a certificate under s.16A(15D) and (15G) is not proved to have been calibrated using equipment verified or authenticated under the *National Measurement Act 1960* (Cth.) does not serve to discharge the onus resting on a defendant under s.16A(15H) of proving that that instrument was either defective or not properly operated. To establish that some form of testing for accuracy has not been carried out is not to prove that the instrument in question is defective or not being operated properly. It simply means that there is no evidence at all on those matters. In the absence of affirmative evidence of defect or improper operation, the defendant fails to discharge the onus imposed by s.16A(15H). The result is that a certificate in the form specified in s.16A(15D) and (15G) of the Act continues to have the evidentiary effect ascribed to it by those provisions, which is that the certificate, in this case ex.1, is conclusive as to the matters specified.

We consider that the decision in *Pavich v. Carrol-Walden* to be incorrect. It should be overruled. The complainant in the present case proved to the requisite standard all the necessary elements of the offence charged against the respondent to the complaint in the magistrates court. The order nisi review must be made absolute and the appeal allowed. The proceedings must be remitted to the magistrates court at Hervey Bay to enable the magistrate to enter up a conviction and impose an appropriate penalty, if any, and otherwise proceed according to law.

At the hearing of the appeal before this Court the respondent did not appear, although he did submit written outlines opposing the application to have the order nisi made absolute. He should be ordered to pay the costs of the appeal but should be granted an indemnity certificate under the *Appeal Costs Fund Act 1973*.

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Judgment delivered 8 August 1997

Judgment of the Court

APPEAL ALLOWED. THE PROCEEDINGS ARE REMITTED TO THE MAGISTRATES COURT AT HERVEY BAY TO ENTER UP A CONVICTION AND IMPOSE AN APPROPRIATE PENALTY, IF ANY, AND OTHERWISE PROCEED ACCORDING TO LAW. THE RESPONDENT IS ORDERED TO PAY THE COSTS OF THE APPEAL BUT IS GRANTED AN INDEMNITY CERTIFICATE UNDER THE *APPEAL COSTS FUNDS ACT 1973* s.15(1).

CATCHWORDS: ORDER TO REVIEW - Magistrate found breathalyser defective - *Traffic Act 1949* ss. 16A(15G), (15H) - *Pavich v. Carrol-Walden* (115/95) District Court Qld. overruled.

Counsel: Mr T.A.C. Winn for the appellant
No appearance for the respondent

Solicitors: Director of Public Prosecutions (Queensland) for the appellant
No appearance for the respondent

Hearing Date: 29 July 1997