11/77

SUPREME COURT OF VICTORIA

ISKOV v MATTERS

Murray J

14, 17 February 1977

MOTOR TRAFFIC – DRINK/DRIVING – REFUSING PRELIMINARY BREATH TEST – EVIDENCE NOT GIVEN BY POLICE INFORMANT AT THE HEARING THAT HE ENTERTAINED THE BELIEF THAT THE DEFENDANT HAD DRIVEN THE MOTOR CAR WITHIN THE PREVIOUS TWO HOURS WHEN IT WAS INVOLVED IN AN ACCIDENT – PROOF BY INFERENCE – MAGISTRATE FOUND THE CHARGE PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80E(1)(b).

The police informant attended the scene of a single car accident and observed a motor car on the median strip; tracks led to the point where the car was standing, behind the car there was a twisted safety railing; the applicant, the only occupant of the car) was seated in the driver's seat. Evidence was given of various indications that the applicant was affected by alcohol. She was taken to the police station where the respondent said, he believed on reasonable grounds that she was driving in the last two hours and involved in an accident and he required her to take a preliminary breath test. She refused. The applicant was charged with refusing a preliminary breath test. The informant did not give direct evidence that he did in fact entertain the belief that the applicant had driven a motor car within the previous two hours when it was involved in an accident. No evidence was called by the applicant. Counsel submitted there was no evidence that the police informant entertained the belief required by the section, and further, that since he did not give evidence of his belief it was impossible for the Magistrate to determine whether such belief was on reasonable grounds or not. The Magistrate rejected this submission and found the charge proved. Upon order nisi to review—

HELD: Order nisi discharged.

1. In the present case, the provisions of s80E(1)(b) of the *Motor Car Act* 1958 were such that proof by inference was very much easier than was the case under s408A of the *Crimes Act*. What must be believed on reasonable grounds under s80E(1)(b) are three matters: first, that the defendant had been the driver of or in charge of a motor car; secondly, that he had been so within the previous two hours; and, thirdly, that during that period the car had been involved in an accident on the highway while he was so driving or in charge of it.

2. 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. In a vast number of criminal cases intention, both basic and specific, which is also a state of mind, falls to be proved by inference and there is no reason why belief is not similarly capable of proof.

***Staples v McGill*, VSC, Gowans J, 22 September 1969, not followed.**

3. The informant having given evidence of all relevant matters, the Magistrate was amply justified in inferring from the evidence that the informant believed that within the period of two hours the applicant had been the driver of the car when it was involved in an accident on the highway and that the grounds for such belief were reasonable.

4. The possibility that the respondent did not turn his mind to the question one way or the other was excluded by the evidence that the respondent said to the applicant when requesting her to undergo a preliminary breath test that he did hold the requisite belief. Accordingly, the Magistrate was correct in his decision and the order nisi was discharged.

MURRAY J: This is the return of an order nisi to review the decision of the Stipendiary Magistrate sitting at Dromana on 21 June 1976. The applicant was charged on an information taken out by the respondent under the provisions of s80E(1)(b) of the *Motor Car Act*, the relevant parts of which read:

> "A member of the police force may at any time require—
> ... any person such member believes on reasonable grounds has within the last two preceding hours driven a motor car ... when it was involved in an accident upon a highway
> — to undergo a preliminary breath test ...".

The evidence given at the hearing of the information was given by the respondent and by Senior Constable Wilson. So far as relevant to the provisions of s80E(1)(b) it may be briefly summarized as follows:

At approximately 8.50 p.m. on 11 June 1976 the respondent and Senior Constable Wilson attended the scene of a single car accident on the Nepean Highway at a point 22 metres east of Second Avenue, Rosebud. They there saw a Wolseley motor car on the median strip facing in a westerly direction. They observed tracks leading from the roadway to the point where the car was standing, and immediately behind the car were various twisted and contorted pieces of safety railing. The applicant was seated in the driver's seat of the car and was the only occupant. She was assisted from the car and when asked how the accident occurred she stated that she had been blinded by the headlights of a car coming in the opposite direction. She said that she was not familiar with this section of the road and ran up onto the centre strip. Evidence was given of various indications that she was affected by alcohol and she was taken to the Rosebud police station where the respondent said that he believed on reasonable grounds that she had driven a motor car within the last two hours when that motor car was involved in an accident on a highway and that he required her to take a preliminary breath test. She refused to do so. The respondent did not give direct evidence at the hearing that he did in fact entertain the belief that the applicant had driven a motor car within the previous two hours when it was involved in an accident. No evidence was called by the applicant.

At the close of the case for the prosecution counsel for the applicant submitted that there was no case to answer on the basis that there was no evidence that the respondent entertained the belief required by the section and further that in view of the fact that he did not give evidence of his belief it was impossible for the Magistrate to determine whether such belief was on reasonable grounds or not. The Magistrate rejected the submission and convicted the applicant.

The order nisi was granted on the following grounds: -

> (1). His Worship was wrong in law to find that since there had been a motor car accident, no evidence of the informant's actual belief as to whether the applicant was in charge of a motor car within the meaning of S82 of the *Motor Car Act* 1958, was needed.
>
> (2). His Worship was wrong in law to find that since there had been a motor car accident the applicant was therefore required to take a preliminary breath test, whether or not the respondent believed on reasonable grounds that: –
> (a) the applicant had been driving a motor car within the last two preceding hours;
> (b) had been in charge of a motor car within the meaning of s82 of the *Motor Car Act* 1958; or
> (c) the applicant's driving may have been impaired by the consumption of intoxicating liquor; or
> (d) the applicant had in fact consumed intoxicating liquor; or
> (e) there had been a motor car accident upon a highway.
>
> (3). His Worship was wrong in the law in convicting the applicant of the offences charged in the information in that there was no evidence before his Worship as to the belief of the informant as regards any of the matters referred to in paragraph 2 hereof.
>
> (4). His Worship was wrong in law in convicting the applicant of the offence charged in the information in that there was no evidence before his Worship as to the existence of reasonable grounds for the belief of the informant as regards any of the matters referred to in paragraph 2 hereof."

In my view the first two grounds cannot be sustained on any view because there is, in my opinion, nothing in the material before me to indicate that the Magistrate made the findings or adopted the views therein set out. However, the substantial argument before me rested upon grounds (3) and (4) and was to the effect that as the respondent did not swear that he entertained the belief that the applicant had been the driver of a car within the previous two hours which had been involved in an accident, it was not open to the Magistrate to find that the terms of s80E(1)(b) had been complied with and further that because he did not swear to this belief and the grounds upon which it was based, there was no way in which the Magistrate could determine whether such grounds were reasonable.

Counsel referred to and relied strongly upon the unreported decision of Gowans J in *Staples v McGill* delivered on 22 September 1969. Reference was also made to a decision of the Full Court in *Muldoon v Johnstone*, unreported, delivered on 25 June 1975, but I can get no assistance from that decision.

On p3(a) of his reasons for judgment in *Staples v McGill*, VSC, 22 September 1969, Gowans J said:

> "Mr Mattei has taken the point that there was no evidence before the Magistrate that the constable held any belief to the effect of the matters set out in sub-4 and there was no evidence as to what the grounds of that belief were. This is obviously correct because the constable never gave any evidence that he held any belief to the effect of the matters set out in sub-4. The only evidence in any way bearing upon that is that part of his evidence as to what he said to the defendant. It is true that he said to the defendant, 'I believe you were driving a motor car...' etc., but he never at any time gave any evidence to the effect that he in fact held that belief. It is true also that in the course of his evidence he set out a number of matters bearing upon the defendant's condition and his conduct in relation to the car, but he never at any time said that these were grounds upon which he based his belief. That really made it impossible to determine the reasonableness or otherwise of the grounds upon which he held his belief since neither the belief nor the grounds were stated."

It must, however, be borne in mind that his Honour was dealing with an information under s408A of the *Crimes Act* which required a belief on reasonable grounds that a person: -

> (1) had been within the previous two hours the driver of or in charge of a motor car and
>
> (2) had behaved whilst driving or in charge of a motor car in a manner which indicated that his ability to drive was impaired by the consumption of alcohol.

The evidence in the case so far as it related to the manner in which the defendant had driven it was very limited and certainly open to constructions other than an impairment of ability to drive by the consumption of alcohol. Consequently, in the absence of evidence of the relevant belief and the grounds upon which it was based, proof fell far short of the criminal standard required.

If by the words I have quoted, Gowans J meant that in every case in which a police officer is required to form a belief on reasonable grounds, formal evidence must be given to that effect, with respect, I am unable to agree. Belief is a state of mind which, in my opinion, is capable of proof by means other than by the direct evidence of the person allegedly holding it. In a vast number of criminal cases intention, both basic and specific, which is also a state of mind, falls to be proved by inference and I see no reason why belief is not similarly capable of proof. In the unreported decision of McInerney J in *Palmer v Scollary* VSC, 16 August 1972, his Honour seems clearly to have adopted this view. In that case, which was also a case arising under s408A of the *Crimes Act*, his Honour came to the conclusion that in the absence of direct evidence by the informant that he entertained the necessary belief and the grounds upon which it was based, the circumstantial evidence was not sufficient to establish the guilt of the applicant.
In the present case, however, the provisions of s80E(1)(b) are such that proof by inference is very much easier than was the case under s408A of the *Crimes Act*. What must be believed on reasonable grounds under s80E(1)(b) are simply three matters: first, that the defendant has been the driver of or in charge of a motor car; secondly, that he had been so within the previous two hours; and, thirdly, that during that period the car had been involved in an accident on the highway while he was so driving or in charge of it.

If the argument is correct that the informant must in every case formally depose to his belief and formally state the grounds therefor, it would follow that, in the absence of such formal evidence, a police officer who deposed personally to witnessing an accident on the highway and immediately requesting the driver of one of the vehicles involved to undergo a preliminary breath test would fail on his information if the driver refused to undergo the test. Such a view is, in my opinion, untenable. In such a case the inference that the police officer believed on reasonable grounds that the defendant had been the driver of a motor car within the preceding two hours which was involved in an accident on the highway would be irresistible and formal evidence of that belief or of the grounds therefor would, in my opinion, be quite unnecessary.

In relation to proof of a required state of mind on the part of an informant reference may be made to *Henderson v Surfield and Carter* [1927] SASR 31; *Harty v Harcourt and O'Brien; Ex parte Harcourt and O'Brien* [1936] St R Qd 1, at p23 and *Wallace v Hansberry* [1959] SASR 20. In the present case the Magistrate convicted the applicant and I must assume he was satisfied to the required extent of all the elements of the offence charged. The problem I have to determine, therefore, is whether the evidence was capable of so satisfying him in relation to the three elements required under s80E(1)(b).

The evidence showed that the applicant's car had left the roadway, proceeded on to the median strip and knocked over safety railings. It therefore showed there had been an accident and the applicant admitted that she had been the driver of the car at the relevant time. Although there was no precise evidence as to the time at which the accident occurred, the evidence showed that the applicant was still seated in the driving seat at 8.50 p.m. when the police arrived. She refused to take the preliminary breath test at 9.05 p.m. There was no suggestion that she was injured. Having regard to the place where the events occurred, namely the Nepean Highway in Rosebud, it would be impossible in my view to entertain any reasonable doubt that that accident had occurred inside the two-hour period. The informant having given evidence of all these matters, it appears to me that the Magistrate was amply justified in inferring from the evidence that the informant believed that within the period of two hours the applicant had been the driver of the car when it was involved in an accident on the highway and that the grounds for such belief were reasonable.

The possibility that the respondent did not turn his mind to the question one way or the other is excluded by the evidence that the respondent said to the applicant when requesting her to undergo a preliminary breath test that he did hold the requisite belief. For the above reasons I think the Magistrate was quite correct in his decision and the order nisi will be discharged with costs to be taxed not exceeding $200. Order nisi discharged.

Solicitors for the defendant: Rigby and Fielding.
Solicitor for the informant: EL Lane, Crown Solicitor.
