51/87

SUPREME COURT OF VICTORIA

MARKOVSKI v CHANDLER

O'Bryan J

3 December 1987 — (1987) 6 MVR 285

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE – TAKEN 2½ HOURS AFTER DRIVING – PRESUMPTION OF CONTINUANCE – EVIDENCE OF POST-DRIVING DRINKING – WHETHER REASONABLE PROBABILITY OF CHANGE INSTEAD OF CONTINUANCE RAISED: *MOTOR CAR ACT* 1958, S81A.

About 9pm., whilst driving a motor car, M. collided with another vehicle. After the collision, M. walked to his home nearby, stayed about five minutes and was taken to hospital where a blood sample was taken at 11.35 pm., showing a blood/alcohol concentration of .191%. On the hearing of the charge of driving whilst exceeding .05% blood/alcohol, M. gave evidence that he consumed intoxicating liquor after the collision but before the taking of the blood sample. An analytical chemist gave evidence on M.'s behalf that consumption of the liquor "could easily affect the blood test to such an extent that at the time of driving the (defendant) was indeed under 0.05%." The Magistrate accepted the defendant's evidence as to his drinking after cessation of driving, and also the evidence of the analytical chemist, however, was satisfied that at the time of driving the defendant was "over .05 but to what extent unable to say." The Magistrate then convicted M., fined him $500, cancelled his driver's licence and disqualified him from obtaining a licence for a period of twelve months. Upon order nisi to review—

HELD: Order nisi discharged.
(1) Where the blood/alcohol content of a driver 2 hours 30 minutes after driving was .191% and there was evidence that the driver consumed alcohol shortly before driving coupled with evidence that the driver was affected by alcohol upon cessation of driving, it was reasonably open to apply the presumption of continuance and conclude beyond reasonable doubt that the driver's blood/alcohol level at the time of driving was in excess of the legal limit.

(2) (a) Evidence of a person having consumed alcohol after cessation of driving but before the blood test is material to whether the presumption of continuance should be applied.

(b) In the present case, the unsatisfactory nature of the evidence for the defendant did not raise a reasonable probability of change instead of continuance, and accordingly, it was open to the Magistrate to find the charge proved beyond reasonable doubt.

O'BRYAN J: **[1]** This is an order nisi to review the decision of the Magistrates' Court at Preston on 16th April 1986 whereby the Court convicted the applicant of an offence "that at Thomastown on 31st January 1985 (he) 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 centum", contrary to s81A(1) of the *Motor Car Act* 1958.

The order nisi was granted on four grounds, two only being relevant now.

> Ground 3 - "That in view of his findings of fact and law the Learned Stipendiary Magistrate was wrong in law in holding that it was reasonably open to him to conclude that at the time of driving the Applicant's blood alcohol content exceeded 0.05%."
>
> **[2]** Ground 4 - "That upon the evidence the Learned Stipendiary Magistrate was in error in convicting the Applicant."

The material before the Court shows that at about 9pm a motor car driven by the applicant collided with another vehicle at an intersection in Thomastown controlled by a round-about. The other driver said that the applicant "staggered out of his vehicle". Another passenger said that the applicant smelt strongly of alcohol and his "eyes were red". The witnesses were unsure of the time the accident happened and it was accepted by counsel at the hearing before me that "about 9pm." was a reasonable finding for the Magistrate to make. The evidence was that the applicant did not speak English clearly but was understood to say that he wished to "go to the toilet". One of the passengers followed the applicant to his home, about three minutes walk away from the

accident scene, and observed him enter a house. The applicant's wife was present. After about five minutes the applicant emerged from the house and was taken to Preston and Northcote Community Hospital. A blood sample was taken from the applicant at 2335 hours by a legally qualified medical practitioner. Analysis of the blood showed a level of 0.191 grams of alcohol per 100 millilitres of blood (0.191 per cent).

On 19th June the respondent said that he had a conversation with the applicant who denied that he had anything to drink after the accident or at his house. **[3]** The applicant told the respondent that he did not even go inside. Upon this evidence, the Court would have been entitled to convict the applicant by applying the presumption of continuance. Cf. *Wright v Bastin (No. 2)* [1979] VicRp 35; (1979) VR 329; *James v Sanderson* (unreported, Tadgell J, 23/3/82).

At the hearing the applicant gave evidence that he was a brewery worker, that he ceased working at approximately 2.30pm., that he proceeded to Lalor where he carried out manual work and that while he was at Lalor he consumed two small glasses of moselle wine. The applicant also gave evidence that he left the accident scene to go home and use the toilet and while he was inside the house his wife gave him " a glass of ouzo to drink". The glass described was a 10 oz glass and the applicant said that the glass was half full or "a little bit more". He denied being affected by alcohol at the time of driving. The applicant also said that his clothing usually smells of alcohol from splashes on the assembly line. The applicant's wife corroborated that the applicant consumed ouzo from a glass "more than half full".

An analytical chemist said that on 17th February 1986, he conducted tests as to the effects of ouzo on the blood alcohol reading of the applicant. The evidence of the analyst is described in the principal affidavit filed on behalf of the applicant in these terms:

> **[4]** Mr Russell gave evidence that the results of his tests were such that the consumption of six to seven ounces of ouzo or grappa, sometime after the accident could easily affect the applicant's blood alcohol concentration to an extent whereby it had no co-relation to the blood alcohol content or concentration at the time of driving. He gave evidence that whilst the applicant could have a blood alcohol concentration of .191 at 11.30pm., the consumption of that amount of ouzo between 10 and 11pm. could easily affect the blood test to such an extent that at the time of driving the applicant was indeed under 0.05%."

The learned Magistrate made the following findings of fact:

> "I find that the time of the accident carrot be established, however I am satisfied that it was more than two hours before testing of the defendant. I accept the defendant's evidence that he had consumed grappa or ouzo after the accident. I am satisfied that at the time of driving, however, the defendant was over 0.05%. I accept the evidence of Mr Russell the expert, but am satisfied that at the time of driving the defendant was over 0.05%."

The first finding means that the statutory presumption as to the level of alcohol present in the blood of the applicant at the time at which the offence was alleged to have been committed was not available to the respondent. Section 80G *Motor Car Act* 1958 is restricted to cases where the alcohol present in the blood is established within two hours of the cessation of driving. Only in such cases does reversal of the onus of proof arise.

The second finding brings me to consider the evidence of Mr Russell. The summary of Mr Russell's evidence does not show what scientific tests were conducted and what results were obtained from his tests. **[5]** The assumptions made by Mr Russell are erroneous because they do not accord with the evidence. Six or seven ounces of ouzo is relevantly more than five or six ounces of ouzo, the quantity the applicant and his wife spoke about. No basis existed for Mr Russell to conclude that the applicant consumed ouzo "between 10 and 11 pm.". Mr Russell appears not to have reached any affirmative conclusions. Did he opine upon the basis that the applicant consumed no more than "two small glasses of moselle" some time after 2.30pm or upon a basis that the applicant consumed some other undisclosed quantity of alcohol? One may take judicial notice that seven ounces of beer produces a blood alcohol level of .015% some time after consumption but the level for ouzo in a particular quantity is unknown. The evidence of Mr Russell omits the most important conclusion. What blood alcohol level will five or six ounces of ouzo produce and in what period of time? The Magistrate accepted the evidence that the consumption of ouzo by

the applicant after the cessation of driving and before the blood test was conducted probably increased the level of alcohol in the applicant's blood to some degree. To what degree does not seem to have been covered by the evidence. One may conclude that the learned Magistrate probably attached very little weight to the opinion of Mr Russell because of the paucity of the evidence of the scientific investigations.

I shall refer now to the authorities. The first authority relied upon by Mr Sullivan, who appeared for **[6]** the applicant, is *De Kruiff v Smith* [1971] VicRp 94; (1971) VR 761. A question arose whether the common law presumption of continuance could be coupled with the result of the breath analysis so as to lead to a conclusion that the defendant had at the time of his last driving the vehicle more than 0.05 per cent of alcohol in his blood. The breath analysis was made more than two hours after the cessation of driving. The Magistrate was not satisfied that the defendant did not consume alcohol between the time of the driving and the time of the taking of the breath test. In these circumstances the Magistrate dismissed the charge as he was unable to exclude a reasonable hypothesis consistent with innocence. McInerney J upheld the decision because the facts accepted by the Magistrate permitted the defendant to consume an unknown quantity of alcohol in a period of up to an hour in a hotel. His Honour held that it was impossible for the Court to say "that a magistrate should not have had a reasonable doubt, or that the magistrate should have been satisfied beyond reasonable doubt." This decision may be distinguished as it was decided upon particular facts not present in this proceeding. Further, the applicant De Kruiff, who carried the burden of proof, was endeavouring to disturb a decision in favour of the defendant, a singularly difficult task.

The presumption of continuance is discussed in *Smith v Maddison* [1967] VicRp 34; (1967) VR 307; *Heywood v Robinson* [1975] VicRp 55; (1975) VR 562; *Wright v Bastin (No.2)* [1979] VicRp 35; (1979) VR 329 **[7]** and *James v Sanderson* (as above). Each of these authorities was decided on its own particular facts. What is common to these authorities is that, in the absence of evidence showing that circumstances have occurred to raise a probability of change instead of continuance, evidence of the defendant having consumed alcohol shortly before the driving, coupled with evidence of the defendant being affected by alcohol upon the cessation of driving and of the defendant's blood alcohol level being nearly four times in excess of the legal limit two hours and 30 minutes after the time of driving, leaves it reasonably open to conclude beyond reasonable doubt that the defendant's blood alcohol level at the time of driving was in excess of the legal limit. Obviously evidence of a person having consumed alcohol after the cessation of driving and before the test was carried out is material to whether the presumption of continuance should be applied.

In the present case the evidence for the defendant was unsatisfactory and deficient in important respects. More than the mere evidence of the consumption of five or six or even seven ounces of ouzo by the defendant was required to establish as a reasonable hypothesis that the alcoholic content of the ouzo consumed had produced by 2235 hours the difference between 0.05 per cent and 0.191 per cent. The opinion of Mr Russell, expressed as it was in a very guarded manner, did not raise a reasonable probability of change instead of continuance.

In my opinion, the learned Magistrate was entitled to accept the evidence of Mr Russell and to find the charge proved beyond reasonable doubt. The order nisi is discharged with costs.
