37/78

SUPREME COURT OF VICTORIA

FAGAN v FIDLER

McInerney J

14 March, 30 June 1978

MOTOR TRAFFIC – DRINK/DRIVING – REFUSE BREATH TEST – NO EVIDENCE BY INFORMANT THAT HE HELD REQUIRED BELIEF THAT THE DEFENDANT'S ABILITY TO DRIVE IMPAIRED – WHETHER REQUIRED BELIEF COULD BE INFERRED – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS80F(6)(B), 80F(11).

When driving his motor vehicle, the defendant was seen when he turned left veer suddenly to avoid a centre traffic island and 80 feet from that intersection, had to veer suddenly right to avoid striking a parked car. He was then followed for over half a mile and there were no other examples of bad driving. The only observations with respect to the consumption of alcohol were the smell of intoxicating liquor and unsteadiness on the feet together with admissions by the defendant that he had consumed intoxicating liquor. The defendant admitted that he was on his way home from work and that he was very tired and had been working for long hours. The informant did not give evidence that the defendant's ability to drive the motor vehicle was impaired. The charge was found proved. Upon appeal—

HELD: Order absolute. Conviction set aside. Charge dismissed.

1. The questions to be decided were (1) whether the informant formed the belief that the ability of the defendant to drive a motor car had been impaired by the consumption of intoxicating liquor and (2) whether the informant had reasonable grounds for that belief.

2. This being a criminal case, the prosecution insofar as it relied on circumstantial evidence was bound to prove its case to the extent that the facts proved excluded all reasonable hypotheses consistent with innocence.

3. The informant did not give evidence before the court that at the time when he required the defendant to undergo a breathalyser test he believed that the defendant's ability to drive a motor car was impaired by the consumption of intoxicating liquor. His evidence that at Russell St Police Station he stated to the defendant that he believed on reasonable grounds that the defendant's ability to drive the motor car was impaired by the consumption of intoxicating liquor was relevant to prove the making of the demand under s80F(6)(b) that the defendant undergo a breathalyser test. It was not admissible to prove that the informant had in fact at that time entertained the belief asserted in that statement.

4. There may be cases where although the police officer concerned has not sworn that he formed the required beliefs, the state of the evidence is such as to permit only the inference that the informant held each of the relevant beliefs and that there were reasonable grounds for each of those beliefs. The present case was not such a case: on the contrary it was a case where the observed facts and information available to the informant permitted an inference consistent with innocence, namely, fatigue.

5. In those circumstances in the absence of the informant's sworn evidence that he held each of the requisite beliefs and as to the grounds on which he held those beliefs and in the absence of a finding by the magistrate as to the basis of and the reasonableness of the informant's beliefs, it was impossible to say that the circumstantial evidence was such as to exclude all hypotheses consistent with innocence and such as to require the conclusion, beyond reasonable doubt, that the applicant's capacity to drive a car had been impaired by the consumption of liquor.

6. The state of the prosecution evidence was not such as to exclude reasonable doubt as to whether the informant held the required beliefs and not such as to exclude reasonable doubt, that such beliefs that those it held were reasonable.

7. The present case was one in which in the absence of evidence by the informant that he held the required beliefs and as to the basis of those beliefs and in the absence of any finding by the magistrate as to the informant having held those beliefs and as to the basis on which such beliefs were held the prosecution had excluded all hypotheses consistent with innocence, or that no conclusion

was open to the magistrate than to convict. In the present case it would be wrong in law to allow the conviction to stand.

McINERNEY J: ... So far as relevant to the present case the matters required to be established by the prosecution in a charge laid under section 80F(11)(a) were:—

(i) that a member of the police force (the informant) has found the defendant driving a motor car;

(ii) that the police officer on the evidence then available to him formed the belief—
(a) that the defendant's ability to drive the motor car was impaired, and
(b) that the impairment of the defendant's ability to drive the motor car was due to the consumption of liquor by the defendant;

(iii) that on that evidence the police officer had reasonable grounds for each of those beliefs;

(iv) that the police officer thereupon required the defendant to furnish a sample of breath for analysis by a breath analysing instrument;

(v) that the defendant refused or failed to furnish a sample of his breath for analysis.

There was evidence from which the learned magistrate was entitled to find ingredients (i), (iv) and (v) established.

There was evidence from which the magistrate was entitled to find that the defendant's ability to drive a car fell short of the standard of driving required by the law and that the informant believed that it so fell short. The section uses the word 'impaired' which imports an element of comparison. It cannot be that comparison with the defendant's normal standard of driving is intended, for it would seldom happen in urban areas that a police officer would have any prior knowledge of a defendant's ability to drive a motor vehicle. The comparison must surely be with the standard of driving required by law and to the extent that the evidence showed that the defendant's driving fell short of that standard. It was open to the informant to form the belief that the defendant's ability to drive a motor car had been impaired.

The informant however did not give evidence at the hearing that he had formed that belief and the question is whether there was evidence from which the magistrate could be satisfied beyond reasonable doubt that the informant had formed that belief. On the basis of the defendant's statements that the defendant had within some hours of having been observed to drive the car consumed intoxicating liquor, and the evidence of the informant that the defendant's breath smelt strongly of liquor, and that the defendant was unsteady on his feet, it was open to the learned magistrate to have found that the defendant had in fact consumed intoxicating liquor within some hours prior to his having been apprehended by the police, and likewise to have found that on that evidence it was open to the informant to have formed the belief that the defendant had within the same period consumed intoxicating liquor.

As to whether it was open to the informant to have formed a belief that the ability of the defendant to drive had been impaired by the consumption of alcoholic liquor, there was evidence from which it would have been possible to infer that the impairment was due to fatigue alone or to the consumption of alcoholic liquor alone or to a combination of both factors. The evidence showed that the informant at no time gave consideration to the question whether the defendant's manner of driving was caused by fatigue or circumstances (e.g. tension) other than the consumption of liquor.

If in fact the informant formed the belief that the impairment of the defendant's ability to drive a car was caused, wholly or in part, by consumption of intoxicating liquor the question whether there were reasonable grounds for the belief would require consideration of whether the evidence was such as to exclude beyond reasonable doubt all explanations for the impairment of the defendant's ability to drive other than the consumption of intoxicating liquor.

There arise therefore the questions (1) whether the informant formed the belief that the ability of the defendant to drive a motor car had been impaired by the consumption of intoxicating liquor and (2) whether the informant had reasonable grounds for that belief.

This being a criminal case, the prosecution insofar as it relies on circumstantial evidence is bound to prove its case to the extent that the facts proved exclude all reasonable hypotheses consistent with innocence — see the passage from the unreported judgement of the Full Court of the High Court in *Bradshaw v McEwans Pty Ltd* (1951) cited in *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352 at p358; [1952] ALR 308.

In this case the informant did not give evidence before the court that at the time when he required the defendant to undergo a breathalyser test he believed that the defendant's ability to drive a motor car was impaired by the consumption of intoxicating liquor. His evidence that at Russell St Police Station he stated to the defendant that he believed on reasonable grounds that the defendant's ability to drive the motor car was impaired by the consumption of intoxicating liquor was relevant to prove the making of the demand under s80F(6)(b) that the defendant undergo a breathalyser test. It was not admissible to prove that the informant had in fact at that time entertained the belief asserted in that statement.

As I have previously pointed out in *Palmer v Scollary* (P/R 6772) (unreported 16/8/72) and as Murray J has said in *Iskov v Matters* [1977] VicRp 26; (1977) VR 220 this does not mean that in every case where the informant or other police officer concerned fails to state expressly in his evidence that he had formed the required belief the information must be dismissed. As Murray J has pointed out in *Iskov v Matters* (*supra*) at p223:

> 'Belief is a state of mind which... is capable of proof by means other than by the direct evidence of the person allegedly holding it ...'

If no direct evidence of the existence of the relevant belief is given by the informant or other police officer concerned, then the informant must prove facts which permit the court to draw, beyond reasonable doubt, the inference that at the relevant time the informant or other police officer concerned had the requisite belief.

There is a substantial difference between the offence charged against the applicant and the offence on which the defendant had been convicted in *Iskov v Matters* (*supra*). In that case the charge laid under s80E(3) was that the defendant having been required under s80E(1)(b) to undergo a preliminary breath test had refused or failed to do so. All that the prosecution had to prove was that the police officer concerned believed on reasonable grounds that within the last two preceding hours the defendant had driven or been in charge of a motor car when it was involved in an accident on a highway. The police officer concerned did not give evidence that he had so believed, but the evidence was such as to admit of no other conclusion. In the circumstances the officer's failure to give evidence as to his belief was immaterial: the evidence demonstrated beyond reasonable doubt that he must have formed and had in fact formed that belief.

In the present case (as in *Palmer v Scollary* (*supra*)) the Magistrate convicted the defendant and it must be taken that he did so on the footing, that he was satisfied beyond reasonable doubt as to each and every ingredient of the offence charged. There was however, no express evidence by the informant that he had, at the time when he required the defendant to undergo a breathalyser test, a belief that the defendant's ability to drive a motor car was impaired by the consumption of liquor. The informant's failure to give that evidence calls in question the existence of that belief and requires the court to scrutinize very closely the sufficiency of the evidence now relied on as circumstantial evidence, said to demonstrate beyond reasonable doubt the existence of that belief.

In this context, I would, with respect adopt the remarks of Gowans J in *Staples v McGill* (O/R 6411, 22 September 1969, unreported) cited in *Iskov v Matters* (*supra* at p222) I would adopt also (*mutatis mutandis*) the remarks of Piper J in *Corsten v Noblett* (1927) SASR 421 at p424 in relation to the 'suspected property' section of the *Police Act of South Australia*. Piper J pointed out that the section:

> 'makes a serious departure from the common law and encroaches greatly upon the liberty of the subject. It is not necessary to enlarge upon that. A condition precedent to the charge is that a suspicion is in fact held that the goods have been stolen or unlawfully obtained. There is no difficulty at all in a constable deposing to the fact of suspicion when it has existed and there is good reason for requiring him to pledge his oath on the subject. The fact that he has not done so may create a doubt of his being fully able to do so. His inability to do it might be due to various causes but particularly

it might happen that he knew facts not mentioned in evidence which excluded from his mind the particular suspicion necessary to the case'.

In this connection it may be pertinent to point out that if a police officer knows that he may be called on to pledge his oath on the subject of the required beliefs he will be less likely to abuse his powers by exercising them in circumstances in which he is not entitled to exercise such powers.

The magistrate did not at any stage state that he found as a fact that the informant held either of the requisite beliefs or that the informant had reasonable grounds for such beliefs. It is, however, implicit in the affidavit of the applicant's solicitor that the magistrate did in fact find on the basis of what the informant stated to the defendant when requiring the defendant to undergo a breathalyser test that the informant had formed the beliefs referred to in ingredient (ii) above and if that was the basis of the magistrate's finding it was not permissible for the magistrate to use that statement of the informant for that purpose, and there was no other evidence on which the magistrate could so find.

There may be cases where although the police officer concerned has not sworn that he formed the required beliefs, the state of the evidence is such as to permit only the inference that the informant held each of the relevant beliefs and that there were reasonable grounds for each of those beliefs. The present case is not such a case: on the contrary it is a case where the observed facts and information available to the informant permit of an inference consistent with innocence, namely, fatigue. In those circumstances in the absence of the informant's sworn evidence that he held each of the requisite beliefs and as to the grounds on which he held those beliefs and in the absence of a finding by the magistrate as to the basis of and the reasonableness of the informant's beliefs, it is impossible to say that the circumstantial evidence was such as to exclude all hypotheses consistent with innocence and such as to require the conclusion, beyond reasonable doubt, that the applicant's capacity to drive a car had been impaired by consumption of liquor. Putting it in jury terms I do not consider that a reasonable jury, properly directed, must inevitably have convicted.

On the contrary, I think the state of the prosecution evidence was not such as to exclude reasonable doubt as to whether the informant held the required beliefs and not such as to exclude reasonable doubt, that such beliefs that those it held were reasonable.

The present case is one in which in the absence of evidence by the informant that he held the required beliefs and as to the basis of those beliefs and in the absence of any finding by the magistrate as to the informant having held those beliefs and as to the basis on which such beliefs were held I am not satisfied that the prosecution had excluded all hypotheses consistent with innocence, or that no conclusion was open to the magistrate than to convict. In my opinion in the present case it would be wrong in law to allow the conviction to stand.
