21/83

SUPREME COURT OF VICTORIA

NAYLOR v MITCHELL

Fullagar J

22 March 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE TAKEN – 25 DAYS BETWEEN SAMPLING AND ANALYSING – WHETHER PRESUMPTIONS OF REGULARITY OR CONTINUANCE APPLY: *MOTOR CAR ACT* 1958, SS81A, 80D, 80G.

Whilst driving his motor car, M. collided with the tray of a parked truck. M. suffered severe head injuries and was admitted to hospital where a blood test was taken showing a blood/alcohol content of .254%. When M. was questioned about the reading, he expressed "great astonishment", saying that he could not remember anything prior to 2 hours before the accident, save that he had drunk 2 bottles of Crown lager. When the matter came on for hearing, no evidence was given by or on behalf of M; but it was submitted that because it took 25 days for the blood sample to be analysed, the court could not be satisfied that the identity and integrity of the blood sample had been proved beyond reasonable doubt. The magistrate dismissed the information, holding, in effect, that the presumptions of regularity and continuance could not survive a 25 days' period of silence. On order nisi to review—

HELD: Order nisi absolute.
There was nothing to cast doubt upon the proper deduction in the circumstances:-
(1) that the labelled sample at the laboratory was the precise sample taken and labelled at the hospital;

(2) that the presumptions of regularity and continuance could survive a 25 days' period of silence.
***Huntington v Jupp* (unreported 19 May 1978, O'Bryan J) (MC 24/1978) considered and followed.**
[See also *Collins v Mithen* (MC 12/1975)]

FULLAGAR J: *[After setting out the facts, His Honour continued (at p 5)]:* … Mr Zayler of Counsel for the respondent-defendant contended that this Court should infer that the Magistrate's doubt was raised by three things in combination – viz:

> (a) the absence of evidence as to how when and by whom the sample was collected from the hospital and transported and delivered to the hospital, and
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> (b) the absence of evidence that the sample was placed by the doctor into a locked receptacle at the hospital, both (a) and (b) being considered in the light of
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> (c) the passage of 25 days from sample-taking to analysis without any evidence at all relating to the sample in the interim.

It was these matters in combination, he said, which led to a doubt as to the identity or integrity, or both, of the blood sample finally tested by the analyst. In my opinion the passage of 25 days, rather than 5 or 15 days, adds nothing to the significance or otherwise of the other two items (a) and (b) above in a case where no suspicions can arise from the lapse of time itself.

Mr Zayler argued to the contrary. He contended that the Magistrate was entitled to acquit. He conceded that the authorities show that there is a strong presumption of regularity in these cases, that is to say, a strong presumption that each of the doctor and the analyst carried out all his respective statutory duties, and that the hospital staff and laboratory staff refrained from acting unlawfully in respect of the sample, and that the sample received by the analyst, duly labelled, was the same sample as the doctor had labelled at the hospital. But he said that the presumptions were by the lapse of time in this case weakened to the stage where the Magistrate was entitled to hold a reasonable doubt as to identity, or integrity or both, of the sample. He said the important thing here was regularity of handling. He pointed out that the proper capping and sealing and locking of the sample were matters as to which the defendant could not obtain evidence readily, although the defendant within 14 days after the sample had been taken, could have obtained a duplicate of the sample. Mr Zayler said that the presumption of regularity applied in these cases

was based on three foundations, viz, first, policy or convenience, and secondly probability and thirdly general experience. He presented arguments to the effect that each foundation in a case like the present pointed away from allowing the presumptions to operate, and in favour of compelling the informant to prove much more as to regularity of handling between the taking of the sample and the analysing of it.

The contentions of Mr Zayler collided with the views expressed by O'Bryan J in *Huntington v Jupp* (unreported 19th May 1978), where the time between the taking of the sample and the analysis was 45 days, and he submitted that I should not follow that decision. He also drew my attention to the fact that it was at least distinguishable on the ground that that case was a review of conviction, whereas the present case was a review an acquittal. O'Bryan J was called upon to decide only whether it was open to the Justices to convict, whereas I am called upon by the informant to decide that the Magistrate was not entitled to acquit.

Reserving for the moment the question raised by this distinction, I think I should follow the *ratio decidendi* adopted by O'Bryan J. Furthermore, I agree with it. If there were the slightest evidence that some real possibility existed of some identified kind of sabotage or negligence or other interference with the sample, then the arguments of Mr Zayler would carry more force. Similarly if some suspicion could attach to the actual time lag *per se*.

In all the circumstances it seems to me that identity and integrity of the sample are reasonably secured by labelling, and by relying on the professional persons for their due compliance with the regulations. In all the circumstances of the present case I do not think the time lag could lead to any real danger at all that the sample was not properly kept or that it did not retain its integrity.

Mr Nash for the informant contended that the question was, simply, whether in the face of the evidence the Magistrate could reasonably entertain a doubt as to the integrity or identity of the sample tested by the analyst, and he contended that the answer must be in the negative. In the end I am persuaded that these submissions are correct in all the circumstances of this particular case.

[His Honour then considered Huntington v Jupp *and continued]:* ... The judgment of O'Bryan J was a carefully considered one which dealt faithfully and in detail with the many authorities, reported and unreported. I am not impressed with any of Mr Zayler's careful arguments to the effect that I should not follow His Honour's decision. Moreover he has in my opinion failed, despite a very full and careful argument to cast any doubt upon the correctness of that decision.

The remaining question arises out of the fact that the decision of the lower Court in *Huntington v Jupp* was a conviction. The question now is whether the Magistrate in the present case was entitled to acquit or whether the acquittal was based purely on a "perverse" finding not open to him. I am, of course, using "perverse" in a strictly legal sense for it is so obvious that the Magistrate in the present case was careful and conscientious in reaching his decision. In my opinion the acquittal was in law "perverse", (i.e. not open to the Court) in the circumstances of the present case, and having regard to the only explanation attributed to the Magistrate as set out in the affidavit of the prosecuting sergeant of police. I reiterate that the defendant gave no evidence, and that his friends gave no evidence, and that no reason was offered for his failure or that of his drinking companions to give evidence, and there was nothing to cast doubt upon the proper deduction in the circumstances, which was that the labelled sample at the laboratory was the precise sample which had been taken and labelled at the hospital. The Magistrate was wrong in law in holding, in effect, that the presumptions of regularity and continuance could not, in the present case, survive a 25 days' period of silence.

Mr Zayler did not expressly base argument on the facts elicited on cross-examination of the informant as appears in para. 12 of the affidavit. Mr Zayler said nothing about that evidence. Nor, apparently, did Counsel below. The statement by the defendant, out of Court and not on oath, that he could remember drinking only two beers throughout the 24 hours preceding the accident, had to be considered in the light of his accompanying statements as to time of first and last drinks, and in the light of the repeated emphatic statements by the defendant that he had no memory at all of the period of the last two hours before the accident, at the commencement of which period

he was still drinking in a group of his friends at a hotel. I repeat that none of the friends gave evidence. Having regard to the certificate evidence, and to the fact that the defendant was not called as a witness, I have concluded that these out of Court statements could not reasonably be regarded as displacing the strong presumption of regularity and continuance raised by the evidence for the informant. In my opinion the acquittal should be set aside. In the absence of any further submissions of Counsel, I think the proper course in all the circumstances is to order that the case be remitted to the Magistrate with a direction to him to convict the defendant and to fix penalties in accordance with law.

APPEARANCES: Mr Zayler, counsel for respondent/defendant. Mr G Nash, counsel for informant.
