39/83

SUPREME COURT OF VICTORIA

GREENWOOD v JACK

Gray J

25 August 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD ALCOHOL EXCEEDING .05% – SCHEDULE 7 CERTIFICATE – ERROR IN CERTIFICATE AS TO TIME OF DELIVERY TO DEFENDANT – EFFECT OF – STANDARD OF PROOF: *MOTOR CAR ACT* 1958, SS80F, 81A.

J. had been found at 8:30 pm. in the driver's seat of his car parked in the emergency lane of a freeway. He was taken to a police station and at 9:18 pm. tested by a member of the Breath Analysis Section who, at the completion of the test, filled in and signed a Schedule 7 certificate in triplicate. Shortly after, a copy was handed to J.; however the certificate showed the time of delivery as 8:25 pm. instead of 9:25 pm. At the end of the prosecution case, it was submitted that as the magistrate could not be satisfied that the certificate had been served as soon as practicable after completion of the test, the charge should be dismissed. The magistrate agreed that J. could not properly be convicted and dismissed the information. On order nisi to review—

HELD: Order nisi absolute.
1. The question of what is meant by "as soon as practicable" in s80F(2) is one to be determined in the light of all the prevailing circumstances.
***Creely v Ingles* [1969] VicRp 94; (1969) VR 732, applied.**

2. In deciding that preliminary factual matter, the magistrate did not need to be satisfied beyond a balance of probabilities.
***Wendo v R* [1963] HCA 19; (109) CLR 559; [1964] ALR 292; 37 ALJR 77, followed.**
***Ross v Smith* [1969] VicRp 51; (1969) VR 411, discussed.**

3. If evidence is given which is of an uncontroversial character and is inherently probable, it should not be rejected unless satisfactory reasons are expressed for the rejection.
***Llewellyn v Reynolds* [1952] VicLawRp 24; (1952) VLR 171; [1952] ALR 358, applied.**

4. The evidence disclosed that the transaction between the informant, defendant and the breath analysis operator was a routine one, likely to be completed within a very short period. In the circumstances there was no satisfactory reason to justify the magistrate in not being satisfied that the certificate was handed to the defendant as soon as practicable after the test was completed.

GRAY J: *[After setting out the facts and the ground of the order nisi, his Honour continued]:* … **[5]** To deal with this matter it is necessary to make some reference to the relevant statutory provisions. Section 80F(1) of the *Motor Car Act* enables evidence to be given of the percentage of alcohol indicated to be present in the blood of a person by a breath analysing instrument. In proceedings of this kind, the result of the analysis is to be regarded as evidence of the percentage of alcohol present in the blood of the person at the time his breath was analysed by the instrument. However, sub-s (2) of s80F lays down a preliminary condition which must be satisfied before a certificate of the result of the breath analysis be admitted into evidence.

[His Honour then quoted sub-s (2) and continued]: The question of what is meant by "as soon as practicable" in the sub-section has been considered by this Court in *Creely v Ingles* [1969] VicRp 94; (1969) VR 732. Mr Justice Little decided that the question whether a certificate is delivered as soon as practicable is **[6]** one to be determined in light of all the circumstances. It is not one to be determined on some mathematical basis of adding together periods of time taken in relation to the various steps in the analysis. It follows that the learned magistrate was required to make a finding of fact in the light of all the prevailing circumstances.

It was argued before me, that before admitting the document, the learned magistrate had to be satisfied beyond reasonable doubt of the preliminary question. This contention was based upon some observations of Winneke CJ in *Ross v Smith* [1969] VicRp 51; (1969) VR 411. In that case the Chief Justice was concerned with a similar question to the present, but in a somewhat

different context. At p414 he said, when speaking of the statutory provisions corresponding to s80F:

> "It is important I think to remember that these were penal proceedings, and therefore they required, in accordance with the ordinary rules, strict proof beyond reasonable doubt. I think also it is material to observe that the provisions of subsection (2) stand entirely for the benefit of the defendant. They provide no benefit so far as the prosecution is concerned. Subsection (2) appears to be intended as a safeguard for the person whose breath is analysed."

It is not altogether clear that the Chief Justice did hold that the preliminary question has to be determined affirmatively beyond reasonable doubt. If His Honour did intend to so hold, I would myself entertain some doubt as to the correctness of such a view. It is clear that the essential elements of **[7]** this offence are, or require proof by the prosecution, that the defendant drove his motor car and at that time had the prohibited concentration of alcohol in his blood. It is certainly not an element of this offence that the Schedule 7 certificate was served as soon as practicable after the test was completed. The ordinary rule is that where a judge has to decide a preliminary factual matter as a condition for the admission of evidence, that fact does not have to be determined beyond reasonable doubt, even in a criminal trial. The contrary view was argued before the High Court in *Wendo v R* [1963] HCA 19; (1963) 109 CLR 559; [1964] ALR 292; 37 ALJR 77. The Court consisted of Dixon CJ and Taylor and Owen JJ Dixon CJ in a separate judgment said at p562:-

> "The second matter I wish to refer to is the view that in order to render a confessional statement admissible in evidence it must be established beyond reasonable doubt that it vas made voluntarily. I am not prepared to say what are the limits of the application of the general proposition laid down in *Woolmington v DPP* [1935] UKHL 1; [1935] AC 462; [1935] All ER 1; 25 Cr App R 72; 153 LT 232, but I think that it is a mistake to transfer the principle from its application to the issues before the jury to incidental matters of fact which the judge must decide."

Taylor and Owen JJ delivered a joint judgment, and in relation to this matter Their Honours said at p572:-

> "With great respect, we are unable to agree that this is the law. In criminal trials, as in civil cases, questions of fact frequently arise which must be determined by the trial judge before he decides whether to admit evidence for the consideration of the jury. Confessional statements are but one illustration of the type of evidence the tender of which may give rise to preliminary questions of fact which the judge must decide for himself. Other illustrations were given by Lord Denman CJ in *Doe v Davies* [1847] EngR 10; (1847) 10 QB 314; 116 ER 122 where His Lordship said, 'There **[8]** are conditions present which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency are conditions precedent to admitting *viva voce* evidence, and the apprehension of immediate death to admitting evidence of dying declarations, and search to secondary evidence of lost writings and stamp to certain written instruments, and so is consanguinity or affinity in the declarant to declarations of deceased relatives.' But proof of the fulfilment of these or any other conditions precedent to the admission of evidence is not required to be given beyond reasonable doubt. As Starke J said in *Cornelius v R* [1936] HCA 25; (1936) 55 CLR 235; [1936] ALR 278, 'The judge merely decides whether there is *prima facie* any reason for presenting the evidence at all to the jury.'"

After setting out a further quotation from Starke J, the joint judgment continues:

> "We have no doubt that this correctly states the rule, whether the question arises in the course of the case for the Crown or during the evidence for the defence. If the judge decides there is a *prima facie* reason for admitting the evidence, it is for the jury or, in a case such as this, the judge sitting as a jury, to determine what weight is to be given to it. It is then that the standard of proof beyond reasonable doubt has to be applied, and it will often happen that, in applying that standard, the tribunal of fact will properly be asked to take into account evidentiary material before it which has earlier been elicited on the *voire dire*."

Accordingly, it seems to me that the learned magistrate really had to decide whether the preliminary factual matter had been established on a *prima facie* basis. At the highest, the Magistrates' Court did not need to be satisfied beyond a balance of probabilities. However, the point is not crucial, having regard to the view that I have ultimately taken. I am prepared to discuss the case, even upon the hypothesis that the proper degree of persuasion was proof beyond **[9]** reasonable doubt of the satisfying of the preliminary condition. The question is whether the

learned magistrate was in error in finding himself unsatisfied with the evidence in support of the preliminary fact.

I have already summarised the evidence that the learned magistrate had before him on this point. I repeat the informant's evidence appearing in para 12 of his affidavit, which paragraph was not challenged on these proceedings. I quote from the affidavit:-

> "That I then gave evidence that at about 9:05 pm. on the night of the 4th May 1982 I introduced the defendant to a member of the Breath Analysis Section, who then conducted a test on the defendant in my presence. At the completion of the test I saw the operator fill in and sign the Schedule 7 in triplicate. the operator then handed me the three copies of the Schedule 7 which I examined and observed them to be identical. I handed them back to the operator who then handed the original to the defendant and the copy to me."

It is to be observed that the learned magistrate was not essentially concerned with the precise time at which the certificate was handed to the defendant. What he was concerned to be satisfied with was whether the certificate was handed to the defendant as soon as practicable after the completion of the breath analysis. An ordinary reading of the informant's evidence set out in para 12 of his affidavit would, in my opinion, convey that the events there described followed one another in quick succession. There was certainly nothing in the evidence before the Magistrates' Court which gave any contrary indication.

[10] A finding that that evidence failed to satisfy the preliminary requirement is somewhat surprising. However, the question is whether the magistrate was in error being unsatisfied with the evidence. Reliance was placed by counsel for the respondent upon the well known decision in *Young v Paddle Bros* [1956] VicLawRp 6; (1956) VLR 38; [1956] ALR 301, which is authority for the proposition that, on the review of a decision of a magistrate on a question of fact, the approach is similar to that of an appeal from a verdict of a jury. The decision cannot be set aside unless the complaining party is entitled as a matter of law to have the decision set aside, or it appears that there is no reasonable view of the evidence that is consistent with the decision. In this context the question is whether the view taken by the learned magistrate was reasonably open to him in the circumstances.

It is well established that a tribunal of fact is not obliged to accept evidence merely because it is uncontradicted. However, the authorities do show that if evidence is given which is of an uncontroversial character and is inherently probable, it should not be rejected unless satisfactory reasons are expressed for the rejection. There are a number of cases over the years which lay down that proposition in various terms. I refer to a decision of the Full Court in *Llewellyn v Reynolds* (1952) VLR 171;(1952) VLR 171; [1952] ALR 358.

[His Honour then referred to a passage from the joint judgment of the Court at p176 and continued] **[11]** In this case it is clear, in my opinion, that the informant, in the passages to which I have referred, was giving evidence of a routine transaction concerning himself, the breath analysis operator and the defendant. By the very nature of the transaction it is likely to be completed within a very short period. The account given by the informant appears to be speaking of events which followed immediately upon each other. I can detect no satisfactory reason to justify the magistrate in not being satisfied that the certificate was handed to the defendant as soon as practicable after the test was completed. It can certainly be said that the magistrate did not put forward any reasons for his rejection and no adequate reasons appear to arise from the circumstances.

It was said by counsel for the respondent that the informant had contradicted himself on a point which arose from his evidence of the apprehension of the **[12]** defendant at the scene. It was said that the informant first said that no policewoman had been involved, but later conceded that such a person had been involved. Some such material does emerge from the respondent's affidavit. There is nothing in the material to suggest to my mind that such a circumstance held any weight in the magistrate's mind in rejecting the admission of the certificate. Even if he had assigned that reason for his lack of satisfaction with the informant's evidence, it would hardly appear a satisfactory reason. I invited counsel for the defendant to proffer any conceivable reason for the rejection of the informant's evidence. The question of the policewoman was the only matter to which he was able to draw attention. However, my impression is that the magistrate's lack of satisfaction was linked in some way to the obvious mistake about the time in the certificate. That

circumstance, to my mind, provides no reason at all for the rejection of the informant's evidence as to the sequence of events.

Reliance was also placed on some passages in the judgement of the Chief Justice in *Ross v Smith* (*supra*) where somewhat similar evidence was not regarded by the learned Chief Justice as satisfying the test in sub-section (2). However, the evidence was significantly different in *Ross v Smith*, and, in any event, I am concerned to consider this case on the evidentiary material before me.

[13] It does appear from the affidavits that the submission to the learned magistrate was expressed as being submission that there was no case to answer. If the learned magistrate did treat the application to him as a submission that there was no case to answer, his upholding of the submission is, in my opinion, clearly not justified. Looked at in that light, all that the learned magistrate had to be satisfied about was that there was some evidence, if accepted, which supported the prosecution case. In this regard, I refer to *Wilson v Kuhl* [1979] VicRp 34; (1979) VR 315, in particular passages in the judgment of McGarvie J at p318.

However, it was accepted by each counsel before me that the real question the learned magistrate had to determine was whether the preliminary matter provided for in sub-section (2) had been satisfied. In my opinion, for the reasons I have sought to express, the learned magistrate, acting reasonably, had no alternative but to admit the Schedule 7 certificate into evidence. What followed thereafter would depend upon the course of events taken in the proceedings. However, I am quite satisfied that error has been shown on the part of the learned magistrate and that the order absolute should be made.

APPEARANCES: Mr T Casey for Applicant/Informant. Mr G Morrish for Respondent/Defendant.
