48/83

SUPREME COURT OF VICTORIA

LEWIS v MAIDEN

Nicholson J

5 October 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE – MEDICAL PRACTITIONER NOT FAMILIAR WITH REGULATIONS – RELIANCE UPON PRINTED INSTRUCTIONS IN BLOOD SAMPLE KIT – PRESUMPTION OF REGULARITY DISCUSSED: *MOTOR CAR ACT* 1958, SS80D, 81A.

M. was charged with having driven a motor car whilst exceeding .05% blood/alcohol. At the hearing, the, medical practitioner who took a blood sample from M. was cross-examined as to his taking of the sample. The doctor said that he had never read the relevant regulations, but relied entirely on the instructions printed in the blood sample kit; he had no idea what was written on the labels on the containers, and he had no knowledge about the use of anti-coagulants in connection with blood tests. At the close of the informant's case, it was submitted that there was no case to answer on the ground that the regulations had not been complied with. The magistrate agreed and dismissed the information. Upon orders nisi to review—

HELD: Order nisi absolute.
1. Compliance with the regulations is not a condition precedent to a conviction.
***Pavlovic v Krizman* (MC 13/75);**
***Mallock v Tabak* [1977] VicRp 7; (1977) VR 78; and**
***Hindson v Monahan* [1970] VicRp 12; (1970) VR 84, applied.**

2. The presumption of regularity is limited in scope when the question of compliance with the regulations is put directly in issue.
***Hess v* Clarebrough (MC 1/83; and**
***Hocking v Roberts* (MC 30/83), discussed.**

3. Where it emerges that a doctor has no knowledge of the requirements of the regulations, a court may dismiss the information if it is left with a reasonable doubt as to the reliability or accuracy of the doctor's finding on analysis.
***Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596, applied.**

4. As there was evidence that M. had been driving whilst exceeding .05% blood/alcohol, the court should not have upheld the submission of no case to answer.

NICHOLSON J: *[After setting out the facts and the grounds of the order nisi, His Honour continued]:* … **[4]** The respondent did not appear and was not represented before me and that I have only had the benefit of argument from counsel for the informant, who has nevertheless provided me with a full and fair assessment of the legal position in **[5]** relation to the matter. He referred me to two unreported decisions of this Court, namely, *Hess v Clarebrough* which was a decision of O'Bryan J delivered on the 3rd November 1982, and *Hocking v Roberts* which was a decision of Brooking J delivered on the 22nd June 1983, in support of his proposition that neither the witness's lack of knowledge of regulations nor his inability to remember the steps taken by him were sufficient to establish that the regulations had not been complied with. He therefore submitted, that there had been a *prima facie* case established in evidence called on behalf of the informant.

In *Hess v Clarebrough* O'Bryan J, after citing the decisions of McInerney J in *Commissioner of Corporate Affairs v Green* [1978] VicRp 48; (1978) VR 505; (1978) 3 ACLR 289; [1978] ACLC 40-381 and McGarvie J in *Wilson v Kuhl* [1979] VicRp 34; (1979) VR 315 pointed out that the critical issue for the court to consider on a submission of no case to answer, is whether there is before the court *prima facie* evidence which, if accepted, would provide evidence that at the time when the person charged was driving his motor car the percentage of alcohol in his blood exceeded .05 per cent. Like the present case, the decision under review in that case also involved the upholding by the Magistrate of a submission of no case to answer based upon the cross-examination of a doctor taking the relevant blood sample. As in this case, the doctor had not read the regulations

and was unable to say whether the sample contained anti-coagulants or not and had not read the labels on the containers. His Honour said that none of these answers established that there had been any non-compliance with the regulations. I respectfully agree with his view which I think is equally applicable to the **[6]** present case. I should also mention that the view taken by him concerning submissions of no case to answer in which he applied the test suggested by McGarvie J in *Wilson v Kuhl*, would appear to be in accordance with the recent decision of the Full Court in *Attorney-General's Reference No. 1 of 1983* [1983] VicRp 101; [1983] 2 VR 410.

[7] His Honour (O'Bryan J) having found that there was no evidence of non-compliance with the regulations went on to point out that the presumption of regularity can apply to cases of this type and he referred to *Hindson v Monahan* [1970] VicRp 12; (1970) VR 84, *Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596, *Huntington v Jupp*, a decision of His Honour delivered on the 19th May 1978 and *Parker v Kis* an unreported decision of Marks J delivered on the 27th July 1980.

Although it is clearly correct that the presumption of regularity can apply, for my part I think that there are dangers in permitting the presumption of regularity to have too much scope when the question of compliance with the regulations is put directly in issue by the defendant in the way that it was here. It must be remembered that the defendant is charged with a criminal offence carrying a substantial penalty. See *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78 per Lush J at pp84-5 and *Cummins v Dalton*, an unreported decision of Crockett J delivered on the 10th February 1982.

It is true that in *Mallock v Tabak*, Lush J did apply the presumption of regularity but he did so in circumstances where a Schedule 6 certificate having been given, no attempt was made on behalf of the defendant to cross-examine the doctor concerned and it was then submitted on behalf of the defendant that the informant had not proved that the driver from whom the sample was taken was at the hospital for examination and treatment consequent upon an accident. There was evidence that he had been conveyed there by ambulance and Lush J applied the presumption upon the basis that the doctor was unlikely to have been a party to an assault. I think however that when the mode of compliance with the regulations is put **[8]** directly in issue different considerations apply and indeed Lush J did distinguish this situation in his remarks at pp84-5.

In *Hocking v Roberts* (*supra*) Brooking J held that similar evidence to that given by the doctor in the present case and in *Hess v Clarebrough* did not amount to evidence of non-compliance with the regulations for the same reasons as those stated by O'Bryan J in that case. His Honour went on to hold that the certificate given by the doctor was sufficient to amount to *prima facie* evidence of the facts contained therein pursuant to s80D(3) of the *Motor Car Act* and therefore he did not find it necessary to consider the question whether the presumption of regularity applied.

With respect to His Honour I find some difficulty in relying upon the contents of a certificate, albeit that it is made *prima facie* evidence by statute where the witness so certifying has certified that regulations were complied with in circumstances where it emerges in evidence that he has not the faintest idea as to what the requirements of the regulations are. Although I think it not to the point as to whether he has read the regulations I think that he must have some knowledge as to what the requirements in fact are before he can certify as to compliance with such requirement.

Accordingly, where it emerges that he does not know what the requirements are, it seems to me that the *prima facie* effect of his certification as to compliance with them is displaced. Compliance may of course still be proved despite his lack of knowledge if it can be established that the steps taken by him constituted compliance. However in the final analysis, in the present case I reach a similar conclusion to that arrived at by O'Bryan J and Brooking J in the cases cited, albeit by a different route.

[9] The learned Magistrate in this case had evidence before him that a blood sample was taken from the respondent by Dr Kerr who said that he had done so in accordance with instructions contained in a kit provided to him for that purpose. There was no evidence that he did not comply with the regulations, but his evidence as to whether he did comply with the regulations was most unsatisfactory. Had compliance with the regulations been a necessary condition precedent to a

conviction then I would have been disposed to think that the learned Magistrate was correct in upholding the submission of no case to answer. However it seems clear that compliance with the regulations is not a condition precedent to a conviction.

In *Pavlovic v Krizman*, an unreported decision of Gowans J referred to by Lush J in *Mallock v Tabak* His Honour held that there was no general requirement that compliance with the regulations was a condition precedent to the acceptance of a certificate under Schedule 6 of the *Motor Car Act* 1958 into evidence. In *Hindson v Monahan* which is a case relating to regulations concerning the correct method of use of breath analysing instruments, His Honour commented that nowhere in the section or in the Act is there any requirement that the regulations must be complied with and concluded that compliance with the regulations is not a relevant circumstance in relation to the offence charged (pp95-6).

In *Wylie v Nicholson* McInerney J criticised the view that compliance with the regulations could never be a relevant circumstance or that failure to comply with them could never justify a dismissal. After quoting the relevant section conferring power to make the regulations, His Honour said :-

> **[10/11]** "I would not for myself be prepared – sight unseen – to exclude the possibility that a failure to comply with the regulation might occur in such circumstances as to create a reasonable doubt in the mind of the tribunal as to whether the breath analysing instrument had in that particular case given an accurate result. In such a case, the tribunal would be bound to dismiss the information, not on the mere basis that the regulations have not been complied with but rather on the basis that the want of compliance with the regulations had occurred in such circumstances as to make the analysis unreliable. There is nothing in the section to compel the tribunal of fact to convict if in fact the tribunal is left with a reasonable doubt as to the accuracy of the analysis."

His Honour referred to *Saxe v Kellett* [1970] VicRp 79; (1970) VR 600. I think that the remarks of McInerney J are equally apt in relation to the question of compliance or otherwise with the regulations relating to the taking of blood samples. For the reasons already stated as to the proper test to be applied in determining whether or not a *prima facie* case exists, I consider that the learned Magistrate erred in holding that no *prima facie* case had been established. I think that there was evidence before the Magistrate that the respondent had been driving at the relevant time in circumstances where the percentage of alcohol in his blood, expressed in grams per 100 millilitres, exceeded .05 per cent, there being evidence of a blood sample having been taken which on analysis produced a reading of .134 per cent. Accordingly the learned Magistrate should not have upheld the submission of no case to answer.

[12] This does not, however, mean that had the case proceeded to the point where the Magistrate was called upon to determine whether the guilt of the respondent had been established beyond reasonable doubt that he could not have dismissed the information upon the basis that the evidence as to the taking of the blood sample was such as to make the finding on analysis unreliable. This would be a matter for him to determine as the ultimate tribunal of fact. It follows from what I have said that ground 3 of the order nisi should be made absolute.

I do not think that the evidence was such that the Magistrate should have held that the blood sample was taken and preserved for analysis by Dr Kerr in accordance with the regulations and in any event, he was not called upon to do so at the time of ruling upon the submission of no case to answer. Therefore, ground 2 of the order nisi will be discharged.

Ground 3 will also be discharged for similar reasons, in that for the purpose of dealing with the submission of no case to answer, the Magistrate was not at that stage called upon to determine whether or not he was satisfied that the percentage of alcohol in the blood of the respondent when the sample was taken expressed in grams per 100 millilitres was more than .05 per cent.
