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SUPREME COURT OF VICTORIA

McARTHUR v McRAE

Harris J

16 November 1973 — [1974] VicRp 43; [1974] VR 353

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT WITH A READING OF 0.160BAC – CERTIFICATE OF ANALYSIS ADMITTED INTO EVIDENCE – NOT CONTESTED BY DEFENDANT – MAGISTRATE HEARD ANOTHER CASE THE SAME DAY AND ACCEPTED EVIDENCE THAT THE READING MAY BE LESS THAN THAT RECORDED – MAGISTRATE APPLIED THE EVIDENCE IN THAT CASE TO THE PRESENT CASE – WHETHER PROPER – MAGISTRATE SAID THAT THERE WERE REFERENCES WHICH SHOWED THAT THERE COULD BE INACCURACIES IN THE BREATH ANALYSING INSTRUMENTS – MAGISTRATE READ DOWN READING TO LESS THAN 0.15BAC AND IMPOSED A LESSER DISQUALIFICATION – WHETHER MAGISTRATE IN ERROR; *MOTOR CAR ACT* 1958, S81A.

HELD: Order nisi absolute. Order in relation to the disqualification period set aside. Remitted to the Magistrates' Court for further hearing to determine the appropriate period of disqualification.
1. The only evidence as to the percentage of alcohol in the blood of the defendant was that the percentage was .16 per cent. That was established by the certificate. That certificate was *prima facie* evidence of that fact.

2. Section 80G of the *Motor Car Act* 1958 creates a statutory evidentiary presumption with respect to these matters. It provides that "For the purposes of this Division if it is established that at any time within two hours after an alleged offence a certain percentage of alcohol was present in the blood of the person charged with the offence it shall be presumed until the contrary is proved that not less than that percentage of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed". This section therefore brought about the result that in the defendant's case the Court had to presume until the contrary was proved that, as it had been established that at 7.05pm. the percentage of alcohol present in his blood was .16 per cent, the percentage of alcohol present in his blood at the time when the offence was committed, namely 6.25pm. was also .16 per cent. There was no evidence at all to the contrary of this in the defendant's case.

3. The fact was that in McRae's case there was no evidence in relation to breathalyser error, and, accordingly, the magistrate was not entitled in deciding McRae's case to rely upon anything except the evidence which was given in his case.

4. Therefore, on the evidence given in McRae's case the magistrate should have been satisfied that the percentage of alcohol in his blood was .16 and consequently that the magistrate should have fixed as the disqualification period during which McRae was unable to obtain a licence, a period of not less than 12 months.

5. If a defendant wished to rely upon a defence based upon the inaccuracy of the blood alcohol instruments in general or the particular one that was used in the defendant's case, then it was necessary for him to call evidence to this effect.

6. Consequently, the magistrate was wrong in taking into account, in determining the period for which he disqualified the defendant from obtaining a licence, that the breath analysing instrument could be slightly inaccurate. Indeed, there was no basis upon which he could make a finding that the breath analysing instrument used in McRae's case was slightly inaccurate. Consequently, he was wrong in basing his order disqualifying the defendant on the basis that the defendant had a percentage of alcohol in his blood less than the percentage shown by the breath analysing instrument.

HARRIS J: On 20 February 1973 the defendant, William McRae, appeared before the Magistrates' Court at Ballarat to answer an information and summons for an offence under s81A(1) of the *Motor Car Act* 1958. The information alleged that on 18 November 1972, at Ballarat in the State of Victoria, the defendant did drive a motor car whilst the percentage of alcohol in his blood, expressed in grams per 100 millilitres of blood, was more than .05 per cent. The informant was Peter Douglas McArthur. The defendant appeared; he pleaded guilty, and he was represented by

a solicitor. The end result of the hearing was that the stipendiary magistrate, who constituted the court, convicted the defendant, fined him $30, cancelled his driving licence and disqualified him from obtaining a licence for six months.

The informant has obtained an order nisi to review that decision on these grounds:

(1) that the magistrate was wrong in taking into account, in determining the period for which he disqualified the defendant from obtaining a licence, that the breath analysing instrument could be slightly inaccurate, and in basing his order so disqualifying the defendant on his having a percentage of alcohol in his blood less than the percentage shown by the breath analysing instrument:

(2) that on the whole of the evidence given before him the magistrate should have been satisfied that the percentage of alcohol in the blood of the defendant was .16, and should have disqualified the defendant from obtaining a licence for a period of not less than 12 months.

At the hearing of the order nisi before me, Mr Gurvich appeared for the informant to move the order nisi absolute. There was no appearance for the defendant.

To understand the points raised by the order nisi it is now necessary to return to the evidence and to what happened at the Magistrates' Court at Ballarat. The only witness who gave evidence for the informant was the informant himself, who is a Senior Constable of Police. He gave evidence of intercepting the defendant on 18 November 1972, as a result of the speed at which he observed the defendant was driving his motor car along Creswick Road, Ballarat. The defendant was questioned about his speed, but the informant gave evidence that he noticed that the defendant's breath smelt of intoxicating liquor. The constable asked the defendant had he been drinking that day; the defendant said he had had about five beers. The defendant was then taken to the Ballarat Police Station, where a breath test was conducted, and the procedure prescribed by s80F of the *Motor Car Act* 1958 was carried out.

At the hearing before the magistrate the witness tendered a certificate of the result of the breath test. That certificate was in the form prescribed by Schedule Seven of the *Motor Car Act* 1958 and, consequently, it was *prima facie* evidence of the facts and matters stated therein by virtue of the provisions of s80F(3). The certificate included the facts that the test took place at 7.05 p.m. on 18 November 1972 and that the instrument indicated that the quantity of alcohol present in the blood of the defendant at the time and place referred to in the certificate was .16 grams of alcohol per 100 millilitres of blood, which, expressed as a percentage, was .16 per cent.

The informant's case was closed with the evidence of the informant, who was not cross-examined. The defendant did not give any evidence. It is shown by the affidavit of the informant, which was sworn in support of the order nisi, that the magistrate then stood the matter down and heard evidence in respect of a charge against one Roderick William Hanford Griffin, who had been intercepted as the same time and in similar circumstances to the defendant McRae, and who had been charged with the same offences. I add that the defendant in this case was also charged with a speeding offence under the *Road Traffic Regulations*; but nothing turns upon that fact.

At the conclusion of the case against Griffin, Griffin made an unsworn statement, during the course of which he stated that he had been with the defendant McRae that day—that is to say, on 18 November 1972—and had consumed approximately the same quantity of liquor as he had. Griffin was represented by another solicitor, who made a submission on behalf of his client, as a result of which the magistrate adjourned Griffin's matter until 18 December 1973, on condition that Griffin enter into a bond in the sum of $50 to be of good behaviour and to appear on that date. At that stage of the proceedings the solicitor acting for the defendant McRae rose and submitted that McRae should also receive a bond, and that if the magistrate did not accede to that submission, then because of the fact that both McRae and Griffin had consumed the same quantity of liquor, and it being unusual for the readings to be so far apart, only a six-month cancellation of McRae's licence should be imposed, and not a 12-month.

McArthur's affidavit states that McRae's reading was at .16 per cent; and that fact is established by the certificate, a copy of which is exhibited to the affidavit. But he goes on to say that that was McRae's reading, "compared with Griffin's .11 per cent". This is obviously a reference to the evidence in Griffin's case, no doubt established by a certificate similar to the one used in McRae's case.

Having heard what McRae's solicitor had said, the stipendiary magistrate then stated that he was not prepared to grant him a bond, bearing in mind McRae's reading. The magistrate went on to say that, however, as McRae's reading was only slightly above .15 per cent, he would allow that the breathalyser could be slightly inaccurate, and that he based his penalty on a reading of less than .15 per cent.

Having stated those matters, it becomes apparent how the magistrate recorded the penalty which he in fact did. The relevant part of that penalty, so far as this case is concerned, is the disqualification of McRae from obtaining a licence for six months. Section 81A(3) lays down certain mandatory provisions which have to be observed where a person is convicted for an offence against s81A(1). Where a person is convicted of such an offence, the court is required to cancel the licence of such person to drive a motor car; and, in the case of a first offence, to disqualify him from obtaining a licence for not less than one of three specified periods, which are set out in the sub-section in para (a) thereof.

The determination of which of the periods of disqualification is applicable to the case before the Court depends upon the percentage of alcohol in the blood of the person at the time the offence was committed. Where the percentage was .10 per cent or more but less than .15 per cent, then the minimum period of disqualification is six months: see subs(3)(a)(ii). Where the percentage of alcohol in the blood at the time the offence was committed was .15 per cent or more, then the minimum period of disqualification is 12 months: see subs(3)(a)(iii).

In this case the magistrate treated the case as one coming within the provisions of subs(3)(a)(ii). The questions raised by the order nisi to review are whether he was justified in making a finding that the percentage of alcohol in the blood of the defendant at the time the offence was committed was .10 per cent or more, but less than .15 per cent.

In the defendant's case the only evidence was the evidence that I have already outlined. That is to say, the only evidence as to the percentage of alcohol in the blood of the defendant was that the percentage was .16 per cent. That was established by the certificate. That certificate was *prima facie* evidence of that fact. The certificate further established that the time at which the test was taken was 7.05 p.m. on 18 November 1972. The informant's evidence had established that the time at which he intercepted the defendant was 6.25 p.m. on 18 November 1972. Thus the test took place within two hours after the alleged offence had occurred.

Section 80G of the *Motor Car Act* 1958 creates a statutory evidentiary presumption with respect to these matters. It provides that "For the purposes of this Division if it is established that at any time within two hours after an alleged offence a certain percentage of alcohol was present in the blood of the person charged with the offence it shall be presumed until the contrary is proved that not less than that percentage of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed". This section therefore brought about the result that in the defendant's case the Court had to presume until the contrary was proved that, as it had been established that at 7.05 p.m. the percentage of alcohol present in his blood was .16 per cent, the percentage of alcohol present in his blood at the time when the offence was committed, namely 6.25 p.m. was also .16 per cent. There was no evidence at all to the contrary of this in the defendant's case.

What the magistrate had before him in Griffin's case is another matter. In that case the magistrate did have evidence, as one can infer from the informant's affidavit, that Griffin's blood alcohol content was .11 per cent. It is not, however, even clear whether Griffin was intercepted at the same time as McRae or not, but, be that as it may, the magistrate did have evidence as to the percentage of alcohol in the blood of Griffin. Furthermore, in Griffin's case, although Griffin only made an unsworn statement, Griffin was entitled to make that statement by reason of s25 of the *Evidence Act* 1958 and the magistrate was entitled to place such reliance upon it in Griffin's case as he saw fit, but it is an entirely different matter for the magistrate to use evidence in Griffin's case for the purpose of deciding McRae's case.

It would have been possible for evidence to have been called in McRae's case after Griffin's case had been determined because McRae's case had not been finally disposed of by then. Griffin could have been called to give evidence and the constable could have been recalled to produce

Griffin's certificate in McRae's case. If that had been done there would have been evidence in McRae's case which it would have been legitimate for the magistrate to consider. Whether it would have enabled him to have reached a conclusion that McRae's blood alcohol percentage at the time his offence was committed was less than .15 per cent is another matter: see *Holdsworth v Fox* a decision of Menhennitt J [1974] VicRp 27; [1974] VR 250. The fact was that in McRae's case there was no such evidence, and, in my opinion, the magistrate was not entitled in deciding McRae's case to rely upon anything except the evidence which was given in his case.

I therefore hold that on the evidence given before him in McRae's case the magistrate should have been satisfied that the percentage of alcohol in his blood was .16 and consequently that the magistrate should have fixed as the disqualification period during which McRae was unable to obtain a licence, a period of not less than 12 months.

As the affidavit indicated, the magistrate also relied upon something else in reaching the conclusion he did. He said he "would allow that the breathalyser could be slightly inaccurate". The magistrate has sworn and filed an affidavit in this case and he explains in that affidavit how he went about deciding this matter in the way he did. He provides a perfectly understandable approach to the matter, but the question is whether this course was legally open to him. The magistrate says in his affidavit that he was aware of the numerous writings concerning the accuracy of the breath analysing instrument, by which I take it to mean he was aware there were numerous writings concerning the extent to which breathalysing instruments in general were or were not accurate.

He went on to say that in view of the statement made by Griffin he was prepared to give the defendant McRae the benefit of the doubt as to whether his reading was above or below .15 per cent. He said he was prepared to accept the statement made by Griffin and that, in his view, the circumstances of the wide variance in the reading was unusual. He added that he was prepared in the circumstances to hold that the breath analysing instrument may have been inaccurate and that a doubt had been raised in his mind as to whether the reading was above or below .15 per cent.

I have already dealt with the fact that the magistrate was not entitled to use the evidence that had been given in Griffin's case when he was deciding McRae's case. I am further of the view that it was not open to the magistrate to use whatever knowledge he had acquired from writings, or perhaps from his experience in other cases under this section of possible inaccuracies in breath analysing instruments. In my view, s80F, s80G and s81A of the *Motor Car Act* 1958 deal with the matter of the use of breath analysing instruments in proceedings under the *Motor Car Act*. They provide statutory provisions in s80F(3) and in s80G which have the result that where there is no other evidence the reading stated in the certificate is the only evidence of the percentage of alcohol in the blood of the defendant at the time the offence was committed.

If a defendant wishes to rely upon a defence based upon the inaccuracy of the blood alcohol instruments in general or the particular one that was used in the defendant's case, then in my opinion it is necessary for him to call evidence to this effect. Prior to the introduction into the *Motor Car Act* of the present statutory provisions relating to the taking of tests and the use of the results of those tests, the evidence derived from breath analysing instruments had to be determined according to common law. This was the subject of the decision of Sir Edmund Herring, then Chief Justice of this Court, in the case of *Porter v Kolodzeij*, reported in [1962] VicRp 11; [1962] VR 75, in particular, see the passage at VR p78.

Consequently, in my view, the magistrate was wrong in taking into account, in determining the period for which he disqualified the defendant from obtaining a licence, that the breath analysing instrument could be slightly inaccurate. Indeed, in my view, there was no basis upon which he could make a finding that the breath analysing instrument used in McRae's case was slightly inaccurate. Consequently, he was wrong, in my view, in basing his order disqualifying the defendant on the basis that the defendant had a percentage of alcohol in his blood less than the percentage shown by the breath analysing instrument.

The result is that I held that both the grounds of the order nisi have been established, and that the order nisi should be made absolute on both grounds. The order will be: order nisi

made absolute on grounds 1 and 2. Order of the magistrate of 20 February 1973 in so far as it provided that the defendant be disqualified from obtaining a licence to drive a motor vehicle for a period of six months. Matter remitted to the Magistrates' Court at Ballarat for further hearing to determine the appropriate period of disqualification to be imposed pursuant to s81A(3)(a)(iii) of the *Motor Car Act* 1958.

I will order that the defendant pay the informant's costs of and incidental to the order to review, and I fix those costs at the sum of $200. Order absolute.

Solicitor for the informant: John Downey, Crown Solicitor.
