40/85

SUPREME COURT OF VICTORIA

REEVES v McWILLIAMS

Tadgell J

23, 25 September 1985 — [1986] VicRp 31; [1986] VR 321; (1985) 3 MVR 81

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST – SCHEDULE 7 CERTIFICATE ADMITTED INTO EVIDENCE – EXPERT EVIDENCE LED IN REPLY – PRESUMPTION CREATED BY S80G *MOTOR CAR ACT* 1958 – WHETHER COPY CERTIFICATE RAISES PRESUMPTION – WHEN ALCOHOL PERCENTAGE "ESTABLISHED": *MOTOR CAR ACT* 1958, SS80F(3), 80G, 81A.

McW. pleaded guilty to a charge of driving whilst exceeding .05% blood/alcohol. At the hearing, McW. did not give evidence; however, expert scientific evidence was adduced on his behalf generally to the effect that the breath analysing instrument of the kind used could have given a reading in excess of McW's actual blood/alcohol concentration at the relevant time. The Magistrate, while convicting McW., expressed himself not to be satisfied that the defendant's blood/alcohol concentration at the relevant time was in excess of .15%, and proceeded to impose a fine, cancel McW.'s licences and disqualify him from obtaining a licence for 12 months. R., the informant, applied for an order to review—

HELD: Order nisi discharged.
(1) The presumption created by s80G of the *Motor Car Act* 1958 does not arise until the particular percentage of alcohol is "established".

(2) The particular percentage of alcohol is not "established" until all of the evidence is given; that is, the *prima facie* evidence afforded by the 7th Schedule copy certificate, any other relevant evidence (if any) together with any evidence adduced to meet or qualify the *prima facie* evidence.

(3) If the *prima facie* evidence is not met or qualified and the time of the breath analysis was within two hours of the alleged offence, the presumption created by s80G of the *Motor Car Act* 1958 is raised – until the contrary is proved – that the alcohol concentration referred to in the copy certificate was not less at the time of the alleged offence.
***Holdsworth v Fox* [1974] VicRp 27; [1974] VR 255; and**
***Francis v Stevens* [1983] VicRp 21; [1983] 1 VR 260, applied.**
***Larchin v Traynor* (MC 28/1980); and *Hearn v Poot* (MC 10/1984) distinguished.**

(4) Observations as to matters to be considered when making findings of facts concerning the accuracy of a breath analysis by a breathalyzer, such as:
(i) the weight and effect to be given to expert evidence;
(ii) whether the breath analysing instrument produced a high or low reading:
(iii) the extent of any possible inaccuracy and the proportion of the reading to the suggested reading; and
(iv) the circumstances in which the expert performed his tests, the number of tests and the percentage producing a discrepancy between breath and blood analysis, and the reasons explaining such discrepancy.

TADGELL J: [1] By this order to review the applicant, who is the informant to an information, seeks to call in question a decision of a Stipendiary Magistrate constituting the Magistrates' Court at Mordialloc on 25th September 1984. The information charged the respondent with an offence under s81A(1) of the *Motor Car Act* 1958, namely, that on 18th February 1984 at Mentone he drove a motor car while the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum.

The respondent pleaded guilty to the charge and there was evidence that he was driving a motor car at about 8 pm. on the day in question. There was also tendered for the applicant a copy certificate in the form provided for in the 7th Schedule of the *Motor Car Act*. This showed that within 2 hours after 8 pm. on the day a breath analysing **[2]** instrument had indicated the quantity of alcohol present in the respondent's blood to have been "0.170 grams of alcohol per 100 millilitres of blood which, expressed as a percentage, is 0.170 per centum ..." Pursuant to

s80F(3) of the Act, the applicant relied on the copy certificate as affording *prima facie* evidence of the relevant percentage of alcohol in the respondent's blood.

According to the applicant's affidavit filed in this Court, the Stipendiary Magistrate, while convicting the respondent, expressed himself not to be satisfied "that the reading was in excess of 0.15%". If the Stipendiary Magistrate did in fact so express himself, I take him to have meant that his lack of satisfaction lay not in the reading of the instrument but in its expressing accurately the respondent's blood alcohol content, as I might compendiously, if somewhat inaccurately, describe it. At all events, the Magistrate convicted the respondent and dealt with him by fining him and also by cancelling his driving licences and disqualifying him from obtaining any further licence for 12 months, as is required where the percentage is .10 per cent or more but less than .15 per cent. Had the applicant proved to the Magistrate's satisfaction a blood alcohol content in the respondent in excess of .15 per cent, as she sought to do, the period of disqualification of 2 years would have been required: s81A(3).

The respondent did not give evidence below, but the Stipendiary Magistrate was evidently persuaded to reach the conclusion he did by virtue of expert scientific evidence adduced on the respondent's behalf. This evidence was in no sense specifically related to the respondent's circumstances **[3]** on the day of the alleged offence or to the particular instrument by which his breath was tested. Rather, it was designed to show in general terms that a breath analysing instrument of the kind used could have given a reading in excess of the respondent's actual blood alcohol concentration at the relevant time. The applicant's contention in this Court was in essence that the evidence called for the respondent was insufficient to rebut the statutory effect of the evidence provided by the copy certificate in the form of the 7th Schedule that the respondent's blood alcohol concentration was .17 per cent and that the Magistrate had no alternative but to deal with the respondent on that footing.

I need not set out in terms the grounds of the order nisi. It is sufficient to say that the argumentative steps taken to support the grounds that were relied on amounted to these:-

> (1) that the copy 7th Schedule certificate, in combination with s80F(3) of the Act, provided *prima facie* evidence of a blood alcohol concentration of .17 per cent;
>
> (2) that s80G of the Act accordingly created a presumption, until the contrary was proved by the respondent, that not less than that percentage of alcohol was present in his blood at the relevant time; and
>
> (3) that the evidence called for the respondent could not have displaced that presumption.

Section 80G provides as follows:-

> "For the purposes of this Division [i.e. Division 2 of Part IV of the Act, which deals with offences and legal proceedings] if it is established that at any time **[4]** within two hours after an alleged offence a certain percentage of alcohol was present in the blood of the person charged with the offence it shall be presumed until the contrary is proved that not less than that percentage of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed".

Counsel for the applicant relied heavily on the decision of Menhennitt J in *Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225 upon the meaning and effect of s80G and submitted that that decision really made the respondent's position in this case unarguable. The headnote expresses accurately enough what the case decided. It reads:-

> "The combined effect of ss80G and 81A(1) of the *Motor Car Act* 1958 is that, once it is established that, within two hours of an alleged offence of driving a motor car in contravention of s81A(1), there was present in the blood of the driver of the motor car a specified percentage of alcohol expressed in grams per 100 millilitres of blood, which percentage is in excess of .05 per cent, the onus is on the driver to establish that at the time of the driving the percentage of alcohol in his blood was not merely less than that specified percentage but also was not in excess of .05 per cent, or at the very least that it was lower than is significant for any relevant purpose."

It was argued for the applicant here that since in the present case the evidence did not establish and indeed, did not attempt to establish, that the percentage of alcohol in the respondent's

blood was less than .17 per cent, it was necessarily insufficient as evidence to meet the test laid down by Menhennitt J. What was required, it was submitted, was evidence that was specific to the respondent and to his condition at the time of the alleged offence. The evidence offered was concerned with breath analysing instruments in general and was designed to demonstrate their fallibility. Such evidence, it was submitted for the applicant, was not only insufficient to combat the presumption created by **[5]** s80G but was really irrelevant to the task in hand. It seems to me that this argument misapprehends the meaning of s80G and the effect that Menhennitt J attributed to it in *Holdsworth v Fox*.

In my opinion s80G does no more than create a rebuttable presumption that a percentage of alcohol established to have been present in a person's blood at any time within two hours after the commission of a relevant alleged offence by him was at the least present in his blood at the time of the commission of the alleged offence. It is to be noted that the presumption does not arise unless and until the presence of a particular percentage of alcohol in a person's blood at a time within two hours of the alleged offence is "established". The section has nothing to say about the means by which that fact might be established. It might be done by evidence of the result of a blood test or by other relevant evidence, including no doubt such evidence as the result of a breath test provides. If evidence of the result of a breath test is offered, that might be provided, to the extent that s80F(3) allows, by the tender of a copy certificate in the form of that in the 7th Schedule; or it might be provided by oral evidence pursuant to s80F(1). If, as in the present case, a copy certificate is tendered, it will be *prima facie* evidence of the percentage referred to in it. Whatever evidence is used, however, its quality cannot be improved by virtue of s80G, for that section of course presupposes that the fact is "established" before the presumption to which it refers arises. It cannot be right, therefore, to argue that, upon **[6]** the mere tender of a copy certificate under s80F(3), s80G creates a presumption of its correctness until the contrary is proved.

If the certificate "established" (to use the word in the section) that within two hours of the commission of the respondent's alleged offence the percentage of alcohol in his blood was .17 per cent, the presumption referred to in s80G arose unless the contrary was proved. The copy certificate, however, was only *prima facie* evidence. Any evidence called to meet that evidence had therefore to be considered before a conclusion was reached as to whether s80G applied at all. I believe that nothing I have said so far is contrary to what was decided in *Holdsworth v Fox*. In that case the question was whether the *prima facie* evidence afforded by a copy certificate in the form allowed by the 7th Schedule was impugned or met by evidence of the defendant's consumption of alcohol after the commission of the alleged offence and before a breath test was given. The subsequent consumption of alcohol was found, or might have been inferred, to have raised the defendant's blood alcohol level at the time the breath test was given above what it was at the time of the alleged offence. Section 80G was applied to sustain the conclusion that what was established without contest to be the defendant's blood alcohol level at the time of the breath analysis within two hours of the alleged offence was presumed to have been at least his blood alcohol level at the time of the offence, the contrary not having been proved. It is important to notice that in *Holdsworth v Fox* there was no attack on the reliability of the breath analysis the result of which was recorded in the certificate, which certificate stood as *prima facie* evidence of the **[7]** defendant's blood alcohol level at the time the breath test was given within two hours after the alleged offence. There was therefore no difficulty in concluding that it had been "established" that a certain percentage of alcohol had been present in the defendant's blood within the relevant two hour limit. That was not so in the present case, because evidence was led by which it was sought to meet the *prima facie* evidence which the certificate provided.

I do not presume to question anything that was decided in *Holdsworth v Fox*. There is, however, a passage towards the end of His Honour's judgment, at p230 of the report, that could be misunderstood if not read in the context of facts to which it related. The passage is this:-

> "In the result, therefore, I conclude that, once the certificate in the present case as to a percentage of alcohol present in the blood of .10 per cent at 15 minutes after the driving was properly admitted in evidence, the onus was on the defendant to satisfy the court that at the time of the driving the percentage of alcohol in his blood was not more than .05 per cent, and that it was insufficient for him to establish that the percentage at the time of the driving was to some undetermined amount or percentage less than .10 per cent."

I do not understand Menhennitt J there to have been saying that, whenever a copy

certificate in accordance with the 7th Schedule is tendered and admitted in evidence, an onus is cast on the defendant by virtue of s80G to prove what s80G contemplates he should prove. Such an onus arises, in my view, only where a copy certificate (or some other appropriate evidence) establishes that within two hours after the alleged offence a particular level of alcohol was present in the driver's blood. **[8]** I was referred to two unreported decisions of this Court in which, as counsel for the applicant submitted, a view of s80G was taken, in reliance on *Holdsworth v Fox*, which regarded the tender of a copy certificate in accordance with the 7th Schedule as necessarily leading to the presumption to which s80G refers. These are the decisions of *Larchin v Traynor* (24th March 1980) and *Hearn v Poot* (29th March 1984), each of which referred to *Holdsworth v Fox*. If these decisions, when properly understood, give *Holdsworth v Fox* an interpretation for which the applicant in the present case contends, I would respectfully disagree with them to that extent. In truth, however, I think each of these cases turned very much on its own facts and that the learned judges who decided them expressed no principle which assists me here.

It was conceded for the respondent in argument before me that the copy certificate in the form of the 7th Schedule afforded *prima facie* evidence of the percentage of alcohol in the respondent's blood at the time of the analysis, which was almost two hours after the alleged offence. In order to determine whether or not that *prima facie* evidence established what the applicant sought to prove, namely, a blood alcohol level of .17 per cent at the time of the offence, one must of course consider together with it the evidence called for the respondent. I agree, with respect, with what Crockett J said in *Francis v Stevens* [1983] VicRp 21; [1983] 1 VR 260 at 262, that *prima facie* evidence of the kind the applicant adduced –

> "... does no more than cast an evidentiary burden on the defendant without affecting the ultimate legal burden on the prosecution. This means that if **[9]** the matter is raised as a disputed issue, as it was in this case, then it is for the prosecution to prove – and prove beyond reasonable doubt – that the concentration at the time of the breathalyzer exceeded .05 per centum."

If when all the evidence is considered, the tribunal is satisfied that the *prima facie* evidence afforded by the certificate is not rebutted or qualified, it is open to the tribunal to conclude (and no doubt it usually would conclude) that proof of a blood alcohol level had been established as at the time of the analysis as recorded in the certificate. Then, but only then, does s80G operate, if the time of the analysis was within two hours of the alleged offence; and the presumption is raised until the contrary is proved that the relevant alcohol level at the time to which the certificate refers was not less at the time of the alleged offence. This, in my opinion, is the only way in which s80G could become relevant to the present case. If it was not open to the Stipendiary Magistrate to conclude that the *prima facie* evidence adduced for the applicant did not establish that the respondent's blood alcohol level was .17 per cent, then clearly s80G applied, and the respondent's evidence did not rebut the presumption that the section erects.

It is necessary to decide, then, whether the Magistrate's conclusion was not open. This involves some consideration of the evidence that was led for the respondent. That evidence came only from one Geoffrey William Roberts, a consulting chemist. Some account of the evidence was given or purportedly given in the affidavit sworn on behalf of the applicant, but Mr Roberts himself swore an **[10]** affidavit in which he challenged the accuracy of the applicant's affidavit's account of his evidence and provided his own account. It is to the latter that I should refer, then, in assessing the content of Mr Roberts' evidence. He said that he explained to the Magistrate in detail the principles of operation of a breath analysis instrument used by the Victoria Police. It was no part of his evidence to suggest that the reading given by the machine which was used to test the breath of the respondent was in itself inaccurate; nor was he concerned to suggest that the machine might not have been properly used in order to produce the best result that it could. It was part of his evidence that, in order that an analysis of breath be expressed as a blood alcohol concentration, an assumption must be made, as part of the calibration of the dial of the instrument in terms of blood alcohol concentration, that every person partitions exactly one part of alcohol into his breath for every 2,100 parts of alcohol in the same volume of his blood.

Mr Roberts said that studies have shown that the process of partitioning alcohol between blood and breath in the ordinary run of people does not occur actually with the mathematical precision that is assumed in the calibration of the breathalyser; because of the small variations of the partition rate ratio from one person to another, the machine can over- or under-estimate the subject's actual blood alcohol concentration. He said that he had found, as a result of tests

which he had carried out on a large number of subjects, that the machine can over-estimate the subject's actual blood concentration by up to .028 per cent and that it can **[11]** under-estimate it by up to .067 per cent. Mr Roberts, in purporting to summarise his evidence, said that he went into considerable detail in his evidence explaining the nature of the known variations between an estimate of blood alcohol concentration obtained by analysis of a breath sample and the subject's actual blood alcohol concentration as determined by direct analysis of a sample. He stated that to state the possibility of over-or under-estimation of the subject's actual blood alcohol concentration by breath analysis is not to question the accuracy of a particular breath analysing machine or of those machines in general.

The possible over-or-under-estimation relates to the assumptions that underlie the calibration of all machines to permit the reading of an instrument's scale to be translated from the breath sample into blood alcohol concentration. The calibration, Mr Roberts said, is effected by taking a mean of a number of actual samples and selecting a mid point for calibration that reasonably represented the actual blood alcohol concentration of each subject. He said that he could recall stating to the Magistrate that in the original calibration of the instrument some degree of variation between the blood alcohol concentration determined by breath analysis and the subject's actual blood alcohol concentration was recognised as inherent in the design of the machine and the method of measuring blood alcohol concentration.

Mr Roberts said in his affidavit that he admitted in the Court below that the actual amount of alcohol in an individual's blood might be more or less than that registered by the machine. He also conceded that in cross-examination he admitted that he had not carried **[12]** out any test on the particular instrument used to analyse the respondent's breath and had conducted no test of any kind on the respondent. He said that in giving his evidence he accepted that the operation of the instrument used in the analysis of the respondent was properly operated and was working correctly and that it was irrelevant to his thesis as to which particular machine was used.

In conclusion, in his affidavit, Mr Roberts said that he had stated below that if one accepted that the reading shown on the instrument was correct insofar as the instrument had correctly analysed the alcohol content of the air or breath sample introduced into it, it was possible in his opinion, based on tests which he had carried out on many subjects, that the method used of estimating the respondent's blood alcohol concentration had over-estimated his actual blood alcohol concentration by up to .028 per cent. That is a summary of Mr Roberts' affidavit which in turn purports, I think, when fairly read, to be no more than a summary of the evidence he gave below.

It might be said that the evidence of Mr Roberts, when boiled down, did no more than indicate that a breath analysis made by a machine of the kind in question can be inaccurate. It was open to the Stipendiary Magistrate to accept or reject that view; and I think he must be presumed to have accepted it here. What weight and effect he gave in the circumstances to that finding of fact was for him to decide. He was also entitled, I think, to give such weight as he thought fit to the explanation Mr Roberts gave for any possible inaccuracy of the test. **[13]** These were peculiarly questions of fact for the Magistrate to consider in the context of the whole of the evidence.

No doubt the Magistrate was also entitled to consider (and I would assume he did consider) the relatively high reading produced by the instrument in this case, the extent of any possible inaccuracy and the proportion of the one to the other. Unfortunately, there is no record of any reasons given by the Magistrate, if indeed he gave any, for his failure to be satisfied that the allegation of a blood alcohol concentration of .17 per cent was not proved. Some of the matters to which I have referred which the Magistrate no doubt took into account are matters on which minds might differ. I am not sure that I would myself have come to the same conclusion as the Magistrate did. I am not sure that I would not have wanted to consider, for example, the circumstances in which Mr Roberts performed the tests which he said he did perform and which established the possible inaccuracy of a breath test. One might also have wanted to know how many tests Mr Roberts performed, how many of those performed produced a discrepancy between a breath analysis and a direct blood analysis and what facts, if any, were known which might have contributed to any such discrepancy. The decision, however, was for the Magistrate to make and not for me.

My mind has, I must confess, fluctuated to some extent upon the question whether the conclusion which the Magistrate reached was open on the evidence before him. This might be a case very close to the line, but I have decided in the end that I would be arrogating to myself the Magistrate's task if I were to say that the conclusion he reached **[14]** was one which was not reasonably open to him. Moreover, one should be slow to conclude in order to review proceedings, I think, that a decision of the kind the Magistrate reached here was not properly open to him.

As I have indicated, one does not have before one in this Court all the evidence in the form in which it was before the Court below. One has, at best, a summary of it. At least that was so in this case. Applying the well-known tests expressed in such cases as *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38, *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 ; (1961) 19 LGRA 232 and *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1; (1972) 30 LGRA 19, I think I must conclude that the applicant has not shown that the Magistrate was wrong and that the order nisi should therefore be discharged.

Solicitor for the applicant: RJ Lambert, Crown solicitor. Solicitor for the respondent: V Ismailovic.
