02/79

SUPREME COURT OF VICTORIA

MORE v McKNIGHT

Lush J

28 November 1978

MOTOR TRAFFIC – DRINK DRIVING – MOTOR VEHICLE COLLISION – DRIVER UNDERWENT BREATH TEST – BAC READING 0.170% – DRIVER SAID HE CONSUMED A QUANTITY OF INTOXICATING LIQUOR POST-ACCIDENT – FINDING BY COURT THAT READING WAS 0.170%BAC BUT NOT SATISFIED THAT THE DRIVER'S BAC WAS IN EXCESS OF 0.05% – NO SPECIFIC FINDING THAT AT THE TIME OF THE OFFENCE THE DRIVER'S BAC WAS NOT MORE THAN .05% – CHARGE DISMISSED – WHETHER COURT IN ERROR: *MOTOR CAR ACT* 1958, S80G.

McK., a Senior Constable was driving his car just before midnight when it went into a table drain. He notified the Police Station, and was required to take a breath test which produced the result of 0.170%. McK. gave evidence that (1) an approaching truck forced him onto the wrong side of the road, resulting in his car going into the drain, (2) that between 7:30pm & 11:00pm he had consumed a total of 7 or 8 7 oz. glasses of beer, in 2 hotels, and (3) that after the accident and prior to the police arrival, he consumed 2 drinks at his home, totalling about 6 ozs of whisky. He did not disclose this to the investigating Police, and consumption of alcohol after the accident was denied. After hearing evidence in the mater, the Court (comprising two justices of the peace) dismissed the charge on the ground that it could not be satisfied that McK's BAC was in excess of 0.05%. The court did not find that at the time of the offence McK's BAC was not more than .05%. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for hearing before a Stipendiary Magistrate sitting at the Melbourne Magistrates' Court.

1. Section 80G of the *Motor Car Act* 1958 ('Act') requires that where in a particular case it is established that within two hours after the driving the percentage of alcohol present in the blood of a person was in excess of .05 per cent the onus is then thrown on to that person to establish that at the time of the driving the percentage of alcohol in his blood was not more than .05 per cent.
***Holdsworth v Fox* [1974] VicRp 27; (1974) VR 225, followed.**

2. Whilst it will be appreciated that in the terms of s80G of the Act the justices found that .170% of alcohol was present in McK.'s blood at a time within two hours after the offence, it will also be appreciated that the announcement of their decision did not contain a finding that at the time of the offence the percentage of alcohol in McK's blood was not more than .05%. The finding simply was that they were not satisfied that the content exceeded .05%.

3. In view of the fact that there was no finding which was the pre-requisite to the operation of s80G of the Act, the decision reached by the justices must be regarded as being without legal justification.

LUSH J: This is the return of an order nisi to review a decision of the Magistrates' Court at Horsham constituted by two Justices of the Peace dismissing an information against the defendant (the present respondent) that he drove a motor car whilst the percentage of alcohol in his blood was more than .05 per cent, contrary to s81A(1) of the *Motor Car Act*.

The facts of the matter can be sufficiently stated in brief form. The defendant was himself a Senior Constable of Police and just before midnight of the night 9/10 February, 1978, near his home just outside Horsham, he was driving his car and something occurred which had the result that the car went into the table drain at the side of the road. The defendant himself notified the police station. Other police officers came out to the scene, and on the basis, apparently, of their observations the defendant was required to take a breathalyser test. This test was conducted at 12.50 a.m. on the morning of 10th and resulted in a reading of .170%. The general evidence of the eye witnesses was that the defendant was not visibly intoxicated at the scene of the mishap, but, so far as one can judge from the affidavit accounts, there is a passage in the evidence that suggests that he was rather garrulous at one time when the police officers were in attendance there.

The evidence which the defendant gave himself was that the accident had been precipitated by his encountering a large truck travelling in the opposite direction which had swerved on to the wrong side of the road, compelling him to drive into the table drain to get out of the way of the truck. He said that having come off duty about mid-afternoon he had, towards 7 or 7.30 in the evening, gone into the town and had spent the time between 7.30 and about 11 o'clock in two hotels where he had consumed a total of seven or eight standard 7-ounce glasses of beer. He said that after the accident and before the arrival of the other members of the Force from Horsham he had consumed at his house two drinks which were described in two ways. They were described first as "small nips", but in explanation they were said to amount in total to about six ounces of whisky. The consumption of this whisky had not been disclosed to the investigating police and, indeed, the consumption of any alcohol after the accident had been denied. The question obviously arose whether the evidence of the consumption of the whisky was acceptable.

The difficulty which brings the case before this court lies in the formulation of the justices' decision. There are two accounts before me and I see no significant difference between them. The justice who was acting as chairman of the court, according to the informant's affidavit, announced that the court was satisfied that the defendant's blood alcohol concentration at the time of the test was .170% and that the court accepted the Schedule 7 certificate. He went on to say that, however, on the evidence the court was not satisfied that the defendant's blood alcohol concentration at the time of driving was in excess of .05%. Accordingly, the information was dismissed. The account of the decision given in the respondent's affidavit (that is the defendant's affidavit) was in these terms:

> "On returning the court indicated that they found as a matter of fact that the reading of .170 was an accurate reading as to the level of alcohol at the time the test was taken; and secondly that the truck could have forced the defendant off the side of the road and therefore explained the cause of the accident. The court stated that having regard to all the evidence and submissions made to them by counsel they could not be satisfied that the defendant's blood alcohol concentration at the time of the driving relied on by the prosecution was in excess of .05 per centum and accordingly dismissed the information."

That description prompts two comments. The reference to the truck to be completely understood requires a statement that the prosecution in the case did not accept the story about the truck, but said that evidence of signs of the presence of a truck at the scene was explained by the fact that there had been an accident there on the previous day. No evidence was given, however, of any such accident. The reference to the submissions made by counsel calls only for mention of the fact that counsel for the defendant had put to the justices a submission in accurate form of the effect of the decision of Menhennitt J in *Holdsworth v Fox* [1974] VicRp 27; (1974) VR 225.

The order to review was obtained from a judge after, in the first place, being refused by the Master, on five grounds. I do not propose to read those grounds. What was argued was that the announcement made by the justices indicated that they had not made the decision required in the circumstances by s80G of the *Motor Car Act* before the information could be dismissed and that in any case there was no evidence before them on which they could have made the decision required by that section. It is sufficient to say that in one way or another these two matters are covered by grounds 2 to 4 in the order nisi.

Section 80G reads:

> "For the purposes of this Division if it is established that at any time 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."

The effect of this section was considered by Menhennitt J in the decision to which I have referred. The result of that consideration, sufficiently for present purposes, appears in a sentence at p229 of the report:

> "In specific terms this appears to me to mean that if in a particular case it is established that within two hours after the driving the percentage of alcohol present in the blood of a person was in excess of .05 per cent the onus is then thrown on to that person to establish that at the time of the driving the percentage of alcohol in his blood was not more than .05 per cent."

It will be appreciated that in the terms of s80G the justices in this case had found that .170% of alcohol was present in the defendant's blood at a time within two hours after the offence, but it will also be appreciated that the announcement of their decision made by the justices does not contain a finding that at the time of the offence the percentage of alcohol in the defendant's blood was not more than .05%. The finding simply was that they were not satisfied that the content exceeded .05%.

I was referred by counsel to a recent decision of my own, *Van Elst v Tanner* given on 7 September 1978 in which I offered some observations on proof in these cases. The problem, however, in that case was whether the ostensible breathalyser result did establish the blood alcohol content. The case, therefore, does not touch the problem here where justices have made the finding which is the prerequisite to the operation of s80G.

Counsel for the defendant also drew my attention to the fact that a decision of Nelson J *Farnsworth v Reynolds* (unreported, 30 August 1976) supplements the authority of the decision in *Holdsworth v Fox*. These cases were cited to me and it is not, I think, necessary for me to refer to other authorities. A matter which has concerned me in this case is whether the distinction between what the justices actually said and what it was necessary for them to find in order to lay the foundation for the result which they in fact achieved, is so fine that the case is inappropriate for interference by this court, or, to put the matter in language more approaching the technical language of the context, that if the justices' language really indicated the finding required by *Holdsworth v Fox* then I should not be over particular about the language in which that finding was recorded. In my opinion, however, the situation is one in which this court should intervene. So far as can be seen the required finding was not made in the present case and instead the justices' language indicates that they moved away from the requirements of s80G to the kind of consideration of the acceptability of the breathalyser test that was discussed in *Van Elst v Tanner*. In my opinion there never having been the finding required by *Holdsworth v Fox* the decision reached by the justices must be regarded as being without legal justification.

In view of the course which I propose to take with this case, I am not disposed to discuss the sufficiency of the evidence to support the finding which was needed but which was not made in the defendant's favour. Whether the defendant's evidence was to be accepted or not was originally and, in view of the course I am about to take, will again be a matter for the decision of the court of trial.

Counsel put to me different views as to what order should be made if I took the view which, as I have indicated, I have adopted. Counsel for the informant wanted me to send the case back with a direction that there should be a conviction and an appropriate penalty fixed. Counsel for the defendant asked that it be sent back for rehearing. I should send the matter back with a direction to convict only if I were satisfied that the evidence here was incapable of leading to the finding desired by the defendant. As I have already indicated, I am reluctant to discuss that evidence, but I mention that Mr Howard, who appeared for the defendant before me as well as in the Magistrates' Court, submitted that the burden of proof defined in *Holdsworth v Fox* did not as a matter of course require the production of expert evidence.

That submission is in terms and in principle correct in my view. It may in any particular case face a difficulty of practical application because while evidence of observations of the demeanour, speech and so on of the defendant is relevant for this purpose, there must still be some way in which the court can relate that evidence to a percentage of blood alcohol. While it may not theoretically be impossible to achieve that relation without expert evidence, there may be real difficulties in practice. In the present case there was no evidence which was really expert although one of the police officers called is recorded in the respondent's affidavit as having given evidence relating to the effect on blood alcohol content of various matters of alcohol consumption.

The defendant, of course, is not entitled to a second trial as a matter of right, but I am left with the impression that the justices may well have been disposed to accept parts of his evidence and would undoubtedly have accepted evidence relating to the absence of signs of alcohol in his demeanour. I say undoubtedly, because there was no evidence to the contrary of that except for some indication of garrulousness.

I am reluctant, in a matter in which credit is involved and in a matter where on paper the difficulties of accepting some of the defendant's evidence appear formidable, to have the matter go to decision without the credibility having been relevantly weighed. Accordingly I think that the proper course is to send the matter back for rehearing.

In response to my invitation Mr Howard gave me some information about the first hearing. In view of the identity of the defendant and of some matters that were referred to in the evidence, the circuit magistrate of the Wimmera circuit apparently thought that it was not appropriate that he should hear the case himself and arrangements were made for two justices to come from another town or at any rate from some point away from the immediate area of Horsham. These steps were properly and thoughtfully taken. The matter, however, was a very difficult one for justices as cases of this kind frequently must be. I make no criticism of the two gentlemen who tried the case for the error which, as I see it, emerged, and I have no doubt that they heard the case carefully and with experience.

What happened, however, indicates that it would be better if a stipendiary magistrate dealt with the case on the rehearing. In view of the thought which was given to the arrangement of the first hearing, it is perhaps superfluous for me to add any suggestions, but I think that it would be desirable that the second hearing should be by a stipendiary magistrate and that an arrangement should be made for a special sitting by a stipendiary magistrate from another area. That suggestion will not be embodied in the order, but I expect it to be conveyed by the Crown Solicitor to those concerned. In any event, these reasons will be despatched to the Horsham Magistrates' Court which will have a chance to observe them for itself.

(Counsel made further submissions.) During the course of the argument I expressed the view that it was desirable, in the circumstances, that this matter should be heard in the locality in which it had occurred, but counsel having joined in an application that the rehearing should be in Melbourne, and given their reasons for doing so, I see no reason for rejecting that suggestion. Accordingly the order will be:

ORDER:
The order nisi is made absolute.
The decision of the Magistrates' Court is set aside.
The information will be reheard at the Magistrates' Court, Melbourne.
The respondent will pay the informant's costs fixed at $200; the respondent will have a certificate under the appropriate section of the *Appeals Costs Fund Act*.
