81/76

SUPREME COURT OF VICTORIA

FARNSWORTH v REYNOLDS

Nelson J

30 August 1976

MOTOR TRAFFIC – DRINK/DRIVING – BAC.190% – PROPER INTERPRETATION OF S80G OF *MOTOR CAR ACT* 1958 – REBUTTAL EVIDENCE OF PRESUMPTION AS TO LEVEL OF ALCOHOL IN BLOOD – SUCH EVIDENCE ACCEPTED BY THE MAGISTRATE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80G.

The prosecution led evidence showing that the defendant had a blood/alcohol reading of .190%. The defendant led evidence from himself and witnesses as to how much alcohol he had consumed prior to driving. He also submitted to tests conducted by an industrial chemist which showed that the defendant would have had blood/alcohol levels of .110% and .074%. The magistrate accepted the evidence given by and on behalf of the defendant and dismissed the charge. Upon Order Nisi to review—

HELD: Order absolute. Remitted to the Magistrates' Court for rehearing.
1. What is required for the operation of s80G of the *Motor Car Act* 1958 is that it be established that at any time within two hours after an alleged offence, a certain percentage of alcohol was present in the blood of the person charged. That fact might be established by an analysis carried out in accordance with the provisions of sections 80D or 80F or it may be established by other evidence.

2. The section does not require that it be established that a certain percentage of alcohol, and no more than that percentage, was present at the relevant time in the blood of the person charged. The possibility, or indeed the certainty, that a higher percentage of alcohol than a specified percentage was present in the blood does not affect the establishment of the fact that the specified percentage was present. The greater includes the less. If the evidence established that a percentage of not less than a certain percentage was present, then it was established that such certain percentage was present and the presumption in the section applied to that percentage until the contrary was proved. The presumption was that not less than that percentage was present in the person's blood at the time at which the offence alleged to have been committed.

3. The information could only be dismissed if, on a consideration of the whole of the relevant evidence, the Magistrate was not satisfied beyond reasonable doubt that at the time of the offence the percentage of alcohol in the blood of the defendant was more than .05 per cent. The relevant evidence included the evidence given by the defendant and his witnesses, which evidence the Magistrate stated he accepted as to the amount of alcohol consumed by the defendant and as to the substantial identity of the conditions under which the subsequent tests were made with those existing on the day of the offence. The evidence could and should have been assessed by the Magistrate in two ways.

4. Firstly, in view of the different percentages shown in the two tests conducted on the later occasion, the Magistrate would have been faced with a problem as to what percentage of alcohol, if any, he would find established. But he was clearly entitled to find that at least the lower percentage was established. If he did so find, the provisions of s80G would apply and there was no evidence to prove the contrary of the presence of that percentage of alcohol in the blood of the defendant at the time of the offence.
***Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225, applied.**

5. Secondly, and apart altogether from the question of whether s80G applied, the evidence may have had to be assessed from a different point of view; namely as to whether it satisfied the Magistrate that at the time of the offence the percentage of alcohol in the blood of the defendant was more than .05 per centum. If the Magistrate by the process discussed had come to the conclusion that it was established that the percentage of alcohol in the blood of the defendant at any time within two hours after the alleged offence was a certain percentage, or not less than a certain percentage, the second question would be merely one of academic interest, because the provisions of s80G would relate the percentage back to the time of the offence.

6. It is apparent from the reasons for his decision that the Magistrate in this case did not direct

his mind to the inferences which could properly be drawn in favour of the informant's case from the evidence of the defendant and his witnesses. He based his decision solely on his refusal to accept the accuracy of the reading on the breathalyzing instrument operated by the police. To do that was to base his decision on one aspect of the evidence alone and on the evidence in this case he was in error in so doing.

NELSON J: *[His Honour after directing his attention to the contents of relevant sections in the Motor Car Act said:]* ... These two sections (meaning s80D(1) and s80F(1)) only relate to the percentage of alcohol in the blood at the time of the analysis, but s80G then operates to relate back the percentage so found to the time at which the offence is alleged to have been committed. The section clearly applies to percentages of alcohol found upon an analysis, to which sections 80D and 80F relate, but it is not in terms limited in its application to percentages so found.

What is required for the operation of s80G is that it be established that at any time within two hours after an alleged offence, a certain percentage of alcohol was present in the blood of the person charged. That fact might be established by an analysis carried out in accordance with the provisions of sections 80D or 80F or it may be established by other evidence.

In my opinion, the section does not require that it be established that a certain percentage of alcohol, and no more than that percentage, was present at the relevant time in the blood of the person charged. The possibility, or indeed the certainty, that a higher percentage of alcohol than a specified percentage was present in the blood does not affect the establishment of the fact that the specified percentage was present. The greater includes the less. If the evidence establishes that a percentage of not less than a certain percentage was present, then it is established that such certain percentage was present and the presumption in the section applies to that percentage until the contrary is proved. The presumption is that not less than that percentage was present in the person's blood at the time at which the offence alleged to have been committed.

As a matter of ordinary language, 'the contrary' of that presumption is that less than that percentage was present in the person's blood at the time of the alleged offence. The section requires that such 'contrary' shall be proved before the presumption ceases to operate. It has however been held in this court as a matter of construction of the section that proof of the contrary means proof of a specific figure, different from that which would be presumed, or at the very least proof of a percentage lower than is significant for any relevant purpose (*Holdsworth v Fox* [1974] VicRp 27; (1974) VR 225, at p229.) The reference to a figure 'different from that which would be presumed' must, of course, mean a figure lower that that which would be presumed as otherwise the proof would not be to the contrary of a presumption that the percentage was not less than the percentage previously established. Magistrates' Courts are, of course, bound by the interpretations of the section so given by this court unless or until that interpretation is shown to be erroneous by the decision of a court of equal or greater authority binding upon them.

It is now necessary to consider the application of s80G as so interpreted to the case of the prosecution for an offence under s81A. The offence under ss(1) is committed if a person drives a motor car while the percentage of alcohol in his blood is more than .05 per cent. If it is established that at any time within two hours after the alleged offence not less than a certain percentage of alcohol was present in his blood, then by virtue of s80G it shall be presumed, until the contrary is proved, that not less than that percentage of alcohol was present in his blood at the time of the alleged offence. The contrary is not proved until it is proved that at the time of the alleged offence there was a specific percentage of alcohol in his blood which was less than the presumed percentage, or at least that he had a percentage of alcohol in his blood which was no more than .05 per cent, as that is the only percentage which is relevant for the purpose of this sub-section. Proof that he had at the time of the offence a specific percentage of alcohol in his blood which was less than the presumed percentage but which still exceeded .05 per centum would not be relevant for the purpose of ss(1).

The position under the various paragraphs of s81A(3) in relation to penalty may be similarly analysed. Although in some of those paragraphs the relevant percentage of alcohol is described to be more than a certain percentage and less than a specified higher percentage, the latter percentage merely marks the transitional stage to the position where a more severe penalty is applicable. The relevant percentage for the purpose of the paragraph is the lower percentage stated, the higher

percentage only becoming relevant when the question is whether the higher penalty described by the immediately succeeding paragraph is the appropriate penalty. If it is then the provisions of the immediately preceding paragraph become irrelevant.

I turn now to consider the relevant facts in the matter before me in the light of the observation I have made on the application of the section. Evidence was given that within two hours of the alleged offence on the 7th May 1976, a breath test was conducted upon the defendant under the conditions provided for in s80F and that the percentage of alcohol indicated to be present in his blood by the breath analysing instrument was .190 per cent. The defendant gave evidence that on the day of the alleged offence he had consumed a certain quantity of whisky, described as seven half whiskies spread over certain hours. Because of the findings of fact of the Stipendiary Magistrate, it is unnecessary to describe that evidence in greater detail.

Evidence was given for the defence that on a subsequent but unspecified day certain tests were conducted on the defendant. Again, in view of the findings of fact by the Magistrate, it is unnecessary to describe that evidence in greater detail.

Evidence was given for the defence that on a subsequent but unspecified day certain tests were conducted on the defendant again, in view of the findings of fact by the Magistrate, it is unnecessary for me to describe that evidence in detail. The Magistrate found, as I interpret his reasons, that on such subsequent day the defendant had consumed the same quantity of alcohol as he had on the day of the alleged offence, and he also found 'that the conditions under which the alcohol was consumed were substantially the same as those under which the alcohol had been consumed on the day of the offence.

Evidence was given by one Frank Parsons, an industrial chemist, that following the consumption of alcohol for the purpose of the test, a blood sample was taken from the defendant and given to the witness. He said that he subsequently, using a device similar to an approved breath analysing instrument, analysed a sample of the defendant's breath and obtained a reading of .110 per centum blood alcohol. He analysed the blood sample and obtained a reading of .074 per centum blood alcohol. He could not account for the difference in the readings obtained upon the two analyses. He also expressed the opinion, although his qualifications to express this opinion did not appear on the evidence, that the highest reading it would have been possible to obtain from an analysis of the blood sample on the evening such sample was taken was .097 percent blood alcohol and further, that to reach the reading recorded on the night of the test conducted by the police, the defendant would have had to consume the equivalent of twenty glasses of the alcohol content used in the tests.

The Magistrate dismissed the information and I have not found his reasons as set out in the affidavit of the informant, together with the additional material contained in the answering affidavit, easy to interpret. It is, I think, clear that he did not find it established that at the time of the breath test by the police the percentage of .190 per centum was present in the blood of the defendant. That in itself, of course, would mean that it would not be presumed under s80G that not less than that percentage of alcohol was present in the defendant's blood at the time of the offence, and there would be no need to refer to any proof to the contrary to a presumption which could not be made, but I think the only meaning which can be attached to the Magistrate's use of the expression is that he was finding proved that less than a percentage of .190 per centum was present in the defendant's blood at the time of the offence. This in itself would obviously not justify the dismissal of the information. But it is the only reason relied upon by the Magistrate for his immediately following statement that the prosecution have failed to show that at the actual time of driving the defendant's blood alcohol content was in excess of .05 per cent.

The information could only be dismissed if, on a consideration of the whole of the relevant evidence, the Magistrate was not satisfied beyond reasonable doubt that at the time of the offence the percentage of alcohol in the blood of the defendant was more than .05 per cent. The relevant evidence included, of course, the evidence given by the defendant and his witnesses, which evidence the Magistrate stated he accepted as to the amount of alcohol consumed by the defendant and as to the substantial identity of the conditions under which the subsequent tests were made with those existing on the day of the offence. The evidence could and should have been assessed by the Magistrate in two ways.

Firstly, in order to determine whether s80G applied, he had to consider whether it was established that at any time within two hours after the alleged offence a certain percentage of alcohol was present. If such a finding is made, the presumption of the section applies and the Magistrate is bound to apply to until the contrary is proved, in the sense in which Menhennitt J interpreted those words in *Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225.

In considering whether such a finding should be made, the magistrate would not be limited to the consideration of evidence of any actual analysis made in a two hour period and consequently the rejection of the reading given by the breath analysing instrument would not conclude the matter. He must consider what inference he should properly draw from the evidence which he accepts. In this case the Magistrate had evidence which he accepted as to the quantity of alcohol which the defendant had consumed; he had evidence which he accepted, that some days later tests were made on the same man under substantially the same conditions to ascertain the percentage of alcohol in his blood after he had consumed the same amount of alcohol; he had evidence that the tests so made showed that the percentage of alcohol present in the defendant's blood was, according to a breath test, a percentage of .110 and, according to the blood test, a percentage of .074. He accepted that evidence as proving, that the percentage of alcohol in the blood at the time of the police breathalyzer test some days before was less than .190 per cent. Once he was satisfied that the tests so made could fairly be accepted to negate the presence of a certain percentage of alcohol in the blood at the time of the police test, he was clearly entitled to accept them to establish the percentage of alcohol present in the blood at that time, although, of course, the standard of proof to be established would be a higher one.

In view of the different percentages shown in the two tests conducted on the later occasion, he would, of course, be faced with a problem as to what percentage of alcohol, if any, he would find established. But he was clearly entitled to find that at least the lower percentage was established. If he did so find, the provisions of s80G would apply and there was no evidence to prove the contrary of the presence of that percentage of alcohol in the blood of the defendant at the time of the offence.

Secondly, and apart altogether from the question of whether s80G applied, the evidence may have had to be assessed from a different point of view; namely as to whether it satisfied the Magistrate that at the time of the offence the percentage of alcohol in the blood of the defendant was more than .05 per centum. If, of course, the Magistrate by the process I have discussed had come to the conclusion that it was established that the percentage of alcohol in the blood of the defendant at any time within two hours after the alleged offence was a certain percentage, or not less than a certain percentage, the second question would be merely one of academic interest, because the provisions of s80G would relate the percentage back to the time of the offence.

It may in any event in the circumstances of this case be a question of academic interest only since, unless the Magistrate were prepared to infer from the evidence that a certain percentage of alcohol was present in the blood of the defendant at any time within two hours after the offence, it is difficult to see how he could infer that that percentage of alcohol was present in the defendant's blood at the time of the offence. What I desire to emphasise, however, is that in all cases the court is entitled to consider all the relevant evidence and the inferences that it can properly draw from that evidence in determining whether it is satisfied that the offence is proved.

It is not required in all cases to rely upon the presumption contained in s80G, in order to determine the percentage of alcohol in the blood of the defendant at the time of the offence. If it can determine that fact by a proper process of reasoning and inference from the proved facts, it is entitled so to determine it. In cases to which s80G does not apply, and it is assessing the value of evidence from which it can determine the percentage of alcohol present in the blood of the defendant at some time subsequent to the offence, it must of course consider whether any conclusions can properly be drawn from such evidence as to the percentage of alcohol in the blood at the time of the offence; but it is not disqualified from drawing such a conclusion by the provisions of s80G.

In my opinion, it is apparent from the reasons for his decision that the Magistrate in this case did not direct his mind to the inferences which could properly be drawn in favour of the informant's case from the evidence of the defendant and his witnesses. He based his decision solely on his refusal to accept the accuracy of the reading on the breathalyzing instrument operated by the

police. To do that was to base his decision on one aspect of the evidence alone and in my opinion on the evidence in this case he was in error in so doing.

Mr Hassett for the defendant contended that even if I were satisfied that the Magistrate was in error, I should not make the order absolute as the information must upon the evidence in any event be dismissed. He relied for this contention upon the argument that the affidavits did not disclose that the Schedule Seven certificate, or a copy thereof, had been put in evidence, and accordingly that it had not proved that ss(2) of s80F had been complied with (*Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596, at p607-8).

There are two short answers to this submission. In the first place, although neither of the affidavits before me asserts positively either that a Schedule Seven certificate or a copy thereof was or was not put in evidence, the Magistrate in his reasons does refer to such a certificate and it would appear therefore that it was put in evidence. Secondly the requirements as to the proper proof of such a certificate relate only to the effect of evidence of the percentage of alcohol present in the blood as indicated by a breath analysing instrument operated by a person authorised in that behalf by the Chief Commissioner of Police. It is not the effect of such evidence which is in issue on this order to review. The magistrate declined to give such evidence the effect the section gives to it if ss.(2) of s80F was complied with, and I have held it would still be open to him to convict on the other evidence before him.

As this matter will be referred back to the court for re-hearing, I add the observation that although the evidence as to the taking of samples of blood and breath by Mr Parsons and their analysis was admitted by the Magistrate, and I have dealt with it on that basis, it is not made admissible, nor is its effect governed by the provisions of s80D or 80F. Neither section, however, affects the admissibility of any evidence which might be given apart from the provisions of the section.
