32/82

SUPREME COURT OF VICTORIA

BRODY v BRILLIANT

Tadgell J

24 March 1982

MOTOR TRAFFIC – DRINK/DRIVING – SIXTH SCHEDULE AND EIGHTH SCHEDULE CERTIFICATES – LEGALLY QUALIFIED MEDICAL PRACTITIONER - BLOOD SAMPLE TAKEN BY DOCTOR AT HOSPITAL – "IMMEDIATELY RESPONSIBLE FOR THE EXAMINATION AND TREATMENT" – *PRIMA FACIE* PROOFS – "APPROVED ANALYST": *MOTOR CAR ACT* 1958, SS80D, 80DA, 81A.

1. The production of a Sixth Schedule Certificate provides a rebuttable presumption that the sample to which it refers was regularly obtained. That presumption, a presumption of regularity, arises in substance from the existence in the *Motor Car Act* ('Act') of s80DA which requires the legally qualified medical practitioner immediately responsible for the examination or treatment of a person who is brought into a hospital for examination or treatment to take a blood sample from that person. Because of that provision it is to be assumed that a blood sample which has been taken, and which is referred to in a Sixth Schedule Certificate, was taken in accordance with the requirements of s80DA. Having regard to the evidence, there was sufficient to allow the court to reasonably find that the person named in the Certificate was the practitioner immediately responsible for the examination and treatment of the defendant.

2. In relation to the Eighth Schedule Certificate there should be implied in sub-s(13) of s80D a power in Governor in Council, by making an Order in Council, to approve of an analyst for the purposes of s80D. Were it otherwise, the whole of the provisions of s80D of the Act would be set at nought.

3. The Eighth Schedule Certificate which was tendered to the court was the only evidence which was before the court of the approval of the named qualified analyst for the purposes of s80D of the Act. That evidence was not disproved by the production of the *Government Gazette*. Accordingly, the magistrate was not in error in finding the charge proved.

TADGELL J: By this order to review the applicant seeks to have set aside a conviction against him which was recorded by the Magistrates' Court at Collingwood on 20th May last. He was charged on information that on 25th November 1980, at Clifton Hill he drove a motor car whilst the percentage of alcohol in his blood expressed in grams per hundred millilitres of blood was more than 0.05 per centum contrary to the provisions of s81A of the *Motor Car Act* 1958.

The case was argued before me upon the footing that the informant below had proved all the necessary ingredients of the alleged offence save for the allegedly excessive alcohol content of the applicant's blood at the relevant time. There was before the Magistrates' Court evidence from which the court could conclude beyond reasonable doubt that on the day in question, 25th November 1980, the applicant was driving his motor car some time after 10 o'clock at night when he had an accident as a result of which he was injured and that shortly afterwards he was taken to a hospital. There was also evidence from which the court could conclude that, shortly before the accident the applicant had been drinking alcoholic liquor. There was tendered in evidence below a certificate in the form or to the effect of the Sixth Schedule to the *Motor Car Act* and the informant relied upon it in conjunction with the provisions of sub-s(3) of s80D of the *Motor Car Act*, There was also tendered in evidence a certificate in the form or to the effect of the Eighth Schedule to the *Motor Car Act* upon which the informant relied in conjunction with the provisions of sub-s(4) of s80D. Notwithstanding submissions which were made on behalf of the applicant which attacked the validity and efficacy of those two documents, the Magistrates' Court was satisfied that the charge had been proved and the conviction was recorded.

The first ground of the order nisi, as amended, reads as follows:

> That upon the uncontradicted evidence of Noel Patrick Brody, there was no evidence upon which a court could reasonably find that Melinda Galbraith was the legally qualified medical practitioner immediately responsible for the examination and treatment of the applicant within the meaning of s80DA(1) of the *Motor Car Act* 1958 and accordingly her certificate under Schedule Six of the said Act was inadmissible.

In order to understand the purport of that ground one needs to go to the certificate which was tendered under sub-s(3) of s80D of the *Motor Car Act*, the certificate being in the form of what is commonly known as a Sixth Schedule Certificate. It recites (I need not set out the whole of it) that Melinda Galbraith of St Vincent's Hospital, a legally qualified medical practitioner, certifies that she collected a sample of the blood of Francis Brody of 35 St Andrews Avenue, Rosanna at 11.55 p.m. on 25th November 1980, and that all the regulations relating to the collection of such sample were complied with and that such sample was placed in two containers which are described. The certificate was signed MJ Galbraith, MBBS and dated the 25th November 1980. Sub-section (1) of s80D provides, in effect, that where the question whether the percentage of alcohol in the blood of any person at the time of an alleged offence is relevant upon the hearing of an offence against s81A of the *Motor Car Act*, then;

> " ... without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the taking of a sample of blood from that person by a legally qualified medical practitioner within two hours after the alleged offence, of the analysis of that sample of blood by a properly qualified analyst and of the percentage of alcohol expressed in grams per 100 millilitres of blood found by that analyst to be present in that sample of blood at the time of analysis."

Sub-section (1) of s80DA provides that:

> "Where a person of or over the age of 15 years enters or is brought into a hospital for examination or treatment in consequence of an accident involving a motor car, the legally qualified medical practitioner immediately responsible for the examination or treatment of the person shall take from the person a sample of the person's blood for analysis, whether or not the person consents to the taking thereof, unless in the opinion of the legally qualified medical practitioner the taking of a sample of the person's blood would be prejudicial to the proper care and treatment of the person."

A penalty for infringement of that provision is provided. For the defendant, Dr Cremean relied upon the provisions of sub-s(5) of s80DA. They read:

> "Where a sample of a person's blood is taken in accordance with this section, evidence of the taking thereof, the analysis thereof or the results of the analysis thereof shall not be used in evidence in any legal proceedings except for the purposes of s80D."

As I indicated the informant in the court below sought to rely upon the provisions of s80D(1) and, in particular, upon the provisions of s80D(3) which deals with the effect to be given to a certificate signed by a person who purports to be a legally qualified medical practitioner in the form or to the effect of the Sixth Schedule. Such a certificate is to be admitted in evidence in proceedings such as those which were before the Magistrates' Court as *prima facie* proof of facts and matters therein contained. The argument, shortly expressed, was that it is not possible to rely upon a Sixth Schedule Certificate unless there is proof that the provisions of s80DA have been complied with. It was submitted here that there was evidence given by Noel Patrick Brody, who I assume was some relation of the applicant, from which the court ought to have concluded that Dr Galbraith, who signed the Sixth Schedule Certificate which was put in evidence, was not "the legally qualified medical practitioner immediately responsible for the examination or treatment" of the applicant.

In my opinion the provisions of sub-s(5) of s80D do not have the effect which was contended for on behalf of the applicant. To prohibit the use as evidence except for the purposes of s80D of the taking of or of the results of the analysis of a blood sample taken "in accordance with" s80DA is not, in my opinion, to require compliance with the requirements of s80DA where evidence of the taking of a blood sample or of the results of its analysis is given under s80D.

Section 80D(11), however, is relevant. It provides that:

> "Save as provided in section 80DA and sub-section (9) of section 80F no such blood sample (meaning

> a blood sample as referred to in S80D(1)) shall be taken and no evidence of the result of any analysis of such a sample shall be tendered unless the person from whom the blood has been collected has expressed his consent to the collection of the blood and the onus of proving such expression of consent shall be on the prosecution."

It is to be noted that sub-s(11) of s80D places restrictions upon the taking of a blood sample and giving in evidence the result of any analysis of that sample. In terms the sub-section does not place any restriction upon the giving in evidence of a Sixth Schedule Certificate. Notwithstanding that if there were no consent to the taking of a sample and s80DA had not been complied with, the taking of a sample referred to in a Sixth Schedule Certificate might have been taken illegally, the tender of a certificate in the form of the Sixth Schedule is not prohibited in terms by sub-s(11) of s80D.

Nevertheless its own terms (that is, the terms of the certificate) indicate here that there was no consent of the defendant obtained before the blood sample was taken from him. This might mean that no consent was required, the provisions of s80DA having been complied with. It might mean, on the other hand, that consent was required because the provisions of s80DA were not complied with and no consent was obtained. Nevertheless, I think ground (1) of the order nisi fails having regard to what I have already said.

Perhaps in case the validity of the *prima facie* proof which a Sixth Schedule Certificate provides might be affected if the blood sample had been taken illegally by Dr Galbraith, Mr Nash on behalf of the informant went on to make submissions which were designed to indicate that s80DA was in any event complied with. It is now established by the decision of Lush J in the case of *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78, 85, that there arises from the production of a Sixth Schedule Certificate a rebuttable presumption that the sample to which it refers was regularly obtained. That presumption, a presumption of regularity, arises in substance from the existence in the *Motor Car Act* of s80DA which requires the legally qualified medical practitioner immediately responsible for the examination or treatment of a person who is brought into a hospital for examination or treatment to take a blood sample from that person. Because of that provision it is to be assumed that a blood sample which has been taken, and which is referred to in a Sixth Schedule Certificate, was taken in accordance with the requirements of s80DA. As I follow him, Dr Cremean was disposed to accept that proposition. He submitted, however, that, because of the evidence which had been given by Mr Noel Patrick Brody, *prima facie* proof of the facts and matters which are contained in the Sixth Schedule Certificate should have been regarded as displaced.

Mr Noel Patrick Brody gave evidence to this effect. With his wife he attended St Vincent's Hospital, where the applicant was on two occasions on 26th November 1980. The first was at about five minutes to one in the morning and the second was at about 7 o'clock in the morning. On the first occasion he saw a woman who appeared to be treating the applicant. He assumed that she was a doctor, as he says, "because of her attire". He received on one or other of those two visits a medical certificate which was apparently signed by a medical officer which certified that the applicant was then an outpatient of St Vincent's Hospital suffering from what was described in the certificate as "a surgical condition" and that he would be unfit to follow his daily occupation for two days. The signature on that certificate, one can discern, was not that of Melinda Galbraith but was probably that of one Helen Banting. After pursuing some enquiries at the hospital Mr Noel Patrick Brody ascertained that the person who apparently signed the certificate had been a doctor on duty at the hospital and that she was treating the applicant. It was independently proved before the Magistrates' Court that Helen Banting was a legally qualified medical practitioner. All that evidence which was given by Mr Noel Patrick Brody was uncontradicted.

It was submitted on behalf of the applicant that it was sufficient, in the words of the amended ground (1), to create a situation in which there was no evidence upon which the court could reasonably find that Melinda Galbraith was the medical practitioner answering the description in s80DA(1). The amended ground (1) correctly recognises that, in order to succeed, the defendant must establish that a decision contrary to the decision in the court below was the only decision that the evidence on any reasonable view could support.

In my opinion, the evidence which was given by Mr Noel Patrick Brody does not produce evidence such that the evidence before the court could not sustain a conclusion at which the

court arrived. It is to be noted that the evidence which Mr Noel Patrick Brody gave said nothing whatever about Dr Galbraith. Indeed, Mr Noel Patrick Brody, according to his evidence, did not arrive at St Vincent's Hospital for an hour after the time at which, according to the Sixth Schedule Certificate, Dr Galbraith took a blood sample from the defendant. There is nothing to indicate that at five minutes to twelve on the 25th November Dr Galbraith was not the legally qualified medical practitioner immediately responsible for the examination or treatment of the applicant. For all I know, and indeed for all the persons constituting the Magistrates' Court knew, Dr Galbraith might have gone off duty at midnight having taken the blood sample from the applicant five minutes beforehand. There was no cross-examination sought of her, and indeed there was no requirement, as there might have been, that she attend. For these reasons I am of the opinion that ground (1) of the order nisi is not sustained.

As originally phrased, ground (2) of the order nisi read as follows;

> "That the certificate of Alan Bently Atchison dated the 11th Day of December 1980 was inadmissible against the defendant in that:
>
> (a) upon the proper construction of the *Motor Car Act* 1958 there was no power in the Governor-in-Council to make an order approving of a person as an approved analyst pursuant to s80D(13) of the said Act;
>
> (b) there was no evidence that the said Alan Bentley Atchison had been approved as a properly qualified analyst by the Governor-in-Council within the meaning of s80D(13)(b) of the *Motor Car Act* 1958".

Alan Bentley Aitchison was the person referred to in the Eighth Schedule Certificate which was tendered before the Magistrates' Court, which certificate described him as being an approved analyst under s80D of the *Motor Car Act* 1958. This morning Dr Cremean sought to amend ground (2) with a view to making it read in this way: "That the *prima facie* effect of the certificate of Alan Bentley Aitchison dated 11th December 1980 admitted into the evidence was displaced on the question of the percentage of alcohol in the blood of the defendant in that ..." and then follow the two sub-paragraphs (a) and (b) as the ground was originally phrased.

I think I should allow the amendment as sought. That ground was conveniently argued in two parts, (a) and (b), in accordance with the sub-paragraphs of the ground, and I can deal with it in much the same way. Ground (a) relies upon subs(13)(b) of s80D. It provides that:

> "'approved analyst' (in s80D) means a person who has been approved by Order of the Governor in Council published in the *Government Gazette* as a properly qualified analyst for the purposes of this section."

The argument was that before an Order of the Governor in Council could be made and published in the *Government Gazette* there must be power conferred on the Governor in Council to make it; and that neither subs(13) nor any provision in the *Motor Car Act* confers such power. It was said that no such power could be implied as it could be implied in, for example, sub-s(14) of s80F. The last mentioned sub-section states the meaning of the expression "breath analysing instrument'' in s80F and says that it means:

> " ... apparatus of a type approved for the purposes of this section or of any corresponding previous enactment by the Governor in Council by notice published in the *Government Gazette*....''

There is, following sub-s(14), sub-s(15) which in effect gives power to the Governor in Council to revoke any approval given pursuant to sub-s(14). It was argued that the absence of a corresponding power of revocation contained in sub-s(13) of s80D distinguishes the two sections, the power to revoke alone implying to make an order. A similar kind of argument was founded upon the existence of a like power to revoke, contained in the definition of "motor tractor" in sub-s(1) of s3 of the Act. One might well wonder why s80F(15) and the definition of "motor tractor" in s3(1) contain the power to revoke an order which has been made in accordance with the provisions. I should have thought that any assumed power in Governor in Council to make an Order in Council would carry with it the power to revoke such an order. I think there is nothing in this point and that there should be implied in sub-s(13) of s80D a power in Governor in Council, by making an Order in Council, to approve of an analyst for the purposes of s80D. Were it otherwise, the whole of the provisions of s80D would be set at nought. It was impressed upon me that this is a criminal section designed to facilitate the conviction of persons under s81A, amongst others, and that I

should not lightly infer in s80D, a power which is not clearly discernible from it. In my opinion this is a case in which the maxim *ut res magis valeat quam perlat* should be applied.

A failure to do would, I think, impute to the legislature an intention which could not possibly have been intended. The power to revoke which is contained in s80F(15) was presumably placed there out of an abundance of caution. The fact that no such power has been inserted in sub-s(13), which was enacted at a different time than that at which sub-s(15) of s80F was enacted, carries with it no particular consequence. I think, therefore, that ground 2(a) is not sustained.

Ground 2(b) asserts that there was no evidence that Aitchison had been approved as a properly qualified analyst by the Governor in Council within the meaning of s80D(13)(b). There was indeed tendered on behalf of the defendant below a *Government Gazette* dated 1st October 1980 which contains on page 3348, under the heading of "Appointments and Resignations", the statement that:

> "His Excellency the Governor of the State of Victoria, by and with the advice of the Executive Council thereof has, by Orders made on 23 September 1980, been pleased to make the under-mentioned appointment, viz.:"

Then, after the recital of a number of other appointments, there appears under the heading "Ministry for Police and Emergency Services" and the sub-heading Qualified Analyst': "Dr. Alan Bentley Atchison, B. Ag Sc, (Hons, Adel.) Ph D. Police Forensic Science Laboratory, to be a Properly Qualified Analyst for the purposes of section 80D of the *Motor Car Act* 1958." It was sought by that evidence to displace the *prima facie* effect of Dr Aitchison's certificate and to do so by reference to what, it was submitted, had actually been done by the Governor in Council. It was said that sub-s(13)(b) of s80D is a definition section which also contains certain requirements which must be satisfied before it can be said that a particular person satisfies the definition. The requirements are, it was submitted, that by the sub-section an "approved analyst" must be approved by Order of the Governor in Council which is published in the *Government Gazette*, and that he must be approved as a properly qualified analyst for the purposes of the section. It was said that reference to the *Government Gazette* which was tendered indicated that there was in terms an "appointment" and not an "approval" of Dr Aitchison.

It was further said that it was the Order in Council itself that had to be published in the *Government Gazette* and not merely a notice of it; and that notification of the appointment was not a publication of the approval by the Order in Council. I was referred in the course of an interesting argument by Dr Cremean to a case decided by the Manitoba Court of Appeal of *The Town of Dauphin v Cotic* (1960) 21 Man. 2nd Series 719. That was a case in which a by-law depended for its validity on its publication in the *Government Gazette*. It was held that a failure to publish the full terms of the by-law was a fatal omission to the validity of it. By parity of reasoning it was said that, here, the whole of the Order in Council ought to have been published and was not. I think it is unnecessary for me to decide whether what was done in the *Government Gazette* which was tendered is in truth due compliance with what sub-s(13) of s80D contemplates. Let it be supposed, however, that it was not due compliance. How does that leave the matter? It merely leaves it, so far as I can see, in a position that the Eighth Schedule Certificate was the only evidence which was before the court of the approval of Dr Aitchison for the purposes of s80D. I think it is not possible to conclude, therefore, that there was no evidence that Dr Aitchison had been approved. On the contrary there was *prima facie* evidence. That evidence was not disproved by the production of the *Government Gazette*, which itself did not prove an appropriate Order in Council, if that be the case.

In further answer to ground (b) Mr Nash was disposed to argue that, in any event, it was not necessary for the informant to satisfy the court that the requirements of s80D(1) were satisfied before the certificate which Dr Aitchison made out could be received in evidence under sub-s(4). He referred to the case of *R v Cheer* [1979] VicRp 53; (1979) VR 541. It was said to follow that the matter was not affected by the consequence that Dr Aitchison was not a properly qualified analyst. I think *Cheer's Case* does not sustain that argument. *Cheer's Case* decided that it is not a condition precedent to the admissibility of an Eighth Schedule Certificate to prove the facts contemplated by s80D(1). The present question is not a question of admissibility, having regard to the way in which the second ground of the order nisi has been amended. It is a question of the

effect which the certificate is to receive once it has been admitted. It would appear to me that if the certificate were admitted under s80DA(4), and proof were given independently of it that the signatory and the person referred to in it was not in fact an approved analyst, then that might very well affect the quality of *prima facie* proof which otherwise the certificate affords of the facts of the matters contained in it. That, however, is not a question which I need now pursue.

For the reasons I have given, ground (2) of the order nisi fails in its entirety. Grounds 3 and 4 were abandoned. The result, therefore, is that the order nisi must be discharged.
