

30/83

SUPREME COURT OF VICTORIA

HOCKING v ROBERTS

Brooking J

22 June 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE – MEDICAL PRACTITIONER CROSS-EXAMINED RE TAKING OF SAMPLE – DOCTOR NOT FULLY FAMILIAR WITH REGULATIONS – WHETHER FAILURE TO COMPLY WITH REGULATIONS: MOTOR CAR ACT 1958, SS80D, 81A.

R. was charged with having driven a motor car whilst exceeding .05% blood/alcohol. At the hearing, the medical practitioner who took the blood sample from R. was cross-examined as to whether he complied with the regulations in taking the blood sample. The doctor said that he had never read the regulations. Upon the close of the informant's case it was submitted that there was no case to answer on the ground that it had not been shown that there had been compliance with the regulations relating to the taking of the blood sample. The magistrate agreed and dismissed the information. Upon order nisi to review—

HELD: Order nisi absolute.

The eliciting by cross-examination of a doctor of the fact that he is not familiar or fully familiar with the regulations does not produce any evidence of a failure to comply with the regulations.

Hess v Clarebrough (MC 1/83), followed.

BROOKING J: *[After setting out the nature of the charge, His Honour continued]: ... [1] The informant in the Court below relied upon two certificates pursuant to s80D of the Motor Car Act. The first of these was a certificate tendered pursuant to subsection (3) of that section as a certificate purporting to be signed by a person who purported to be a legally qualified medical practitioner in or to the effect of the Sixth Schedule to the Act. That was the certificate of the taking of the blood sample. The certificate tendered was in or to the effect [2] of the form in the Schedule and it certified as to the taking of a blood sample and "that all the regulations relating to the collection of such sample were complied with."*

The second certificate put in evidence in the Court below was tendered under s80D(4) as a certificate of an approved analyst to the percentage of alcohol found in the blood sample. Copies of these certificates were served on the defendant in accordance with s80D(5) and he gave notice in writing pursuant to s80D(7) requiring the medical practitioner concerned, Dr Rabar, to attend for the purposes of cross-examination. Dr Rabar did attend at the hearing and was cross-examined by the solicitor for the defendant. He was asked by the Prosecutor, who examined him briefly before tendering him for cross-examination, whether he complied with the regulations in taking the blood sample. This question was objected to on the ground that it had not been shown that the doctor knew what the provisions of the regulations were. He was then asked in-chief whether he took the blood sample in the normal manner and answered: Yes". In the course of his cross-examination he said that he had never read the regulations, that his procedure for taking blood samples was derived from a list attached to the wall of the Casualty room in the hospital concerned, that he had never checked the regulations against the list to see if they corresponded and that he had no knowledge as to the authorship of the list, but that the list was printed by the Government Printer.

[3] Thereupon the informant closed his case, and the solicitor for the defendant made the no case submission based upon a contention that it was necessary for the informant to show that the regulations relating to the collection of the blood sample had been complied with, and that this had not been shown. The Stipendiary Magistrate upheld this submission, and, as I have said, dismissed the information.

[His Honour then set out the grounds of the order nisi and continued]: ... [4] I have been referred to the unreported decision of O'Bryan J in Hess v Clarebrough, 3rd November 1982. That case resembles the present. There the defendant gave notice requiring the medical practitioner to

attend for the purposes of cross-examination and the medical practitioner was cross-examined. In the course of his cross-examination he said, among other things, that he presumed that he had complied with the regulations because he had a working knowledge of them, but that he had never read the regulations, and that he was not familiar with certain terms which it appeared were used in the regulations.

The Stipendiary Magistrate in that case [5] as in the present, upheld a no case submission based upon the supposed failure of the informant to show that the medical practitioner had taken the blood sample in accordance with regulations. O'Bryan J observed that the answers of the medical practitioner did not provide any evidence that the regulations relating to the collection of the sample had not been complied with. At most, His Honour said, they revealed that the doctor was not fully familiar with the regulations. There was, His Honour said, no evidence of non-compliance with any regulation on the part of the medical practitioner, and, accordingly, the informant's case, having regard to the certificates tendered, did establish a *prima facie* case in relation to the matter of blood alcohol content.

I am content to follow His honour's decision here. His Honour reached, if I may say so with respect, the same conclusion as that which I would have reached, unassisted by what His Honour has said. By s80D(3) a certificate answering the requirements of that sub-section shall be admitted in evidence as a *prima facie* proof of the facts and matters therein contained.

One of the facts or matters therein contained is that all the regulations relating to the collection of the sample were complied with. As in *Hess v Clarebrough* so in the present case the eliciting by the cross-examination of the doctor of the fact that he was not familiar or fully familiar with the regulations did not produce any evidence of a failure to comply with the regulations. Accordingly, the [6] uncontradicted evidence on the point was that afforded by the certificate itself. In my opinion, Ground 2 of the order nisi is made out.

APPEARANCES: For the informant Hocking: Mr J Lenczner, counsel. AG McLean, State Crown Solicitor. No appearance on behalf of the defendant Roberts.
