07/71

SUPREME COURT OF VICTORIA

CALABRESE v SHIRREFF

Nelson J

16 March 1971

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT NOT SEEN DRIVING BEFORE BEING INTERCEPTED BY POLICE – DEFENDANT SAID HE HAD DRIVEN HIS MOTOR VEHICLE TO THE SPOT WHERE HE WAS INTERCEPTED – DEFENDANT NOT ASKED AT WHAT TIME HE DROVE HIS VEHICLE TO THAT SPOT – QUESTION WAS WHETHER DEFENDANT DROVE HIS MOTOR VEHICLE WITHIN TWO HOURS BEFORE THE BREATH TEST WAS CONDUCTED – CIRCUMSTANTIAL EVIDENCE – WHETHER EVERY HYPOTHESIS CAN BE EXCLUDED – DEFENDANT ELECTED NOT TO GIVE EVIDENCE – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Order nisi discharged.
1. The doctrine as to the test to be applied to circumstantial evidence does not mean that every hypothesis which can be advanced by counsel's ingenuity must necessarily be excluded. What it does mean is that any hypothesis which reasonably arises on the evidence, and which would explain the circumstances which have been proved, in a way which is consistent with innocence of the defendant, must be excluded before it can be said that the case has been proved beyond reasonable doubt.

2. It was open to the Magistrate to say that the reasonableness of the hypothesis was considerably discounted by the fact that when the defendant was intercepted by the police, thereafter taken to a police station and submitted to a breath test, and questioned about what drinking he had done that night, in the whole course of that interview he made no suggestion of any fact contained in this hypothesis which would have assisted him in his defence to the charge brought against him.

3. It was open to the Magistrate to come to the conclusion that there was a case to answer. In other words, that he was satisfied that it was open to him to draw the inference on the evidence, as it then stood, of the guilt of the defendant and that stage having been reached and the defendant then having elected not to give evidence, then the Magistrate was entitled the more readily to draw an inference which was open to him to draw on the evidence which had been given by the informant.

NELSON J: This is an order to review the decision of the Magistrates' Court in Morwell on 25 August 1970, whereby the defendant, who was charged with an offence under s81A of the *Motor Car Act*, that he was driving a motor car whilst the percentage of alcohol in his blood was more than .05, was convicted of that offence.

Two grounds for review were taken in the Order nisi, but I think it is clear as a result of discussion that has taken that the defendant in order to succeed on this review must satisfy me that the Magistrate should have dismissed the information at the close of the informant's case, on the ground that there was a reasonable hypothesis to explain the evidence which had been given, which was consistent with the innocence of the defendant and that consequently there was not at that stage evidence upon which the Court could be satisfied beyond reasonable doubt of his guilt.

The evidence was extremely brief. Insofar as it relates to the defendant's driving it consisted of evidence by the informant. He said that at about 7.50pm on Saturday 13 June 1970 he had observed a car parked in Savage Street, Morwell with its headlights burning on high beam. He said that as the police car approached the vehicle he blinked the headlights several times, but the lights on the parked car remained on high beam and he then stopped the police vehicle and walked back to the parked vehicle.

He said that as the police car had passed the parked vehicle he had seen the defendant sitting behind the driver's wheel, and that at that stage the defendant was alone in the vehicle. By the time he arrived back at the car he said that the defendant had turned the car headlights

off and was then getting out of the car. He said that in conversation he directed the attention of the defendant to the fact that the lights were on high beam, and that the following conversation took place. He said to the defendant, "Did you drive this car here tonight?" The defendant replied, "Yes, I drove my family to my friend's place here and I am going in there now." He conceded in cross-examination that he had not at any stage actually seen the defendant driving the car.

A breath analysis was taken at the police station some time between 8.05 pm and 8.20 pm, which in fact showed a blood alcohol content above the permitted limit, and the onus which consequently depended upon the informant was that of satisfying the Court that the defendant had driven the car at some time between — taking it at its best for the defendant — 6.20 pm on that day and the time when he was seen by the informant.

I think that it is clear that a somewhat more careful interrogation by the informant in this case might have cleared up the matter that is at issue, one way or the other without any difficulty. But that additional interrogation did not take place and consequently the sole question is whether the Magistrate on the evidence that I have outlined was entitled to infer that the defendant had driven the car during that period.

Mr Ryan in moving the order absolute has suggested that there was a reasonable hypothesis which would explain the evidence, which was consistent with the innocence of the defendant. Although he put it in several forms, in substance what it amounted to was that instead of the defendant having just driven to the spot where he was seen, shortly prior to the police observing him, as the Magistrate had found, that he had in fact driven to that spot some two hours previously and his family had then gone to his friend's house which was nearby, that he himself had subsequently returned to the car for some reason, either with the intention of driving off or some other such reason, and had entered the car and had then turned the headlights on to the position in which they were when the police first observed him and that on seeing the approach of the police he changed his mind, turned the lights off, disembarked from the car and when the police asked him whether he had driven the car to that position that night, conceded that he did; and then stated to the police that he was going into his friend's place, that being at that time his actual intention.

I do not think that the doctrine as to the test to be applied to circumstantial evidence means that every hypothesis which can be advanced by counsel's ingenuity must necessarily be excluded. I think that what it does mean is that any hypothesis which reasonably arises on the evidence, and which would explain the circumstances which have been proved, in a way which is consistent with innocence of the defendant, must be excluded before it can be said that the case has been proved beyond reasonable doubt.

There is in my opinion on the evidence that was given, nothing which is suggestive of the hypothesis which Mr Ryan suggests, and indeed I can quite understand the Magistrate if he directed his mind to this particular argument, saying that the reasonableness of the hypothesis was considerably discounted by the fact that when the defendant was intercepted by the police, thereafter taken to a police station and submitted to a breath test, and questioned about what drinking he had done that night, in the whole course of that interview he makes no suggestion of any fact contained in this hypothesis which would have assisted him in his defence to the charge brought against him.

In my opinion it was open to the Magistrate to have come to the conclusion at which he did arrive, and that there was a case to answer. In other words, that he was satisfied that it was open to him to draw the inference on the evidence, as it then stood, of the guilt of the defendant and that stage having been reached and the defendant then having elected not to give evidence, then the Magistrate of course was entitled the more readily to draw an inference which was open to him to draw on the evidence which had been given by the informant.

In the circumstances the order nisi will be discharged. The defendant is to pay the informant's costs to be taxed within any limit prescribed by statute.

APPEARANCES: For the appellant/defendant Calabrese: Mr DM Ryan, counsel. Michael J Ryan & Co, solicitors. For the respondent/informant Shirreff: Mr JG Larkins, counsel. State Crown Solicitor.