01/83

SUPREME COURT OF VICTORIA

HESS v CLAREBROUGH

O'Bryan J

3 November 1982

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE OUTSIDE 2-HOUR LIMIT – SUBMISSION OF "NO CASE" – STANDARD OF PROOF – WHETHER NON-COMPLIANCE WITH REGULATIONS – PRESUMPTION OF REGULARITY: *MOTOR CAR ACT* 1958, SS81A, S80D, 80G; *MOTOR CAR (BLOOD SAMPLES) REGULATIONS* 1977, RR219-223A.

C. was involved in a collision between 2 motor cars. A few minutes outside the 2-hour limit, a sample of his blood was taken by a doctor, and upon analysis, was shown to have .227% of alcohol. C. was charged with driving a motor car whilst the percentage of alcohol in his blood exceeded .05. The doctor was required to attend court for the purpose of cross-examination as to his certification that all regulations relating to the collection of the blood sample were complied with. He said that he presumed he complied with the regulations because he had a working knowledge of them; he said he had never read the regulations. He further said that he did not check the blood containers for cleanliness nor read the labels in the blood alcohol kit; and that he released pressure from the container into which he placed the blood sample by first inserting a standard needle through the rubber. Following a submission of "no case", the court dismissed the charge, on the ground that it was not satisfied that the doctor had taken the sample in accordance with the regulations. On an order nisi to review—

HELD: There was no evidence of non-compliance and a *prima facie* case of breach of s81A was established.

O'BRYAN J: *[After setting out the grounds of the order nisi to review stated, His Honour continued]:* In essence the applicant contends that the "no case" submission should not have been upheld because there was a *prima facie* case in evidence called for the informant. The role of the magistrate when deciding a "no case" submission was considered by McInerney J in *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; (1978) VR 505 at 512; (1978) 3 ACLR 289; [1978] ACLC 40-381.

I think it will be helpful if I repeat what he said, because I believe it is a common mistake for the court to apply an altogether inappropriate test when such a submission is made at the end of the informant's case. *[His Honour then read pp512-513 of* Green's Case *and continued]*: In *Wilson v Kuhl* [1979] VicRp 34; (1979) VR 315, McGarvie J also considered the matter of a "no case" submission. His Honour does not refer to *Green's case*, presumably because the decision was not reported until late in 1978. The decision in *Green's case* was delivered in February 1978 and the decision in *Wilson's case* in October. *[His Honour then referred to a passage at p319 in* Wilson's case *and continued]:* In so far as there is any conflict between those decisions I propose to apply the test formulated by McGarvie J in this case on the basis that it is more favourable to the respondent who seeks to uphold the magistrate's decision in the court below. I am not disposed to say that the test formulated by McGarvie J is appropriate in every case, only that it is appropriate in the present proceedings.

The critical issue is whether there was before the court *prima facie* evidence which, if accepted, would provide evidence that at a relevant time the percentage of alcohol in the respondent's blood was more than .05 per centum. A relevant time for the purpose of s81A is the time when the person charged is driving his motor car. In the present case the evidence as to the percentage of alcohol in the respondent's blood related to the time when a sample of blood was taken from his body, namely, 1.48 a.m. At 11.45 pm. the respondent was observed in his motor car at the scene of a collision between two cars. From the admissions which the respondent made to the applicant and in the absence of any other evidence as to the time of the collision, one could infer that the respondent had been driving his motor car a few minutes before 11.45 pm. *[After referring to the presumption arising under s80G of the* Motor Car Act *1958, His Honour continued]:* I agree with Mr Graham that s80G has no application to the present case. That section should be restricted to cases where the alcohol present in the blood is established within two hours of the cessation of driving.

It will only be in such cases that the reversal of the onus of proof prescribed by the section will arise. However, I see no reason why the learned magistrate should not have given effect to the decisions of Menhennitt J in *Heywood v Robinson* [1975] VicRp 55; (1975) VR 562 and *Wright v Bastin (No. 2)* [1979] VicRp 35; (1979) VR 329 and concluded there was evidence which he could accept that at the time of the driving, the blood alcohol content of the applicant exceeded .05, subject to the question of compliance with the regulations.

The applicant had not consumed alcohol between 11.45 pm., when he was found at the scene of an accident, and 1.45 a.m. the following morning when his blood was taken. The analysis of the blood, which had been taken perhaps five or ten minutes outside the two-hour limit prescribed by s80D and s80G, showed an alcohol content four and a half times the statutory limit. The excess above the legal limit was such as to entitle the magistrate to conclude that at the relevant time the applicant was over the statutory limit.

There was evidence placed before the court that at 1.48 a.m. a legally qualified medical practitioner had taken a sample of blood from the respondent pursuant to s80D of the Act. On the facts in this case it is irrelevant, in my opinion, that the sample was taken a few minutes outside two hours after the alleged offence. *[His Honour then referred to s80D(3) of the* Motor Car Act *1958 and rr219-223A of* Motor Car (Blood Samples) Regulations *1977 and continued]:* It may be observed that Regulations 219 to 223A inclusive impose upon the doctor certain mandatory obligations. No regulation, however, forbids a doctor from doing other incidental things which he may find necessary to do in the course of taking a blood sample. Something arose in the present case.

The doctor said in the course of cross-examination that he released pressure from the container into which he placed the blood sample by first inserting a standard needle through the rubber. That is not something which the doctor is required to do under the regulations nor is it something prohibited by the regulations. The doctor used his experience and initiative to overcome a problem which he had encountered in the past. He said: "If you don't release the air first when you try to put the blood into the bottle, it sprays all over the room with the pressure." In my view that step cannot be regarded as non-compliance with the regulations in any respect. It may have been relevant to the ultimate analysis and possibly affected the weight given to the evidence of the analyst if, for example, the needle used to release the pressure might possibly have been contaminated by alcohol but, there was no evidence of anything like that happening in this case. The doctor informed the court that he presumed he complied with the regulations because he had a working knowledge of them. He said he had never read the regulations. *[His Honour then set out the procedure which the doctor said he followed]*: None of those answers shows non-compliance with any regulation. Next the doctor was asked: "Have you heard of a tight fitting cap and Septum Seal?" "I am not familiar with the term." "Those terms are used in the regulations?" "I have never read the regulations."

Again, those answers did not provide any evidence of non-compliance with the regulations. At most they revealed that the doctor did not have familiarity with Regulation 223A, in particular, but there is no basis for concluding that because a person has not read the regulations he has not complied with them. As Mr McArdle correctly observed, one does not have to read all the *Road Traffic Regulations* or the *Motor Car Regulations* in order to comply with them.

[After referring to further evidence of the doctor, His Honour continued]: In my view there was no evidence of non-compliance with any regulation, on the part of the doctor or the person or persons who prepared the containers into which the blood was eventually placed. So far as the doctor is concerned he followed the requirements of Regulations 219, 220, 221, 223A(a) and 223A(b). No questions were directed to Regulation 222. There was nothing revealed in the cross-examination which revealed non-compliance with Regulation 223(b) or 223A(a).

It must be remembered that a presumption of regularity applies in cases of this type. *Hindson v Monahan* [1970] VicRp 12; (1970) VR 84; *Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596, and *Huntington v Jupp* 19 May 1978 unreported. Those cases provide examples of the application of the principle. An exhaustive collection of the authorities on this point is found in *Parker v Kis*, a decision of Marks J, 27 July 1980 unreported.

In my view the learned magistrate fell into error in finding that the regulations had not been complied with. In my view there was no evidence of non-compliance and a *prima facie* case of breach of s81A by the respondent was established by the informant's case. The evidence before the court at the end of the informant's case, if accepted, provided evidence of each element of the charge. The evidence, being reasonable, inherently probable, and uncontradicted, should have been accepted by the Court. *Hardy v* Gillette [1976] VicRp 36; (1976) VR 392 at 395-7, and *Read v Nerey Nominees Pty Ltd* [1979] VicRp 6; (1979) VR 47. Accordingly, the order nisi will be made absolute.

APPEARANCES: Mr JD McArdle, counsel for applicant (Hess). Mr D Graham, counsel for respondent (Clarebrough).
