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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v CHEER

Young CJ, Lush and Beach JJ

1 June 1979 — [1979] VicRp 53; [1979] VR 541

MOTOR TRAFFIC – CULPABLE DRIVING – BLOOD SAMPLE TAKEN FROM DEFENDANT DRIVER – SAMPLE TAKEN MORE THAN TWO HOURS AFTER THE DRIVING – WHETHER CERTIFICATES ADMISSIBLE IN EVIDENCE – WHETHER STATUTORY PROVISION CREATES A CODE ABOUT PROOF OF OFFENCE – WHETHER CERTIFICATES CAN BE USED WHERE *VIVA VOCE* EVIDENCE ADMISSIBLE: *MOTOR CAR ACT* 1958, S80D.

1. When regard is had to the history of s80D of the *Motor Car Act* 1958 ('Act') it is clear that its original purpose was not to create a code whereby a person's blood alcohol content might be proved by the production of certificates but to provide a method of proving or facilitating proof that a person was or was not under the influence of intoxicating liquor.

2. The giving of evidence of the taking of a sample of blood and the analysis of that sample does not depend on s80D(1) or (2) of the Act in either its original or its amended form. Such evidence is admissible without the authority of statute. What sub-s(1) authorises is the giving of evidence of analysis in terms of a percentage, without further exposition of the significance of the percentage. What sub-s(2) does is to give probative force to evidence so expressed without any such exposition. Neither sub-section diminishes the position under the rules of common law, which permits such evidence to be given provided its relevance to the issues of a case is demonstrated by expert evidence.

3. There is no reason for restricting the general words of the three sub-sections dealing with the certificates. From a reading of sub-ss(5) to (9) there can be inferred a general policy that a certificate can be used in any circumstances where *viva voce* evidence would be admissible. They are, therefore, inconsistent with any construction producing a result that in some cases *viva voce* evidence would be admissible but a certificate would not.

THE COURT: At 7.30pm Cheer was involved in a number of collisions with other vehicles (the last one resulting in a fatality). After some difficulty he was taken to a Police Station where he refused to submit to a breathalyser test. He was later taken to the Box Hill Hospital where, at 11.45pm, a sample of his blood was taken for analysis (he having suffered a minor injury).

At his trial Sixth and Eighth Schedule certificates were admitted in evidence. He appealed on the ground that those two certificates were inadmissible and should not have been received in evidence, (although it was conceded by the defence that it would have been open for the Crown to have called *viva voce* evidence as to those matters even though the sample was taken more than 2 hours after the alleged offence).

The Court referred to Section 80D of the *Motor Car Act* and stated "The precise effect of s80D(2)b) is not easy to define, and the task of defining it need not be attempted in this judgment. We express no opinion on the question whether a conviction for an offence of driving under the influence of intoxicating liquor could be supported by evidence of the analysis alone: but, however that may be, the paragraph makes the analysis result, expressed as a percentage, evidence of the quantity of the alcohol in the blood tested, and permits its use along with other evidence, if any, e.g. behaviour, in proof of an allegation that the person from whom the blood was taken was under the influence of intoxicating liquor, and does so without requiring as a condition of such use the giving of expert evidence explaining the significance of the analysis in terms of the consequences of the percentage found on human behaviour generally. Such a use would not have been permissible at common law."

As to the defence contention that s80D creates a code whereby a person's blood alcohol content may be proved by the production of certificates in the forms of the Schedules in the Act,

and that sub-ss(3) and (4) should be read down so as to be confined to samples taken within 2 hours of the alleged offence, the Court went on "In our opinion, it cannot be said that s80D merely creates a code whereby a person's blood alcohol content may be proved by the production of the appropriate certificates. If one has regard to the history of the section it can be seen that its purpose is much wider and of far greater significance."

Their Honours point out that the origin of s80D is to be found in the *Crimes (Driving offences) Act* 1955. The judgment sets out s6(1) of that Act and also refers to sub-ss (2) and (3). (It is to be noted that the expression "within eight hours" appears therein). That section became s408 of the *Crimes* Act 1957 and was amended and added to by the *Crimes (Amendment) Act* 1957. Section 80D, in due course, effectively replaced s408. The Court said: When regard is had to the history of s80D it is clear, in our view, that its original purpose was not to create a code whereby a person's blood alcohol content might be proved by the production of certificates, which was the applicant's argument, but to provide a method of proving or facilitating proof that a person was or was not under the influence of intoxicating liquor.

The giving of evidence of the taking of a sample of blood and the analysis of that sample does not depend on s80D(1) or (2) in either its original or its amended form. Such evidence is admissible without the authority of statute. What sub-s(1) authorises is the giving of evidence of analysis in terms of a percentage, without further exposition of the significance of the percentage. What sub-s(2) does is to give probative force to evidence so expressed without any such exposition. Neither sub-section diminishes the position under the rules of common law, which permits such evidence to be given provided its relevance to the issues of a case is demonstrated by expert evidence.

This view of the common law position was in substance admitted by counsel for the applicant, whose contention was the narrow one that at common law a certificate of the result would not be admitted and that the only certificates covered by sub-ss(3), (3A) and (4) were those relating to tests taken within two hours of the offence. In our opinion this argument fails. Upon an examination of the history and upon an examination of the words of s80D." [The Court went on further to approve the reasoning and the decision of Menhennitt J in *Wright v Bastin* [1978] VicRp 57; [1978] VR 609; MC 14/1979) with the qualification "We express no opinion on a further point made by His Honour, that sub-s(2) prevented the discretionary exclusion to which it referred."] [It concluded "These considerations reveal that there is no reason for restricting the general words of the three sub-sections dealing with the certificates. We would add that, in our opinion, from a reading of sub-ss(5) to (9) there can be inferred a general policy that a certificate can be used in any circumstances where *viva voce* evidence would be admissible. They are, therefore, inconsistent with any construction producing a result that in some cases *viva voce* evidence would be admissible but a certificate would not.]
