13/70

SUPREME COURT OF VICTORIA

TURNER v BUNWORTH

Menhennitt J

10 June 1970

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER FOUND TO HAVE A BAC OF .170 AT 11.50PM – DEFENDANT FOUND DRIVING AT 9.30PM – WHETHER EVIDENCE ADMISSIBLE GIVEN THAT THE DEFENDANT DROVE ABOUT 2 HOURS AND 20 MINUTES BEFORE THE TIME OF THE TEST – JUDICIAL NOTICE OF HIGH BLOOD/ALCOHOL READINGS – WHETHER OPEN TO MAGISTRATE TO CONCLUDE THAT DEFENDANT HAD A BLOOD/ALCOHOL IN EXCESS OF .05 AT 9.30PM: *MOTOR CAR ACT* 1958, S81A.

HELD: Order nisi discharged.
1. Not only was the evidence of the breath analysis test admissible, but it was possible to draw reasonable inferences from all the facts including that evidence, and those inferences included inferences based upon all the evidence, including the breath analysis test and as to what the blood alcohol content of the defendant probably was at a time anterior to the taking of the test.

2. It was a well-known fact of which one could take judicial notice, that to have a blood alcohol content of .17 a considerable quantity of alcohol has to be consumed. The evidence, including the evidence that the defendant had nothing further to drink after coming home, established that that alcohol was probably consumed during the evening at the hotel where he had been, he having said that he had a few drinks at the hotel. Calling in aid of one's common knowledge and the facts of which one can take judicial notice, the conclusion followed that if the defendant had a blood alcohol content of .170 at 11.50pm, he would have had a blood alcohol content of that order for some time prior thereto, having had no further alcohol to drink in the meantime.

3. The percentage of alcohol in the blood at 11.50 was considerable. If at that stage the excess over .05 per cent had been small or significantly smaller than it was, it would have been much more difficult to draw the inference the Magistrate drew and various hypotheses, including reasonable ones consistent with innocence, would be open. But having regard to the high proportion of alcohol at 11.50 it seemed that any hypothesis which would lead to the view that the defendant did not have alcohol in excess of .05 at 9.30 when he was driving home was not a reasonable hypothesis.

4. Accordingly, it was open to the Magistrate to come to the conclusion he did and convict the defendant.

MENHENNITT J: This is the return of an Order Nisi to review an order made by the Court of Petty Sessions at Werribee on 27 October 1969. On that, date the Court of Petty Sessions at Werribee, constituted by a Stipendiary Magistrate, convicted Richard John Bunworth (to whom I shall refer to as the defendant) of the offence that he did drive 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. That offence is created by s81A of the *Motor Car Act* 1958 as amended. The defendant was fined $25 and his motor car licence was cancelled for three months.

On the 25 November 1969 Master Jacobs granted an order nisi to review that decision on the grounds;

> 1. That the learned Stipendiary Magistrate having found that the breath analysis test had been made more than two hours after the alleged driving offence, there was no sufficient evidence from which he could properly infer that the defendant's blood alcohol content at the time of driving of the car was more than .05 per centum.
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> 2. That having regard to the said evidence the learned Stipendiary Magistrate should have dismissed the information.

The order nisi has presumably been served upon the informant Leslie Francis Turner, and in accordance with the terms of the order nisi this case comes on for hearing in the Miscellaneous Causes List. I have been informed that it was listed in the usual way and a date fixed, namely, Tuesday 9 June 1970, which means that it comes on that day subject to any part heard cases and comes on thereafter, and it has been listed for today and advertised in the newspapers and on the noticeboards that is in today's list.

When the case was called on for hearing there was no appearance for the defendant who obtained the order Nisi, but his solicitor who had previously acted for him in the matter informed me that he was no longer acting and advised him to seek legal aid. I requested that enquiries be made and I have been informed that those enquiries reveal that no application for legal aid has been made. In those circumstances the matter comes before me with the defendant who has sought and obtained the order nisi not appearing and not moving before me that the order nisi be made absolute. Counsel for the informant submitted that in that situation I should in the absence of a motion to have the order nisi made absolute discharge the order nisi.

But in my view the order nisi having been granted it is the duty of the Court to consider it on the material before it. This is not now a matter which has not been initiated in this Court, because an order nisi has been made calling upon the informant to show cause why the order should not be reviewed. That order nisi being before me it appears to me that I am called upon to consider the matter and decide whether or not the order of the Court of Petty Sessions should be reviewed regardless of the absence of the defendant. He has taken the necessary initiating step by obtaining an order nisi from a Master. This conclusion appears to me to accord with what the High Court did in *Pirrie v McFarlane* [1925] HCA 30; (1925) 36 CLR 170; 31 ALR 365 where an order nisi was removed into the High Court pursuant to s40A of the *Judiciary Act* and, despite the absence of the informant who obtained the order nisi, the High Court heard and considered the matter and made the order absolute and convicted the defendant of the charge as to which the Court of Petty Sessions had dismissed the information.

Accordingly, I turn to the material before me. I have had the benefit of submissions by counsel for the informant and he has presented the matter, it appears to me, fairly and drawn my attention to all relevant matters and subject to the disability that I have not had the benefit of argument for the defendant, otherwise I am in an appropriate position to hear and determine the order to review.

The evidence establishes that the defendant on 21 June 1969 had a breathalyser test within the meaning of s408(f) of the *Crimes Act* 1958 as amended. As the charge falls within para (c) of s408A(1) in that the hearing in Petty Sessions was for an offence against s81A of the *Motor Car Act* 1958, the provisions of s408A apply and that section provides in substance that the percentage of alcohol indicated to be present in the blood of the person by a breath analysing instrument operated by a person authorised in that behalf by the Chief Commissioner of Police shall be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument. The other provisions of s408A of the *Crimes Act* made admissible in evidence the certificate, which was tendered in evidence, signed by Murray Charles Lane an authorised operator of a breath analysing instrument. That certificate establishes that at 11.50pm on 21 June 1969 the defendant had present in his blood .170 grams of alcohol per 100 millilitres of blood which expressed as a percentage is .170 per centum.

Sub-section (1) of s408A provides that that evidence is evidence of the percentage of alcohol present in the blood of the person at the time his breath is analysed regardless of what that time is. Section 81(2) of the *Motor Car Act* 1958 as amended provides, in substance, that if the percentage of alcohol exceeds the permissible limit at anytime within 2 hours after the alleged offence it shall be presumed unless the contrary is proved that the percentage of alcohol was more than .05 percentum at the time of the alleged offence. In this case the Magistrate found as a fact that the time when the test was conducted was more than 2 hours after the alleged offence, and accordingly, reliance could not be placed on sub-section (2) of s81A of the *Motor Car Act.* Nonetheless, the express provisions of s408A(1) of the *Crimes Act* make it clear I think that the certificate and the evidence of the percentage of blood alcohol at the time the breath was analysed is admissible evidence of the percentage of alcohol present at that time, that is what the section says.

In *Smith v Maddison* [1967] VicRp 34; [1967] VR 307 McInerney J held that it was admissible evidence.

On the whole of the evidence the Magistrate found the offence proved and said, in his reasons, that he could infer that the said blood alcohol content at the time of driving exceeded .05 per centum. He subsequently, when invited to state the-facts, made the positive finding:

> "However at the time of driving, retrospectively, the said defendant's blood alcohol content exceeded 0.05."

The Magistrate did not make a finding as to the time of driving, but in my view on the evidence the only reasonable conclusion open to him, was that the defendant drove from a hotel to his home between 9.30 and 9.35 p.m., which was about 2 hours and 15 minutes or up to 2 hours and 20 minutes before the time of the test.

The question raised by the order to review is whether the Magistrate could properly infer that the defendant's blood alcohol content at the time of driving the car was more than .05 per centum. The functions of this Court on an order to review, in a situation of this kind, have been stated on a number of occasions. In *Taylor v Armour and Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at 351; (1961) 19 LGRA 232 the Full Court said:

> "This Court has merely to see whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did."

However, in this case the Magistrate drew an inference from the evidence and the facts found. And as to an inference, in *Chappell v Ross and Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376, Gowans J at p392:-

> "Before drawing an inference of guilt he would have had to consider whether the circumstances left open a reasonable hypothesis consistent with innocence and be satisfied that they did not: *Peacock v R* [1911] HCA 66; (1911) 13 CLR 619 at pp630, 651; 17 ALR 566."

It appears to me that the tests I have referred to are applicable in this case, there is the additional well-recognised principle that so far as the facts are concerned this Court should proceed on the basis of the view of the facts most favourable to the informant on the evidence, having regard to the fact that the defendant was convicted and the Magistrate found that the offence was proved.

The evidence established that between the time of leaving the hotel and the time of the breath analysis test the defendant consumed no alcohol. In answer to the question "Have you had anything to drink since you left the hotel?" he said "No". As I have said, the evidence established that he drove home from the hotel between 9.30 and 9.35pm.

The percentage of alcohol proved to have been in the defendant's blood approximately 2¼ hours or 2 hours and 20 minutes after he left the hotel was .170 per cent, that is 3.4 times the permissible limit of .05. The defendant gave evidence in cross-examination that he had a few drinks at the hotel on the evening in question. Not only is the evidence of the breath analysis test admissible, but in my view it is possible to draw reasonable inferences from all the facts including that evidence, and those inferences include inferences based upon all the evidence, including the breath analysis test, as to what the blood alcohol content of the defendant probably was at a time anterior to the taking of the test. This appears to me to be sound in principle, it is in accordance with the law as stated in *Wigmore on Evidence* 3rd Ed. Vol 20 p413, para 437, in the passage cited by McInerney J in *Smith v Maddison* [1967] VicRp 34; [1967] VR 307 at 310-11 and further, in that case McInerney J held that the evidence of the test was not only admissible but that:

> "It is then a matter for the Court to determine what weight, if any, is to be given to the evidence so admitted. It will be for the court to determine whether, having regard to that evidence and to the other evidence in the case, the court can ultimately infer the existence of the fact in issue, namely, that at the time of driving the blood alcohol content of the defendant was in excess of .05."

(That is at p311).

It appears to me that it is a well-known fact of which one can take judicial notice, that to have a blood alcohol content of .17 a considerable quantity of alcohol has to be consumed. The evidence, including the evidence that the defendant had nothing further to drink after coming home, establishes that that alcohol was probably consumed during the evening at the hotel where he had been, he having said that he had a few drinks at the hotel. Again, calling in aid of one's common knowledge and the facts of which one can take judicial notice, the conclusion follows that if the defendant had a blood alcohol content of .170 at 11.50pm, he would have had a blood alcohol content of that order for some time prior thereto, having had no further alcohol to drink in the meantime.

The question remains whether he had not that blood alcohol content but a blood alcohol content in excess of .05 per cent at the time he drove the car at about 9.30pm. In order to have a blood alcohol content at 11.50pm produced by alcohol consumed before 9.30pm one obvious explanation would be that the defendant was consuming alcohol over the period he was at the hotel.

If the alcohol were consumed in a leisurely fashion over the period he was in the hotel it appears to me that it would be a reasonable inference which it would be open to the Magistrate to draw that by the time he left the hotel his blood alcohol content was more than .05 percent, unless it was a reasonable inference that so close to leaving the hotel that it had not had time to affect his blood alcohol content, the defendant had consumed a substantial amount of alcohol. Human capacity for consumption being what it is, that substantial consumption would, it appears to me, have to be in a form of liquor that contained a high alcohol content.

Accordingly, the only hypothesis which occurs to me which would explain the defendant having a blood alcohol content as high as .17 at 11.50 and not having a blood alcohol content in excess of .05 at 9.30, would be the consumption of a large amount of liquor with high alcohol content very shortly before him leaving the hotel. The passage to which I have referred to the judgment of Gowans J in *Chappell v Ross & Son Pty Ltd* leads to the view that it is for the informant to exclude all reasonable hypotheses consistent with innocence. What I have stated is, I think, a hypothesis which would be consistent with innocence. The question remains whether it is a reasonable one.

I have not found this matter easy but on the whole I have come to the conclusion that that hypothesis is not a reasonable one and that it is in the category of speculative possibility. The language that the defendant used that he had a few drinks at the hotel is consistent with the common practice of drinking beer over a period or some other such drink; it does not suggest drinking of liquor containing a high proportion of alcohol, but even assuming that it does, it does not suggest concentrated drinking, it rather suggests leisurely drinking.

The facts point to the conclusion that the defendant was spending the evening in the hotel and came home at about 9.30. And that is not a situation in which it seems to me to be ordinary or likely that a person would very shortly before leaving the hotel suddenly consume a substantial amount of liquor containing a high alcohol content. The hypothesis that he did any such thing so that he had a blood alcohol content of not more than .05 percent when driving at 9.30, but had one of .17 percent at 11.50 is I think not a reasonable hypothesis.

One matter which influences me greatly in the conclusion I have reached is the percentage of alcohol in the blood at 11.50. If at that stage the excess over .05 per cent had been small or significantly smaller than it was, it would be much more difficult to draw the inference the Magistrate drew and various hypotheses, including reasonable ones consistent with innocence, would be open. But having regard to the high proportion of alcohol at 11.50 it seems to me that any hypothesis which would lead to the view that the defendant did not have alcohol in excess of .05 at 9.30 when he was driving home is not a reasonable hypothesis.

For all of those reasons I conclude that it was open to the Magistrate, as a reasonable man, to come to the conclusion he did and convict the defendant. The order nisi will be discharged. The defendant is ordered to pay the taxed costs of the informant of the order to review not exceeding $120.