44/83

SUPREME COURT OF VICTORIA

NORRIS v NORSBURGH

Gray J

25 August 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD ALCOHOL EXCEEDING .05% – BLOOD SAMPLE – MANNER IN WHICH SAMPLE DEALT WITH – WHETHER DOCTOR MUST PERSONALLY DEAL WITH SAMPLE – PRESUMPTION OF REGULARITY: *MOTOR CAR ACT* 1958, S81A, *MOTOR CAR (BLOOD SAMPLES) REGULATIONS* 1977, RR219, 223.

After a road accident involving the defendant's driving of his motor car, a sample of his blood was taken by a doctor at a hospital. After the sample was taken, the doctor gave the labelled bottle to the sister on duty for her to place in the appropriate receptacle, without directing her as to what she was to do with it. When charges were later laid and when the matter came on for hearing, the doctor was called by the prosecution; after a ruling that there was a case to answer, the defendant's solicitor submitted that as the doctor failed to personally place the sample in the receptacle, then this amounted to a breach of the Regulation, and therefore the prosecution case had not been proved beyond reasonable doubt. The Magistrate agreed and dismissed the information. Upon order nisi to review—

HELD: Order nisi absolute.
1. The prosecution does not have any obligation to prove compliance with the Regulations as part of its case.
***Attwood v Lacey* (unreported, 24 May 1979, Gray J), applied.**

2. Regulation 223B does not require the medical practitioner to personally place the blood sample in the required locked receptacle.

3. As the evidence did not establish any departure from the Regulations nor indicate anything which suggested a departure from the normal course of events, the magistrate erred in law in entertaining a reasonable doubt concerning this element of the prosecution case.

GRAY J: *[After setting out the facts, his Honour continued]:* ... **[5]** I say two things at the outset. First, it is clear, in my opinion, that Regulation 223B does not require the medical practitioner to personally place the sample in the required locked receptacle. The regulation would, in my opinion, be complied with by the medical practitioner directing a member of the hospital staff to place the sample in the receptacle. The regulation should be read as if it stated that the medical practitioner "shall cause the sample to be placed in the required receptacle." Accordingly, if it be relevant, I am satisfied that the learned Magistrate was in error in treating the mere failure of the doctor personally to place the sample in the container as a breach of the regulation.

However, compliance with the regulation does clearly require that the facts are such that, by **[6]** inference or otherwise, it can be said that the medical practitioner did cause the placing of the sample in the receptacle. It has been held over and over again by Judges of this Court that the prosecution does not have any obligation to prove compliance with the regulations as part of its case. For the sake of convenience, I might refer to a judgment of my own in *Attwood v Lacey* (unreported judgment delivered 24th May 1979), in which a number of the cases decided up to that point are referred to. Since that time, I have been told that there have been further decisions to the same effect.

However, if a breach of the regulation is proved, it can, of course, in an appropriate case cause the Court to entertain a reasonable doubt concerning the essential elements of the prosecution case. The prosecution has to prove that the defendant drove his motor car on the occasion in question, and at that time the percentage of alcohol in his blood was in excess of .05 per cent. It is of course, a necessary step in that process for the Crown to prove that a sample of the defendant's blood was taken and that a subsequent analysis produced a result in excess of the prohibited maximum.

There are a number of decisions to the effect that, if there is no evidence concerning what steps were taken in the handling of the sample, the *prima facie* position prevails and that a Court is not acting reasonably in dismissing the information upon the basis **[7]** of some speculative doubt as to the way in which the sample was handled.

In this case, the question is, first, has a departure from the regulations been shown and, if so, whether the departure was sufficient in all the circumstances to reasonably justify the doubt entertained by the Magistrate. I must say that, in the context of this case, I do not consider that the evidence justified a finding that any departure from the regulations had occurred. This sample was taken in the Casualty section of the Benalla Hospital. It is a reasonable inference that the doctors and staff at the hospital have had a great deal of experience in handling persons from whom these samples are taken. In the absence of any indication to the contrary, it is, in my opinion, a reasonable inference that the Sister in charge at the relevant time would know perfectly well what the regulations required when a sample was handed to her by a doctor.

It is, in my opinion, somewhat unreal to suggest that in each instance the doctor should expressly direct the nursing sister to place the sample in the container provided. At the highest, the concessions made by the doctor amount to an admission that he merely took the sample and handed the bottles to the nursing sister. There was nothing in the context to suggest that the nursing sister did anything other than place them in the required receptacle, from where **[8]** the sample was taken some time later by a police officer, who took the sample for analysis.

It is not very clear upon what basis the learned Magistrate experienced his doubt. As I have said, the version appearing in the applicant's affidavit would suggest that he felt doubt that the sample may have been tampered with in some way. But the version appearing in the respondent's affidavit does not throw any light on what was the factual matter which raised a doubt in the Magistrate's mind. It can be said that the learned Magistrate was faced with the absence of positive evidence that the sample had been forthwith placed in the receptacle. It is a reasonable conclusion that his doubt was based on that circumstance. However, in the absence of anything pointing to a departure from the ordinary procedures, I cannot feel that the learned Magistrate was reasonably justified in entertaining a doubt.

The case for the respondent was very well argued by Mr Strugnell of counsel. He put it that the presumption of regularity has no application here because there was no evidence to suggest the existence of an established system. He conceded that if there is no evidence on the point, it must he presumed that the system provided for in the regulations is complied with. In this case, he argues, there is evidence of a departure from the system, and accordingly presumptions based on the existence of a system have no foundation. He **[9]** relied upon the principle enunciated in *Young v Paddle Bros* [1956] VicLawRp 6; (1956) VLR 38; [1956] ALR 301. That principle is that a finding of fact by a primary Court cannot be disturbed it there is any reasonable view of the evidence to support it, more particularly in a case where the primary Court has not been satisfied about a critical matter. That decision can only be disturbed if the failure to be satisfied can be seen to be without any foundation in the evidence.

I have carefully considered the matter in the course of the argument. In the result, I cannot feel that the doubt entertained by the magistrate can be upheld as reasonable. In a case where there is no evidence as to the procedure carried out with the sample, it is clear that the Court cannot speculate about possible interferences to the sample or possible changes in the character of the sample or matters of that sort. The evidentiary position in this case is, in my opinion, indistinguishable from a case where there is no evidence on the subject. I do not consider that the evidence establishes any departure from the regulation, nor do I consider that the evidence brings to light anything which suggests a departure from the normal course of events. Insofar as it may be said that there was no evidence of the existence of a system of compliance with the regulations, I consider that that argument is unsustainable in the context of a large provincial hospital, where the **[10]** persons concerned are a legally qualified medical practitioner and the Sister in charge.

The failure of the learned Magistrate to be satisfied must be regarded as surprising. I have given careful thought to whether it was a view which was reasonably open to him on the evidence. However, in the result, I am satisfied that he erred in law in entertaining a reasonable doubt as to this essential element of the prosecution case.