01/82

SUPREME COURT OF VICTORIA

TAYLOR v LAWRENCE

Jenkinson J

14 October 1981

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE TAKEN – CERTIFICATES FROM MEDICAL PRACTITIONER AND ANALYST TENDERED IN EVIDENCE – DEFENDANT'S FIRST NAME INCORRECT IN CERTIFICATES – "ROBERT" INSTEAD OF "ROBIN" – SUBMISSION OF "NO CASE" – MAGISTRATE NOT SATISFIED THAT THE DEFENDANT WAS THE SAME PERSON FROM WHOM THE BLOOD SAMPLE TAKEN – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

1. Where a blood sample was taken from a person in a hospital serving a small town and in a not heavily populated district, it compelled an inference that the person to whom the maker of the certificate referred to as 'Robert Lawrence' was the defendant 'Robin Arthur Lawrence'. That inference, together with the other evidence was sufficient to satisfy a reasonable tribunal of fact beyond reasonable doubt that the defendant was guilty of the offence of drink/driving.

2. Accordingly, the magistrate was in error in upholding the 'no case' submission and dismissing the charge.

JENKINSON J: Return of an order nisi to review an order of the Magistrates' Court at Ouyen dismissing an information that the respondent on the 16th June 1980 at Daytrap drove a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood exceeded more than .05 per centum.

The evidence in support of the information by the informant, James Rodger Taylor, a Sergeant of Police, who is the applicant, was that Sergeant Taylor saw the respondent in the casualty room of the Ouyen District Hospital at 11:22am on Tuesday the 17th June 1980 where the respondent in answer to questions by the applicant informed the applicant that his name was Robin Arthur Lawrence of Pier Millan and that a motor car which the respondent had been driving at about half past five in the afternoon on Monday the 16th June 1980 had overturned on a road at Daytrap. According to the applicant's evidence before the Magistrates' Court, the respondent further informed the applicant that there was no passenger in the car at the time it overturned; that from 11 o'clock in the morning on the 16th June until about 5 o'clock on that day the respondent had consumed the contents of what he called about half a dozen stubbies; that he had been brought to the Ouyen Hospital after the accident by his father; and that he had not been in a condition to enable him to report the accident to the police.

The applicant gave other evidence of marks on the Calder Highway at a point called Daytrap Corner which suggested that a car had overturned shortly before the applicant's examination of the scene on 18th June; and he also gave evidence that on the 23rd June at the Ouyen Police Station the respondent had agreed with the suggestion by the applicant that the respondent had been admitted to the Ouyen Hospital at 6:30pm. The applicant also gave evidence that at about the time when his conversation with the respondent at the police station on the 23rd June concluded he had said to the respondent: "When you were admitted to the Ouyen Hospital on the 16th day of June, a blood sample was taken from you. It will be analysed and if it shows you had a blood alcohol content in excess of 0.05 per cent, you will receive a summons." The applicant gave no evidence before the Magistrates' Court of any response to that statement by the respondent.

The applicant tendered before the Magistrates' Court two certificates. One was in the form prescribed by the Sixth Schedule to the *Motor Car Act* 1958 and that certificate reads:

> "I, Ronald William Pattinson of Britt Street, Ouyen, a legally qualified medical practitioner hereby certify that I collected a sample of the blood of Robert Lawrence, RSD. Pier Millan at 7:05pm on 16th

June 1980, and that all the regulations relating to the collection of such sample were complied with and that such sample was placed in two containers labelled:
Name of Person: Robert Lawrence
Date Taken: 16th June 1980
Time taken: 7:05pm
Signature: (The signature is not decipherable by me)
Qualifications: M.B.B.S."

The certificate is dated 16th June 1980. The other certificate tendered was in the form prescribed by the Eighth Schedule to the *Motor Car Act* 1958. It reads:-

"I, Reginald John Cunneen of the Forensic Science Laboratory, 193 Spring Street, Melbourne, an approved analyst under s80D of the *Motor Car Act* 1958 hereby certify that I did on the 10th July 1980, analyse by a prescribed method a sample of blood labelled 'Robert Lawrence 16th June 80 7:05 pm (indecipherable signature) MBBS Bl5320' such sample having been received by me on the 10th July 1980, and such sample was found on analysis to contain 0.147 gram of alcohol per 100 millilitres of blood, (0.147 per cent)."

That certificate is signed RG Cunneen and it is dated 14th July 1980.

The applicant gave evidence before the Magistrates' Court that on 4th July 1980 he had collected from a locked receptacle in the Ouyen District Hospital a container which was marked in the way specified in the certificate to which I last referred and that he handed that container to another police officer at Robinvale.

When the case for the informant was closed the solicitor appearing for the respondent submitted that there was no case for the respondent to answer because the name on the certificates to which I have referred was Robert Lawrence whereas the name of the respondent was Robin Arthur Lawrence and the evidence did not justify a conclusion that the person to whom reference was made in the certificate and in the label on the container was Robert Lawrence was the respondent, Robin Arthur Lawrence.

The learned Magistrate constituting the court, after careful consideration of the submission advanced by the solicitor for the respondent and of the authorities to which the solicitor referred, accepted that submission. The learned Magistrate pointed out, quite correctly, that there had been no spoken acceptance by the respondent at the Ouyen Police Station of the assertion which the applicant there made to him that a blood sample had been taken from him at the hospital on 16th June. The learned Magistrate observed that he did not think that it was safe for him to assume in a criminal matter that just because it was a small town and a small hospital the defendant must have been the person from whom the sample was taken. The learned Magistrate also drew attention to the fact that there was no direct evidence connecting the defendant with the sample taken and analysed.

In *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; (1978) VR 505 at p512; (1978) 3 ACLR 289; [1978] ACLC 40-381 McInerney J after quoting the well known passage, concerning the question to be decided when a no case submission is made, in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at 658; [1955] ALR 671 observed:

"The phrase in the passage quoted above 'whether on the evidence as it stands he could lawfully be convicted' is not to be understood as meaning whether on the evidence as it stands the tribunal of fact could be satisfied beyond reasonable doubt as to his guilt. The question is whether 'the prosecution has adduced evidence sufficient to support proof of the issue' – see *May v O'Sullivan* CLR at p658; ALR at p674, and at this stage the standard of proof applied is not proof beyond reasonable doubt but proof on the balance of probabilities ..."

In *Wilson v Kuhl* [1979] VicRp 34; (1979) VR 319 McGarvie J discussed the observations of the High Court in *May v O'Sullivan* and concluded:

"I consider that the test is not whether the evidence establishes a substantial balance of probability in favour of guilt but whether there is evidence which, if accepted, would provide evidence of each element of the charge."

There are other observations by single judges of this court of similar purport and, as will appear, it is unnecessary for me to consider whether there could be any reason for my failing to follow those statements of what the question is which a submission of no case to answer raises. Uninstructed by that authority, I would have thought that the question was as it is stated by Sir Richard Eggleston in *Evidence, Proof and Probability* at p114:

> "Where a case is being tried summarily (i.e. by a magistrate or justices) the same points of decision arise. Thus a magistrate may have to rule that there is a case to answer, applying the standards of whether reasonable men could be satisfied beyond reasonable doubt on the evidence if uncontradicted, and then having so ruled, decide whether he is satisfied beyond reasonable doubt. There is no inconsistency in his ruling that there is a case to answer and then, the defendant not having given evidence, deciding that he is nevertheless not satisfied beyond reasonable doubt. Conversely, he may rule that there is a case to answer, although he is at that stage doubtful whether the case has been proved beyond reasonable doubt, and then become convinced by the failure of the accused to explain facts which he ought, if innocent, to be able to explain."

In my opinion the evidence to which I have referred and the facts of which the learned Magistrate took judicial notice, as he indicated (that is, that Ouyen is a small town and the Ouyen Hospital is a hospital serving a small town and not a heavily populated district) compel the inference that the person to whom the maker of the certificate in the form of the Sixth Schedule referred as Robert Lawrence was the respondent, Robin Arthur Lawrence. In my opinion the inference is compelled with sufficiently persuasive force to justify, indeed to compel, the conclusion that that inference, together with the other evidence, could satisfy a reasonable tribunal of fact of the guilt of the respondent of the offence charged beyond reasonable doubt. Certainly, in my opinion, the inference is of sufficiently persuasive force to satisfy the less stringent tests stated by McInerney J and McGarvie J in the passages to which I have referred, Accordingly, I am of the opinion that the learned Magistrate was in error in his determination of what is, as is made clear in a number of authorities, a question of law; and accordingly the order nisi will be made absolute on the first of the two grounds specified in the order nisi.

The first ground reads:

> "Having regard to the evidence presented by and on behalf of the Informant particularly having regard to the particulars contained in the certificate of the Medical Practitioner the Learned Stipendiary Magistrate should not have dismissed the Information."

The ground should be amended and I will order that it be amended to add at the end of the ground, the words, “at the close of the Informant’s case.”

The second ground reads:

> "The learned Magistrate should have found that the Defendant Robin Arthur Lawrence was the same as Robert Lawrence referred to in the certificates of the Medical Practitioner and the Analyst."

That ground is inappropriately expressed to deal with conclusions at the end of the Informant's case and accordingly the order will be made absolute only on the first ground.

There will be an order that the order nisi be made absolute on the first ground thereof, that the order of the Magistrates' Court dismissing the Information be set aside and that the Information be remitted to the Magistrates' Court at Ouyen for further hearing and determination.
