39/69

SUPREME COURT OF VICTORIA

SAXE v KELLETT

Anderson J

8 April 1970 — [1970] VicRp 79; [1970] VR 600

MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE PRODUCED IN EVIDENCE SHOWING THAT THE DEFENDANT HAD A BAC OF 0.245% – DEFENDANT AND A WITNESS GAVE EVIDENCE THAT THE DEFENDANT CONSUMED FOUR TO FIVE GLASSES OF BEER – THAT THE INFORMANT WAS QUITE SURPRISED AT THE HIGH READING AND THE DEFENDANT DID NOT SHOW ANY SIGNS OF BEING AFFECTED BY LIQUOR – CHARGE DISMISSED BY THE JUSTICES – WHETHER THE JUSTICES IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Order nisi discharged.
1. The certificate was made *prima facie* evidence but only *prima facie* evidence, of the statements contained therein, so that at the close of the case for the prosecution the certificate, containing as it did the alcohol reading and the certification that the machine was in working order and had been properly operated, would be evidence on which the prosecution could found its case.

2. What the justices were concerned with here was the uncertainty that they had as to the efficient and correct operation of the instrument, having regard to the evidence of the constable, who was surprised at the high reading, the reason why he was surprised, and the evidence of the defendant and his witness. So that there was evidence before the justices which would have been sufficient, had they so determined to displace the *prima facie* evidence which the certificate otherwise provided.

3. The justices did not wrongly take into account any evidence. The justices had before them evidence by way of certificate which they were not prepared to act upon because they were not satisfied beyond reasonable doubt that the certificate gave a true indication of the alcohol which was in the defendant at the time in question, and, therefore, there was no evidence before the court at the conclusion of the case satisfying them that the defendant had driven the motor car while there was an excess percentage of alcohol in his blood.

4. Accordingly, the order of the justices was to remain as it was and the order nisi discharged.

ANDERSON J: This is the return of an order nisi to review an order of the Court of Petty Sessions at Frankston made on 5 August 1969 dismissing an information against the defendant, such information charging him with being the driver of a motor car upon a highway, he did drive such motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millimetres of blood was more than .05 per cent. The information is laid under s81(a) of the *Motor Car Act* 1958 and the only point which arises for consideration in this order to review is in relation to the operation and effect of s408A of the *Crimes Act* 1958 which makes applicable to offences against s80(a), s80(b), s81(a) and s82 of the *Motor Car Act* 1958 certain provisions of the *Crimes Act* relating to breathalyser tests.

The information was heard before the Court of Petty Sessions at Frankston consisting of two honorary justices. The prosecution gave evidence that the defendant was subjected to a breathalysing test and a certificate showing the result of that test was created by a First Constable Griffiths who was the constable who administered the test and certificate in the prescribed form and containing all the prescribed material showed that the reading obtained as a result of the test was 0.245 per cent. The certificate was produced in evidence before the justices and the constable who had detained the defendant gave evidence as well, and the only relevant part of his evidence that I need refer to is that he was asked by defence counsel whether he was surprised with the reading being 0.245 per cent, and he replied that he was quite surprised at the reading, as the defendant did not show any other signs of having been affected by liquor.

The defendant was represented by counsel, and he called evidence and himself gave

evidence. The evidence which was given on his behalf was by a companion who said that during the course of the day he had been for some unspecified period with the defendant, though it was apparently a substantial period, and that to his knowledge the defendant had consumed only four to five glasses of beer that day. The defendant himself likewise gave evidence, and he said that had consumed only four to five glasses of beer and that the accident had not been caused by his having been affected by the liquor. Nothing turns on the circumstances of the accident, it was merely the incident which drew the police attention to the defendant.

At the close of the evidence for the defence the justices dismissed the information, and when asked by the prosecuting sergeant for their reasons, the chairman of the justices stated:

> "Firstly, we have in this case evidence given by the constable that he stated he was most surprised with the high reading of 0.245 per cent given by the test, and secondly we have taken into account that we have heard in this case the evidence on oath by the defendant and his witness that the defendant had not consumed more than four beers."

The affidavit in support of the order nisi then states that the sergeant inquired of the chairman if in reaching its decision the Bench had rejected the evidence of the breath analysis test reading of 0.245 per cent, and the chairman replied:

> "We have not heard any evidence from First Constable Griffiths, the breath analysis operator who conducted this test, that the machine was not faulty, and the defendant must be given the benefit of the doubt of this reading".

Mr Charles, who appeared for the informant, submitted that the justices were in error to such an extent as would require the setting aside of the dismissal and the sending of the matter back to the Court of Petty Sessions for rehearing. He said that the chairman had misstated the evidence in his reasons for judgment because he had described the constable as being "most surprised" when the evidence was that the constable was merely "quite surprised". I do not think anything turns upon the slight exaggeration by the chairman, in using the word "most" instead of the word "quite". I do not think that there is any error in their appreciation of the constable's evidence that he was surprised at the high reading, and incidentally he gave in evidence something which no doubt, was still in their minds, that the reason why he was surprised (whether most or quite surprised to my mind does not matter) was that the defendant had shown no other signs of having been affected by liquor.

A further manner in which the justices had erred in their appreciation of the evidence was, Mr Charles said, that the chairman referred to the defendant as having had "no more than four beers", whereas the evidence by the defendant himself and of his witness was that he had had no more than four to five beers. Again, I think nothing turns upon the fact that the chairman said only four beers; what he was indicating in his reasons and the reasons of his colleague was that the defendant had had, on the evidence which they apparently accepted, only a relatively small amount of beer, and whether it was four to five, or four, beers really does not affect the issue at all. The significance is that it was a small quantity of beer, small and relatively insignificant in the circumstances of the case, having regard to the reading which had been obtained, a reading which surprised the constable who had detained the defendant, and who incidentally was a senior constable of police.

Mr Charles took the matter further by referring to the second part of the chairman's reasons for the judgment of the court when he said that they had not heard any evidence from First Constable Griffiths that the machine was not faulty. Mr Charles referred to s408A(2A) of the *Crimes Act*, which is the provision whereby the certificate which was before the court is made *prima facie* evidence. That sub-section reads:

> "A document purporting to be a copy of any certificate given in accordance with the provisions of subs(2) and purporting to be signed by a person authorized by the Chief Commissioner of Police to operate breath analysing instruments shall be *prima facie* evidence in any proceedings referred to in subs(1) of the facts and matters stated therein unless the accused person gives notice in writing to the informant a reasonable time in the circumstances before the hearing that he requires the person giving the certificate to be called as a witness."

The references in that section to subs(1) and subs(2) need not be further amplified. It is sufficient to say that the case with which we are dealing is one comprehended by s408A(1) and s408A(2) of the *Crimes Act*.

Now the certificate which was tendered is a certificate which, as well as certifying that the alcohol content of the blood was 0.245 grams, also certifies that the instrument which the operator used was of a type approved for the purposes of the Act, was an instrument in relation to which all the relevant regulations had been complied with, and, thirdly, was in proper working order and properly operated by him in accordance with the regulations. Such a certificate is made *prima facie* evidence of the facts and matters stated therein, unless the accused gives appropriate notice. The certificate is made *prima facie* evidence but only *prima facie* evidence, of the statements contained therein, so that at the close of the case for the prosecution the certificate, containing as it did the alcohol reading and the certification that the machine was in working order and had been properly operated, would be evidence on which the prosecution could found its case.

But at that point we reach the highest point in the efficacy of the certificate; it is *prima facie* evidence and no more. It provides sufficient evidence for the prosecution to launch its case. When, however, as in this case, the defence is entered upon and there is other evidence before the court besides the certificate—whether it comes solely from a defendant's witnesses, or from evidence which may have been available to the defendant in the course of the informant's case, is immaterial—when there is further evidence besides the certificate, the certificate loses much of its strength and force. True it is that the certificate certifies that the instrument was in proper working order, and was properly operated, but that is only *prima facie* evidence of those facts, and to me it seems that what the justices were concerned with here was the uncertainty that they had as to the efficient and correct operation of the instrument, having regard to the evidence of the constable, who was surprised at the high reading, the reason why he was surprised, and the evidence of the defendant and his witness. So that there was evidence before the justices which would have been sufficient, had they so determined—and it seems to me that they did determine—to displace the *prima facie* evidence which the certificate otherwise provided.

Mr Charles, however, contended that the justices ignored the effect of the certificate completely and appeared, so he submitted, to have considered that there was an obligation upon the prosecution to produce the person who operated the apparatus before they could act upon the certificate and be satisfied that the test had been properly conducted. I do not think that is the effect of the chairman's observations. I think that, when one considers the manner in which the case proceeded and the way in which at the close of the case after the justices had given their decision the sergeant interrogated the chairman, all the chairman was doing was giving in an elliptical way the reasons which operated upon himself and his colleague. He had not sat down and written out, after careful thought, all the mental processes through which he and his colleague had gone. In answer to questions—quite properly put, of course—he merely gave orally, and in effect "off the cuff", the reasons which had exercised his mind and that of his colleague in reaching the decision that they had reached, so that what he said in answer to the first question was that they had the evidence of the senior constable as to his being surprised, and of the small quantity of liquor which the defendant had consumed. They were not concerned to say that four beers, or four to five beers, would mean something less than .05 per cent. What they were, however, in effect saying was: ".245 represents a very large consumption of liquor, and if we accept evidence that this man had only four to five beers, four beers if you wish, and that the high reading surprised the senior constable, well then we have doubts as to the proper working order of the machine and we therefore do not accept the certificate." And they were perfectly entitled to say that, and that is the effect to my mind of what they were saying, both in the first answer which they gave to the sergeant and likewise when they gave the second answer, because to my mind all they were saying is this: They are asked, are they rejecting the evidence of the breath analysis test reading, and they say:

> "we have not heard evidence from the breath analysis operator that the machine was not faulty."

In other words, they are not now accepting as sufficient for their purposes the *prima facie* evidence contained in the certificate, and having rejected that, as they were to my mind perfectly entitled to do, they are then left with no evidence at all on which they could act as to the result of the analysis.

The certificate, therefore, has lost all its efficacy in their minds, because of the evidence which has cast such grave doubt upon it, and that is, I think, what the justices meant when the chairman said that they were giving the defendant the benefit of the doubt.

I do not think this is a case in which the justices have taken into account matters which they should not have taken into account. They have, in an elliptical way, indicated that they have rejected the certificate because the reading was so much out of degree compared with what they were satisfied the defendant had had by way of glasses of beer.

That then being the case, my view being that they have not wrongly taken into account any evidence, we are left with the position that they had before them evidence by way of certificate which they were not prepared to act upon because they were not satisfied beyond reasonable doubt that the certificate gave a true indication of the alcohol which was in the defendant at the time in question, and, therefore, there was no evidence before the court at the conclusion of the case satisfying them that the defendant had driven the motor car while there was an excess percentage of alcohol in his blood.

For those reasons, therefore, I am of the opinion that the order of the Court of Petty Sessions should remain as it is, and that the order nisi should be discharged.

APPEARANCES: For the applicant Saxe: Mr S Charles, counsel. Thomas F Mornane, Crown Solicitor. For the respondent Kellett: Mr GM Eames, counsel. Holding, Ryan and Redlich, solicitors.
