24/78

SUPREME COURT OF VICTORIA

HUNTINGTON v JUPP

O'Bryan J

19 May 1978

MOTOR TRAFFIC – DRINK/DRIVING – EXCEEDING BLOOD/ALCOHOL CONCENTRATION – 0.163%BAC – DEFENDANT SUBMITTED THAT IT WAS NOT PROVED THAT UNAUTHORISED TAMPERING WITH THE BLOOD SAMPLE DID NOT OCCUR BETWEEN COLLECTION OF THE SAMPLE AND RECEIPT BY THE ANALYST – WHETHER COURT ENTITLED TO RELY ON PRESUMPTIONS OF REGULARITY OR CONTINUANCE – WHETHER COURT REQUIRED TO BE SATISFIED THAT SAMPLE OF BLOOD PLACED IN A LOCKED RECEPTACLE – CHARGE FOUND PROVED – WHETHER COURT IN ERROR: *MOTOR CAR ACT*, S80D, 81A(1).

The Informant went to the scene of a 2-car collision at 7:20pm, one of the cars being owned by the defendant. He then went to Austin Hospital where the defendant admitted he had been driving his car when the accident occurred. The defendant was later charged with an offence of driving a motor vehicle whilst his blood/alcohol concentration exceeded .05%. He was convicted. Upon appeal—

HELD: Order nisi discharged.
1. There was no necessity for the Court to be satisfied beyond reasonable doubt that a sample of blood taken from the defendant by a doctor was placed in a locked receptacle in the hospital as required by Reg. 223B of the *Motor Car Act (Blood Samples) Regulations* of 1977.

2. In order to reach the conclusion they did, the Court was entitled to rely upon presumptions of regularity or continuance, there being no evidence before them to show there was any interference with the sample between 16th April (when the collision occurred) and 30th May (when it was received by the analyst). Presumptions of fact of this kind were relied upon by Gowans J in *Collins v Mithen*, (unrep.) and by Lush J in *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78 at 83.

O'BRYAN J: ... Later, the informant received the result of an analysis of a sample of blood purportedly made by Robert Gordon Brown, an approved analyst under the *Motor Car Act*. A sample of the defendant's blood was taken at the Austin Hospital on 16th April. The analysis showed .163 per centum.

At the hearing two certificates were tendered in evidence under the provisions of the *Motor Car Act*. The first certificate was a 6th Schedule Certificate dated 16th April, 1977. It conforms with the 6th Schedule to the *Motor Car Act* and is a certificate of a legally qualified medical practitioner of the taking of a blood sample.

It certifies to the following facts and matters:

> That Roger Allen of Austin Hospital, Heidelberg a legally qualified medical practitioner, collected a sample of the blood of Stanley Jupp, Ingrams Rd., Research, at 2025 on 16th April, 1977, and that all the regulations relating to the collection of such sample were complied with and that such sample was placed in two containers labelled - 'Name of Person, Stanley Jupp; Date taken, 16th April, 1977; Time taken, 2025; Signature, Roger Allen;. Qualifications, MBBS (Qld)'. The certificate was dated 16/4/77 and carried a number at the foot, B4551.

It was tendered pursuant to the provisions of s80D of the *Motor Car Act*. The second certificate was an 8th Schedule Certificate dated 9th June, 1977. It conforms with the 8th Schedule to the Act and is a certificate of an approved analyst of a blood analysis. It certified to the following facts and matters:

> That Robert Gordon Brown of the Forensic Science Laboratory, 193 Spring Street, Melbourne, an approved analyst under section 80D of the *Motor Car Act* 1958, did on the 8th June, 1977, analyse by a prescribed method a sample of blood labelled — 'Stanley Jupp, 16th April, 1977 2025, Roger

Allen, MBBS (Qld.) B4551.' That such sample was received by the said Robert Gordon Brown on 30th May, 1977, and such sample was found on analysis to contain 0.163 gram of alcohol per one hundred millilitres of blood (0.163 per cent).

It was tendered pursuant to the provisions of s80D(4) of the Act. No challenge was made before me, or in the court below, to the admissibility of the certificates. Consequently, all of the facts and matters contained in the certificates were proved in the absence of any rebutting evidence. The court was obliged, in my opinion, to regard those certificates as if the persons who prepared them had been called to court to swear under oath to all the facts and matters stated therein. Accordingly, in the absence of evidence which raised any serious issue of doubt about any of the facts and matters stated in the certificates it would have been the duty of the court to act upon that evidence.

The facts and matters established by the certificates may be conveniently listed as follows:

1. That at 8.25pm on 16/4/77 Dr Allen, a legally qualified practitioner, of the Austin Hospital, collected a sample of blood of the defendant.

2. That Dr. Allen complied with all the regulations relating to the collection of such sample.

3. That Dr. Allen placed such sample in two containers labelled — 'Stanley Jupp, 16th April, 1977, 2025, Roger Allen, MBBS (Qld.).

4. That Robert Gordon Brown is an approved analyst under section 80D of the *Motor Car Act*.

5. That on 30/5/77 Robert Gordon Brown received a sample labelled — 'Stanley Jupp, 16th April, 1977 2025, Roger Allen, MBBS (Qld.) and it also carried a number B4551.

6. That on 8/6/77 the said Brown analysed the sample and found it contained .163 gram of alcohol per one hundred millilitres of blood (0.163 per cent).

There was evidence placed before the court from which it could be presumed that at 8.25pm on 16th April, there was present in the defendant's blood .163 per centum of alcohol, which was within two hours of his driving his motor car. No point was raised before me that the sample of blood taken at the hospital was not taken within two hours of the accident when the defendant was driving his motor car.

Counsel argued that the evidence did not establish any facts or matters about the sample between the time when it was placed in two labelled containers by Dr Allen at the Austin Hospital on 16th April, and the time when one of the labelled containers was received by the analyst, Brown, on 30th May.

In other words, he argued, it was not proved that unauthorised tampering with the sample did not occur between 16th April and 30th May. There are regulations under the *Motor Car Act* which govern the storage and safe keeping of samples of blood collected by a doctor in a hospital pursuant to the provisions of the *Motor Car Act*, 1977 Statutory Rule No. 29.

It was submitted that because there was in this case a period of forty-five days between collection of the sample by the Doctor and receipt by the analyst, the Justices could not be satisfied beyond reasonable doubt as to the integrity of the sample when it reached the analyst. It was submitted that presumptions of regularity and continuance cannot apply, particularly to a quasi-criminal prosecution; alternatively, if they can apply, they should not be applied in this case because of the considerable period of time the condition of storage and control of the container are not covered by evidence.

The elements of the offence are: firstly, that the defendant was driving his motor car, and secondly, that while he was doing so the percentage of alcohol in his blood was more than .05 per centum. In order to prove the latter element, there had to be proof beyond reasonable doubt that a sample of blood was taken from the defendant by a legally qualified medical practitioner within two hours after the driving, and that sample contained a quantity of alcohol more than .05 par centum. There is no element in the offence requiring proof that a sample was placed in a locked receptacle, or was safely kept until it was analysed, or that a member of the police force carried

that sample from a locked receptacle in the hospital to the analyst.

Even if regulations governed all those matters, and there was no evidence of compliance with them it does not follow that the court could not have convicted the defendant. Reference may be made, firstly, to the unreported decision of Nelson J (30th August 1976) in *Waters v Good*, p5, where he said:

> 'It has been decided in several cases in this court that where an informant relies upon the provisions of ss(1) of s80D or ss(1) of s80F, in order to prove the percentage of alcohol present in the blood of a person charged with an offence to which these sub-sections refer, it is not necessary for him to prove compliance with the regulations as to the taking of a sample of blood or the use of a breath analysing instrument as the case may be (see *Hindson v Monahan* [1970] VicRp 12; (1970) VR 84; *Wylie v Nicholson* [1973] VicRp 58; (1975) VR 596; *Lloyd v Thorburn* [1974] VicRp 2; (1974) VR 12; and *Pavlovic v Krisman*, unreported).'

The unreported decision of Gowans J (29th May 1975) in *Pavlovic v Krisman*, may next be referred to. His Honour relating to a s81A(1) offence under the *Motor Car Act* said:

> 'The ground in its paragraph (b) aspect has recourse to the fact that there is nothing in the Act to require compliance with the regulations as a condition precedent to the acceptance of the certificate and the evidence and has recourse also to a number of recent authorities. Those authorities are: *Hindson v Monahan*, *Wylie v Nicholson* and *Lloyd v Thorburn*. Last week I applied these authorities May 21st, 1975) in *Collins v Mithen*, (unreported) by stating:
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> > "There is one other matter that might need to be mentioned, and that is that there are certain regulations with respect to the taking of blood. But there is nothing in the provisions of the Statute itself to make it obligatory for the medical practitioner to comply with those regulations as a condition of establishing an offence or of evidence being given with respect to the analysis of blood; nor is there any obligation on the part of a police officer to comply in any part of the regulations with respect to the keeping of blood. I have not been given any reason justifying a change of mind as to this. It has been submitted that a person who has a blood sample taken when he is in hospital and may not be in a condition of awareness is entitled to have strict compliance with the regulations, but that consideration cannot make the observance of the regulations obligatory and a condition precedent to the receipt of evidence if the legislature has not thought fit to give those matters that effect. That is a matter for the legislature."

Therefore, there was no necessity for the Justices to be satisfied beyond reasonable doubt that a sample of blood taken from the defendant by a doctor was placed in a locked receptacle in the hospital as required by Reg. 223B of the *Motor Car Act (Blood Samples) Regulations* of 1977.

In order to reach the conclusion they did, the Justices were entitled to rely upon presumptions of regularity or continuance, there being no evidence before them to show there was any interference with the sample between 16th April and 30th May. Presumptions of fact of this kind were relied upon by Gowans J in *Collins v Mithen*, and by Lush J in *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78 at 83. Each of Their Honours relied upon a passage in the judgment of Dean J in *Hardess v Beaumont* [1953] VicLawRp 46; (1953) VLR 315 at 320; [1953] ALR 656:

> 'I would add that the presumptions to which I have referred are founded on obvious good sense and that the court should be ready to apply them in cases of this kind. Very large numbers of these prosecutions are heard in Courts of Petty Sessions. It would add greatly to the time and expense if the informant had to be prepared in every case to prove matters as to which there can very rarely be any controversy. It is always open to a defendant to rebut the presumption, but in the absence of some reason for supposing that there is some irregularity, legal practitioners should be discouraged from taking points based on the supposed defects in the informant's proof. A judicious use of such presumptions is abundantly warranted by authority and should serve to prevent excessive insistence on formal requirements of proof.'

The evidence did not raise any issue as to the integrity of the blood sample analysed by Brown. The informant was not called upon to prove a negative, namely, that no tampering with the sample occurred, after the Doctor placed it in the labelled containers, and before it was analyses. The order nisi will be discharged.
