40/75

SUPREME COURT OF VICTORIA

DOWDELL v PARK'NICOLL

Harris J

12 June 1975

MOTOR TRAFFIC – DRINK/DRIVING – READING OF 0.16%BAC – POST DRIVING CONSUMPTION OF ALCOHOL – ACCEPTED BY COURT – CHARGE DISMISSED – WHETHER COURT IN ERROR: *MOTOR CAR ACT* 1958, S81A.

The defendant was involved in a collision whilst driving his motor car. After the collision he went home and according to his evidence and that of his wife, he consumed "two or three inches in a normal size drinking glass" of brandy. Later within two hours after the defendant was driving the defendant was breathalyzed at the police station with a reading of .160%.

It was submitted to the Justices at the hearing of an information for .05% (s81A of *Motor Car Act* 1958) that if the Court accepted that the defendant had the brandy mentioned between the time of collision and the time of taking the breath test it must follow that the brandy would affect the reading of .16% and therefore the charge should be dismissed. The prosecutor made submissions to the contrary. The Justices were referred to *Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225 and *Turner v Bunworth* an unreported decision of Menhennitt J of 10.6.1970. Upon order nisi to review—

HELD: Order absolute. Dismissal set aside.
1. It is s80F(3) of the *Motor Car Act* 1958 which made the certificate which was tendered in this case *prima facie* evidence in any proceedings which were referred to in sub-s(1) of the fact and matter stated therein unless the accused person gave notice in writing to the informant a reasonable time in the circumstances before the hearing that he required the person giving the certificate to be called as a witness. The substance of the provision was that the certificate in the appropriate form was *prima facie* evidence in the proceedings against the defendant of the facts and matters stated therein.

2. The evidence which the Justices accepted established that the defendant had consumed alcohol between the time of the alleged offence and the time that the blood test was taken, but that was all that it established. There was no way at all in which from that evidence the Justices could have come to the conclusion that at the time of the accident the defendant's blood alcohol content was some other particular percentage or could have concluded what was the blood alcohol content of the defendant's blood at the time of the offence, and there was also no way in which from that evidence the Justices could have come to the conclusion that at the time of the offence the blood alcohol content of the defendant was less than .05 per cent. Unless the evidence could have enabled the Court to come to one or other of those conclusions, then the evidence which had been called and accepted was insufficient to prove the contrary of what had to be presumed by virtue of the provisions of s80G.
***Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225, followed.**
***R v Durrant* (1969) 3 All ER 1357, distinguished.**

HARRIS J: The Justices, when they came back into the Court, stated that they had considered the submissions. The Chairman referred to a case called *R v Durrant* reported in (1969) 3 All ER 1357. The Chairman said that in that case it was established that once an amount of liquor had been consumed between the time of driving and the time of the breath test, it was on the prosecution to rebut this evidence. The Chairman said that the Bench accepted that the defendant did consume an amount of brandy after this collision and, in respect of this fact and in view of the matters contained in *Durrant's Case*, that the provision of s80G of the *Motor Car Act* no longer applied.

The Sergeant of Police urged the Justices of the Peace that they should follow *Holdsworth v Fox* and the effect of that case was explained to them, as the affidavit in support of the order nisi shows. Notwithstanding the argument that was put, the information was dismissed and the Chairman said that the Bench based its decision on *R v Durrant*. There were two other charges against the defendant which they were hearing and he was convicted on those charges.

The case that the Justices had obtained, apparently through their own investigations, was a case under the *Road Safety Act* 1967 of the United Kingdom. The relevant provisions of that Act are contained in s1(1), and they are stated at p1358 of the report as follows:

> 'If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under s3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable ..."

and then followed further words which are not material.

That being the legislation which the Court of Appeal in its Criminal Division had to consider, the Court reached a decision, the substance of which is set out in the headnote of the report. The effect of the decision as stated in the headnote is this:

> "An offence under s1(1) of the *Road Safety Act* 1967 is committed only if the proportion of alcohol in the person's blood exceeded the prescribed limit at the time of driving. Accordingly, if a person has consumed alcohol after he has ceased to drive, any specimen provided subsequently by him would not relate to the proportion of alcohol in his blood at the relevant time, i.e. at the time of driving."

The problem about applying that to an offence under the Victorian *Motor Car Act* is that the provisions of the Victorian *Motor Car Act* are different from those of the English legislation.

It is s80F(3) which makes the certificate which was tendered in this case *prima facie* evidence in any proceedings which are referred to in sub-s(1) (these were proceedings of that kind) of the fact and matter stated therein unless the accused person gives notice in writing to the informant a reasonable time in the circumstances before the hearing that he requires the person giving the certificate to be called as a witness. The substance of the provision is that the certificate in the appropriate form is *prima facie* evidence in the proceedings against the defendant of the facts and matters stated therein. (See Section 80G)

In this case the prosecution was entitled to rely upon that section to establish that a blood alcohol content of .160 percentage at 1.40am on the 28th August 1974 was evidence that the percentage of blood alcohol present in the defendant's blood at the time the offence was committed was .160, because the time at which the offence was alleged to have been committed was within two hours before 1.40am.

The effect of the presumption and the meaning of the words 'until the contrary is proved' were considered by Menhennitt J in the case of *Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225. This was a decision to which the Sergeant of Police referred the Justices. The conclusion which His Honour came to is stated (at p229) in this paragraph:

> "In other words, in my view, once it is proved that within two hours of driving the percentage of alcohol present in the blood of a person was a certain figure, the onus is then thrown on that person to prove that at the time of the driving the percentage of alcohol present in his blood was a different percentage, being either some other precise percentage or, at the very least, a percentage lower than is significant for any relevant purpose. 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."

This was a decision that was binding upon the Justices. The effect of it is stated with complete clarity in the passage that I have read out.

The application of that case to the evidence in the present case is this. The evidence which the Justices accepted did establish that the defendant had consumed alcohol between the time of the alleged offence and the time that the blood test was taken, but that is all that it established. There was no way at all in which from that evidence the Justices could have come to the conclusion that at the time of the accident the defendant's blood alcohol content was some other particular percentage. In other words, there was no way in which from that evidence the Justices could have concluded what was the blood alcohol content of the defendant's blood at the time of the

offence, and there was also no way in which from that evidence the Justices could have come to the conclusion that at the time of the offence the blood alcohol content of the defendant was less than .05 per cent. Unless the evidence could have enabled the Court to come to one or other of those conclusions, then the evidence which had been called and accepted was insufficient to prove the contrary of what had to be presumed by virtue of the provisions of s80G.

The result is that the Justices were in error in coming to the decision that they did. They ought not to have dismissed the information but they should have convicted the defendant. The case upon which the Justices relied is not relevant to the consideration of the provisions of s80G. The English legislation follows a different pattern from the Victorian legislation. From what I have said, it follows that the order of the Justices must be set aside.

[The defendant was then convicted and fined $60 his licence to drive a motor car cancelled and he was disqualified from obtaining a licence for a period of twelve months from the date of this decision namely 12 June 1975.]
[Ed note: See *Heywood v Robinson* [1975] VicRp 55; [1975] VR 562 at p570.]
