56/89

SUPREME COURT OF VICTORIA

KOS v JOHNSTON

Marks J

20 November 1989 — (1990) 11 MVR 471

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE TAKEN BY DOCTOR – USE OF KIT BY DOCTOR TO COLLECT SAMPLE – DOCTOR NOT FAMILIAR WITH REGULATIONS – UNABLE TO SAY IF SAMPLE COLLECTED IN ACCORDANCE WITH REGULATIONS – DOCTOR CALLED TO GIVE EVIDENCE – WHETHER PROSECUTION REQUIRED TO PROVE COMPLIANCE WITH REGULATIONS – "SAFEKEEPER": *ROAD SAFETY ACT* 1986, SS49(1)(g), 56(2); *ROAD SAFETY (PROCEDURES) REGULATIONS* 1987.

1. In respect of an alleged breach of s49(1) of the *Road Safety Act* 1986, the prosecution is not required to prove that a sample has been collected in accordance with the Regulations.

2. Where a medical practitioner gave evidence that he was not familiar with the Regulations concerning the collection of blood samples and was unable to say that he collected the relevant sample in accordance with the Regulations, a Magistrate was in error in upholding a 'no case' submission on the basis that the prosecution had failed to prove that the sample had been collected in accordance with the Regulations.

MARKS J: [1] On Sunday, 10 July 1988, the defendant was the driver of a motor vehicle which came into collision with an electricity pole in Doncaster Road, North Balwyn. He appeared to have been injured as he was bleeding, and according to a witness, his breath smelled of beer. He went from the scene of the accident by taxi to the Box Hill Hospital where a Dr Evangolos Klonis collected a blood sample from him. He was charged in due course under s49(1)(g) of the *Road Safety Act* 1986, which makes it an offence where a person has had a sample of blood taken "in accordance with s56 within three hours after driving or being in charge of a motor vehicle and the sample has been analysed within 12 months after it was taken by a properly qualified analyst within the meaning of s57 and the analyst has found that at the time of analysis more than the prescribed concentration of alcohol was present in that sample." It is common ground that the prescribed concentration of alcohol is 0.05 grammes per 100 millilitres of blood. The information came on before the Camberwell Magistrates' Court on 24 May 1989. At the conclusion of the evidence the Magistrate acceded to a no case submission and dismissed the information.

On 23 June 1989, Master Barker granted an order nisi to review the dismissal on the following grounds:

> That the Magistrate was wrong in law –
> (a) in finding that the rules and regulations with respect to the taking and handling of blood samples must be strictly applied;
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> **[2]** (b) in finding that compliance with the Regulations must be proved as part of the Prosecution case;
> (c) in failing to apply the presumption of regularity;
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> (d) in finding that there had been breaches of the Regulations;
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> (e) in not considering whether the failure to comply with the Regulations gave rise to a reasonable doubt that the defendant was guilty.

Section 56(2) of the *Road Safety Act* 1986 provides in effect that a person in the position of the defendant is liable without his consent to having a blood sample collected from him at the hospital to where he went. In this case, he went to the Box Hill Hospital.

Sub-section (2) of s56 provides that the legally qualified medical practitioner immediately responsible for the examination or treatment of the person, must take from him or her a sample of blood for analysis. There is nothing in s56(2) or s49 which suggests that it is an element of the

offence that the blood sample must be taken or collected in conformity with regulations under the Act. The *Road Safety (Procedures) Regulations* 1987 lay down procedures which, in this case, it is said, were breached or not proved to have been complied with.

The evidence before the Magistrate comprised proof by Dr. Klonis that he had, as a medical practitioner treating the plaintiff for his injuries in the accident, complied with his obligation under s56(2) and taken the blood sample. A certificate of the analyst was relied on by the Prosecution as it was entitled, under s57(4) of the *Road Safety Act*, to do and it certified that the blood concentration found was 0.118. This concentration clearly was in excess of the prescribed quantity. No challenge is **[3]** made as to the admissibility of the analyst's certificate.

Section 57(3) provides that the medical practitioner himself, in this case Dr. Klonis, would have been entitled to submit a certificate in the prescribed form as to his conduct in the collection of the blood sample.

Section 57(3) provides:

> "A certificate in the prescribed form purporting to be signed by a legally qualified medical practitioner is admissible in evidence in any proceedings referred to in sub-section (2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it."

No such certificate was tendered, although evidence was elicited that one had been signed and was in existence. In its place, Dr. Klonis gave evidence in response to a notice to do so under the provisions of the Act. It was elicited from Dr. Klonis in cross-examination that he was not familiar with the regulations and that he was not in a position to say whether he had collected the blood sample in accordance with them. He said however that he had used a kit which was available to him at the hospital and that such a kit was normally used for the taking of blood samples in the present circumstances.

It was also elicited from him that there had not been a safekeeper or safekeeper register at the Box Hill Hospital during his period as a doctor there. The regulations require that when a blood sample is taken, a container be handed to a safekeeper and kept available for the person from whom it was taken. It is said that there was a breach of the regulation in this case because there was no safe-keeper and therefore the medical practitioner did not give a blood sample to him. In fact, Dr. Klonis put it in a **[4]** locked box and it was preserved. There is a question whether in the circumstances he himself was a safekeeper within the meaning of the regulations.

No consideration was given by the Magistrate to the definition of 'safekeeper' in the regulations which, in my view, leaves it quite arguable that the medical practitioner, Dr. Klonis himself, was indeed a safekeeper. However, having regard to the conclusion that I have reached about the ruling of the Magistrate, I do not think that this matter needs to be further discussed. I am of the firm conclusion that the Magistrate was in error in holding or ruling on the assumption that the prosecution was required to prove that the sample had been collected in compliance with the regulations.

I have been taken to some dozen or so unreported cases in which judges of this Court have consistently held that the predecessor [s80D(1) of the *Motor Car Act* 1958] to s56(2) of the *Road Safety Act* 1986 did not require proof by the prosecution that the regulations governing the collection of blood samples have been complied with. I should think that these decisions are clearly correct and are in point notwithstanding the legislative change, which in my opinion has no significance here. It is unnecessary to do more than refer to the long list to which I have been referred.

Collins v Mithen, (1975) VSC, Gowans J (unreported)
Pavlovic v Krizman (1975) VSC, Gowans J (unreported)
Waters v Good (1976) VSC, Nelson J (unreported)
Loveday v Coibasic (1977) VSC, Murray J (unreported)
Huntington v Jupp (1978) VSC, O'Bryan J (unreported)
Woodward v McNab (1978) VSC, Murray J (unreported)
Penhalluriack v Knight (1979) VSC, McGarvie J (unreported)

[5] *Attwood v Lacey* (1979) VSC, Gray J (unreported)
Coyle v Guthrie (1979) VSC, Gray J (unreported)
Parker v Kis (1980) VSC, Marks J (unreported)
Gourlay v Freeman (1983) VSC, Southwell J (unreported)
Norris v Norsburgh (1983) VSC, Gray J (unreported)
Hocking v Roberts (1983) VSC, Brooking J (unreported)
Mallock v Tabak [1977] VicRp 7; (1977) VR 78.

The persuasive nature of these authorities and their applicability to this case were not challenged by counsel for the defendant, save that he submitted that they were decided in relation to different legislation and do not necessarily apply to the relevant sections of the *Road Safety Act* 1986. As I have said I think these sections in substance are re-enactments of their earlier counterparts in the *Motor Car Act* 1958.

In any event, I am of the opinion that even if there were some evidence before the Magistrate that the regulations had not been strictly followed, it was necessary for him to decide whether the evidence received without objection should be ruled inadmissible. There was evidence that a blood sample had been taken from the defendant by a medical practitioner; that he had taken it under the circumstances mentioned in s56(2) and that this blood sample had been analysed with the result that the prescribed quantity had been exceeded as provided by s49(1)(g).

I do not think that any matter placed before the Magistrate as to the possible breach of the regulations, permitted him to treat as inadmissible the above evidence. He was obliged to consider it. It may well be that in certain circumstances where procedures required by regulations had not been followed, that a tribunal of fact **[6]** fails to be satisfied beyond reasonable doubt of one or more elements of an offence. The evidence, such as it was, concerning any breach here of the regulations, was unlikely, in my opinion, to have led a reasonable tribunal of fact to conclude that the sample actually taken from the defendant had in some way lost its integrity or that the analysis was other than reliable.

There has been a tendency for Magistrates to uphold ill-founded technical points in this area. It is difficult to understand the reason unless it is that Magistrates are reluctant to register convictions against persons who, when sober, are of good character. The legislation is directed at promotion of road safety and the law now places a strict burden on motorists to drive while sober, or certainly while unaffected in any significant way, by the consumption of alcohol.

The law has become more strict in this area and reflects the concern of the community about those road accidents which are partly contributed to by drivers affected by the consumption of alcohol. In the instant case there was no basis for the tribunal of fact concluding that the sample actually taken from the defendant was in any way unlikely to provide an accurate analysis of the concentration of alcohol in the blood of the defendant.

[7] For the reasons I have given, Grounds (a) and (b) are upheld. It is unnecessary to say anything about Grounds (c), (d) and (e). The decree nisi is made absolute with costs. The information is remitted to the Magistrates' Court at Camberwell for hearing and determination according to law. I will grant a certificate under the *Appeals Cost Fund Act*.

APPEARANCES: For the plaintiff Kos: Mr BM Dennis, counsel. Victorian Government Solicitor. For the defendant Johnston: Mr S Newton, counsel. Kroger & Kroger, solicitors.
