22/72

SUPREME COURT OF VICTORIA

PALMER v SCOLLARY

McInerney J

16 August 1972

MOTOR TRAFFIC – DRINK/DRIVING – REFUSE TO FURNISH A SAMPLE OF BREATH WHEN REQUESTED – DEFENDANT SMELT OF INTOXICATING LIQUOR – POLICE INFORMANT AT THE HEARING DID NOT STATE HIS REASONABLE BELIEF THAT THE DEFENDANT'S DRIVING INDICATED THAT THE DEFENDANT'S ABILITY TO DRIVE WAS IMPAIRED – INFERENCES TO BE DRAWN – DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S408A.

HELD: Order nisi absolute. Conviction set aside.
1. There was no reason in a case such as this why the member of the police force concerned should not have deposed to the existence of the requisite belief, if he had that belief. If he did not depose the existence of that belief, his failure to do so may have given rise to doubts as to whether in fact he had the belief at the time in question and may have justified the Court in scrutinising very closely the sufficiency of the evidence offered as circumstantial evidence of the existence of that belief.

2. The circumstantial evidence here offered as to the facts which occurred on the roadside were not sufficient to establish the guilt of the defendant. The evidence of what took place at the police station during the interrogation and testing of the accused could not reasonably be related back to the formation of any belief as to the behaviour of the defendant whilst driving of such a kind as to indicate that his ability to drive a motor car was impaired.

McINERNEY J: This is the return of an Order Nisi to review granted by Master Brett on 12 October 1971 to review an order of the Magistrates' Court at Brunswick on 13 September 1971 whereby the defendant was convicted of an offence of having refused to furnish a sample of his breath for analysis by a breath analysing instrument, having been requested to furnish that sample.

On conviction the defendant was fined $40, his licence to drive a motor car cancelled and he was disqualified from obtaining a licence under the *Motor Car Act* 1958 for a period of nine months.

The information charged that the defendant "on the 17 April 1971 at Brunswick East having caused a member of the police force to believe on reasonable grounds that the said defendant being the driver of a motor car within the last two preceding hours did behave whilst driving or in charge of such motor car in a manner which indicated that his ability to drive was impaired at the time and being requested to furnish a sample of his breath for analysis by a breath analysing instrument did refuse to do so." The charge was laid under s408A (4) and (5). Sub-section (4)(a) provides:–

> "Where a member of the police force believes on reasonable grounds that a person
> (i) has been at any time within the last two preceding hours driving a motor car or in charge of a motor car within the meaning of s82 of the *Motor Car Act* 1958 and
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> (ii) has behaved whilst driving or in charge of a motor car in a manner which indicates that his ability to drive a motor car was impaired at the time when he was so driving or in charge of a motor car he may require that person to furnish a sample of his breath for analysis by a breath analysing instrument and that person shall subject to the provisions of para (b) furnish the sample of his breath by exhaling directly into the instrument."

Subsection (5)(a) provides:-

> "A person who is required pursuant to subsection (4) to furnish a sample of his breath for analysis and who refuses to do so shall be guilty of an offence and liable upon summary conviction in the

> case of a first offence to a penalty of not more than $100.... unless the Court is satisfied
> (i) that there were no reasonable grounds for requiring the defendant to furnish his breath for analysis or
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> (ii) that there was some other reason of a substantial character for his refusal other than a desire to avoid providing information which might be used against him."

Sub-paragraph (A)(a) of sub-section (5) empowers the Court to cancel the licence and impose a period of disqualification from obtaining a licence.

The charge arose out of an incident on the night of 17 April 1971 when the informant, John Edward Scollary, First Constable of Police attached to the Mobile Traffic Section, was riding a motor cycle west in Miller Street approaching the intersection of Nicholson Street intending to go straight across. According to his evidence he had entered the intersection and the defendant's vehicle, which was travelling north in Nicholson Street, East Brunswick, approaching the intersection of Miller Street and which was, one would assume, bound to slow down or stop or give right of way to the constable's motor cycle, failed to slow down or stop or give right or way, as a result of which the constable was forced to swing sharply to the right and turn north along Nicholson street to avoid a collision with the defendant's vehicle. The informant proceeded north along Nicholson Street and pulled left into Glenlyon Road so as to allow the defendant's car to pass so that he could then proceed to intercept. The informant testified that as the defendant's car passed him (and I assume that this means passed or entered Glenlyon Road intersection), he sounded his horn three times, approximately one second blasts. The informant said that the defendant was not overtaking another vehicle nor was there any danger to warrant his using his horn as a warning to other traffic. The informant thereupon, apparently, set in pursuit of the defendant, intercepted him just south of Blyth Street, having requested him twice to pull over and stop. The informant then detailed his observations of the defendant, asked him what his reason was for failing to give right of way to traffic on his right at the intersection of Miller Street, to which the defendant replied, "I thought you were stopped." The informant asked him, "What is your reason for the unnecessary use of your horn?" to which the defendant replied, "1 thought I should have given you a signal."

The informant says that as the defendant was speaking to him he could smell intoxicating liquor on his breath and he said to the defendant, "Have you been drinking intoxicating liquor this evening?" to which the defendant replied, "This is all a bit trivial, can't we be a bit sensible about this matter?" The informant then said, "I require you to accompany me to the Brunswick police station to furnish samples of your breath for analysis. Are you prepared to furnish a sample of your breath?" The defendant said, "Come on now, we're both intelligent enough to be sensible, the whole thing is a bit trivial, isn't it?" The informant then walked across the street to ring up, saw the defendant get out of the car and start walking down the street in the rain, went back to the defendant and said, "Hop back in the car out of the rain." The defendant went back to the car, came out again holding a bottle of beer and said, "I'm going to drink this and you're not going to stop me." The constable said, "Don't be silly, give it to me", and then some sort of incident occurred, as a result of which two informations were subsequently laid against the defendant, one for assault and another charging that "he broke or caused to be broken glass in a public place, to wit Nicholson Street, without the express consent of the person or authority having the control and management of the place."

The informant, having arrested the defendant, conducted him to the police station, at Brunswick, where a record of interview was conducted, starting at 9 o'clock. The informant gave evidence of the questions and answers put in the record of interview and of tests for sobriety which he conducted and which the defendant does not appear to have been able to perform very well. At 9.55 p.m. the informant again said to the defendant, "I believe on reasonable grounds that you were driving a motor car during the last two preceding hours in a manner which indicated that your ability to drive a motor car was impaired and I require you to furnish a sample of your breath for analysis by this approved breath analysing instrument." The defendant refused to answer and when warned that he might be charged with an offence if he refused he said, "When the inspector comes." When asked whether he had a reason for refusing to furnish a sample of his breath he said, "No reason I could add, but I think that covers it." Later, when Inspector Darley arrived at 10.05p.m. he again repeated his refusal.

The informant did not at any stage of his evidence expressly give evidence that he had believed that the defendant had been driving a motor car within the period of two hours preceding the making of the request to furnish the sample of his breath or that he had believed the defendant had behaved whilst driving or in charge of a motor car in a manner which indicated that his ability to drive a motor car was impaired at the time when he was so driving or in charge of the motor car.

Having regard to the fact that the defendant was arrested, he must, on any view of it, have ceased to be in charge of the motor car at the time of his arrest, but in any event, the term "in charge of a motor car" within the meaning of s408A(4)(a) imports a reference back to the definition of that phrase in s82(1)(c) of the *Motor Car Act*, which provides that for the purpose of that subsection:-

> "A person shall not be deemed to be in charge of a motor car unless he is attempting to start or drive the motor car or unless there are reasonable grounds for the belief that he intends to start or drive the motor car."

There is no evidence that the defendant attempted to start or drive the motor car after he had been intercepted by the informant nor did the informant testify that he had any belief that the defendant intended to start or drive the motor car.

At the hearing, Mr Hore-Lacy of counsel for the defendant, mindful of an unreported decision of Gowans J in the matter of *Staples v McGill* delivered on 22 September 1969, astutely refrained from any cross-examination of the informant as to whether he had formed any belief concerning the defendant's impairment while driving or otherwise, except as above-mentioned, and did not cross-examine him as to the reasonableness of any such belief.

The informant's case having closed, counsel for the defendant submitted there was no case to answer and in support of that submission contended that there was no evidence that First Constable Scollary believed that the defendant being the driver of a motor car within the last two preceding hours had behaved whilst driving or in charge of such motor car in a manner which indicated his ability to drive was impaired at the time. He further contended that there was no evidence about the defendant's driving on which Constable Scollary could form a reasonable belief.

The magistrate over-ruled those submissions. The defendant thereupon gave evidence. He testified, amongst other things, that he believed that at all times he was sober and that his driving was not impaired at the relevant time.

The material in support of the order nisi does not give the relevant evidence of the defendant in any greater detail than I have just given and there has been an answering affidavit filed which would supplement the account of the defendant's evidence there given.

The order nisi was granted on two grounds,

> (1) that there was no evidence before the magistrate that First Constable Scollary or any other member of the police force had any belief as to the matters set out in s408(A)(4) of the *Crimes Act* as amended;
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> (2) that there was no evidence before the magistrate of any grounds on which First Constable Scollary or any other member of the police force based any belief that he may have had on any other matters set out in the aforesaid subsection.

Mr Hore-Lacy put his opening submission very simply. He pointed to the fact that there was not anywhere in the evidence any statement by the informant giving his evidence that he had had the belief which is required by s408A(4)(a).

Mr Ryan for the informant to show cause conceded that this was so, but relied on a number of decisions given in other States, in particular in South Australia, Western Australia and Queensland, to support the proposition that it is not necessary in a prosecution for this offence for the informant to depose directly on oath in the witness box to the fact that he had the requisite belief. Mr Ryan, as I understood it, accepted the following propositions as basic to his argument.

First, that in a prosecution such as was here in question it is necessary for the informant to prove that a member of the police force had the requisite belief prescribed by sub-section (4) of s408A and furthermore that such belief was based on reasonable grounds. Secondly, that the existence of such belief may be proved either by the direct testimony of the member of the police force concerned in the witness box that at the relevant time he had the requisite belief, or by proof of circumstances from which it can reasonably be inferred that he had the requisite belief.

If no direct evidence of the existence of the relevant belief is given by the informant or other police officer concerned, then the informant must prove facts which permit the Court to draw the inference that at the relevant time the constable had the requisite belief. Mr Ryan concedes, as I understand it, that it is not sufficient that the facts proved before the Court at the hearing should constitute ground for a suspicion on the part of the Court when the case comes before it: (see *Henderson v Surfield & Carter* [1927] SASR 31 at p34 in the judgment of Richards AJ).

Mr Ryan cited a number of authorities in support of these propositions, beginning with *Corsten v Noblet* [1927] SASR 421; *Henderson v Surfield & Carter* [1927] SASR 31; *Cox v Angove* (1929) 32 WALR 75; *Harty v Harcourt; Ex parte Harcourt and O'Brien* [1936] St RQd 1; 30 QJPR 4; *Low v Snow; Ex parte Snow* [1945] St RQd 104; 39 QJPR 123; *Le Poidevin v Hudson* [1935] SASR 223; *Wallace v Hansberry* [1959] SASR 20 at p75.

I accept those propositions which were put forward by Mr Ryan in the course of discussion with me with, however, the one qualification, namely, that this being a criminal case the prosecution insofar as it relies on circumstantial evidence is bound to prove its case to the extent that the facts proved exclude all reasonable hypotheses consistent with innocence. I adopt that phrase from the unreported judgment of the Full Court of the High Court in *Bradshaw v McEwans Pty Ltd* 1951 (unreported), cited in the joint judgment of Sir Owen Dixon, Fullagar and Kitto JJ in *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352 at p358; [1952] ALR 308, where this passage was quoted:—

> "The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, whilst in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort (referring to civil cases) where direct proof is not available it is enough if the circumstances appearing in evidence rise to a reasonable and definite inference, they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter or conjecture."

The facts which could be relied on as circumstantial evidence to support an inference as to the belief of the constable are these: there is the fact that he saw the defendant driving, the fact that the defendant failed to give way to him when he, the informant, was the vehicle on his right approaching or entering the intersection of Miller Street and Nicholson Street from the defendant's right. There is the fact that the defendant, as he drove through the intersection of Nicholson Street and Glenlyon Road tooted his horn three times, in circumstances in which he was not under the relevant regulations entitled to toot his horn. There is the fact that he had to he directed twice to pull over before he finally did so. Those were the observations which the informant made as to the driving and behaviour of the defendant while driving and the manner of driving. To that may be added the further fact that the defendant's breath smelt of liquor while he was answering questions put by the informant to him at the time of the interception.

The defendant's answers to the questions were, in one sense, intelligent enough and no inference adverse to the defendant could, I think, be drawn beyond reasonable doubt from those answers. In my view, all the incidents concerning the behaviour of the defendant while driving or in charge of the motor car, including in those incidents the conduct of the defendant in getting out of the car and walking down the street in the rain, then getting into the car and later getting out with a bottle of beer which he asserted he was going to drink are facts which are consistent with an inference that the defendant had driven his motor car in a way which infringed the regulations. They are consistent with the constable having determined to intercept him in order to deal with him for his breach of the traffic regulations.

There is nothing in the material which establishes, in such a fashion as to exclude all reasonable hypotheses consistent with innocence, the proposition that the ability of the defendant

to drive a motor car had been impaired at the time when he was driving. The only other facts which emerge out of the interceptions are the acts of the defendant in getting a bottle of beer and asserting his determination to drink it, but this action and this assertion both took place after he had been required to go to the Brunswick Police Station to furnish a sample of his breath for analysis, and this conduct is consistent with an intention on the defendant's part to defeat or destroy the utility of the breath test.

I adapt to this section, with respect, what was said by Piper J in *Corsten v Noblet* [1927] SASR 421 at p424, in relation to the "suspected property" section of the *Police Act*. He pointed out that the section:

> "makes a serious departure from the common law and encroaches greatly upon the liberty of the subject. It is not necessary to enlarge upon that. A condition precedent to the charge is that a suspicion is in fact held that the goods have been stolen or unlawfully obtained. There is no difficulty at all in a constable deposing to the fact of suspicion when it has existed and there is good reason for requiring him to pledge his oath on the subject. The fact that he has not done so may create a doubt of his being fully able to do so. His inability to do it might be due to various causes but particularly it might happen that he knew facts not mentioned in evidence which excluded from his mind the particular suspicion necessary to the case."

When one bears in mind the original interception was attributable to the informant's having observed infractions of the Traffic Code and determined to intercept and charge the defendant with those breaches, it seems to me that the inferences which can be drawn from the evidence are not such as to exclude, beyond reasonable doubt, the possibility of innocence of this charge.

I accept that there is a distinction between a case where a Magistrate has convicted and the case such as *Staples v McGill* where a Magistrate has acquitted and the question is simply whether there is any evidence before the Magistrate that the constable held the belief to which he has not deposed. Nevertheless I also accept and agree with the comments made by Gowans J in that case that "having regard to the fact that the constable, in his evidence, never at any time testified to having had the belief which the section requires and never at any time specified that the facts to which I have referred were the facts on which he based the suspicion which was necessary to justify him in requiring the defendant to submit to a breath test, ... it becomes impossible in any event to determine the reasonableness or otherwise of the grounds on which the informant held his belief, since neither the belief nor the grounds were stated."

I see no reason in a case such as this why the member of the police force concerned should not depose to the existence of the requisite belief, if he has that belief. If he does not depose the existence of that belief, his failure to do so may give rise to doubts as to whether in fact he had the belief at the time in question and may justify the Court in scrutinising very closely the sufficiency of the evidence offered as circumstantial evidence of the existence of that belief.

In my opinion, the circumstantial evidence here offered as to the facts which occurred on the roadside were not sufficient to establish the guilt of the defendant. I am also of the view that the evidence of what took place at the police station during the interrogation and testing of the accused cannot reasonably be related back to the formation of any belief as to the behaviour of the defendant whilst driving of such a kind as to indicate that his ability to drive a motor car was impaired.

I think the first ground really requires some amendment, because the evidence does, as I say justify an inference that the constable had the belief that the defendant was driving. The real point is that there was no evidence on which the Magistrate could find that the informant or any other member of the police had any belief as to the matters set out in sub-para (2) of para.(a) of s408(A)(4).

Mr HORE-LACY: I seek to amend in accordance with Your Honour's observation.
HIS HONOUR: I will give you leave to make that amendment and on that ground as amended I will make the order nisi absolute. I think it is unnecessary to say anything as to ground 2 in the circumstances, which might have required further argument. The order of the Magistrates' Court will be set aside and with it the conviction, the fine, the cancellation of the licence and the order of disqualification. I do not think it would be right in the circumstances to remit the information

for rehearing Mr Ryan.
Mr RYAN: I am not instructed to what attitude the Crown takes about this matter – would Your Honour pardon me for a moment. Yes I am instructed not to seek that it be remitted sir.
HIS HONOUR: I think it would present a great temptation to remedy the defect and that kind of temptation should not be presented.
Mr RYAN: I was not really concerned in seeking those instructions about that temptation so much sir, but the observation could perhaps be made that the Magistrate's mind might have been influenced in fixing penalties for other convictions by the penalty which he imposed on this one, but I am instructed not to seek a remission.
HIS HONOUR: Are you asking for costs?
Mr HORE-LACY: Yes Your Honour.
HIS HONOUR: The usual order as to costs limited to $200.
Mr RYAN: Would Your Honour grant a certificate under *Appeals Costs Fund Act*?
HIS HONOUR: Yes I will do that. I will return your copy – I think it is Mr Ryan's copy.

APPEARANCES: For the defendant/applicant Palmer: Mr D Hore-Lacy, counsel. Messrs Yelland, Shuster & Associates, solicitors. For the Informant/Respondent Scollary: Mr DK Ryan counsel. Mr John Downey, solicitor.
