10/84

SUPREME COURT OF VICTORIA

HEARN v POOT

O'Bryan J

29 March 1984 — (1984) 2 MVR 79

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD/ALCOHOL EXCEEDING .05% – SCHEDULE 7 CERTIFICATE RECEIVED IN EVIDENCE – PRESUMPTION - ONUS ON DEFENDANT – EVIDENCE OF CONSULTING CHEMIST – NO EVIDENCE OF PRECISE PERCENTAGE OF BLOOD/ALCOHOL – EVIDENCE OF ERROR IN BREATHALYSER READING – WHETHER ADMISSIBLE – WHETHER PRESUMPTION REBUTTED: *MOTOR CAR ACT* 1958, SS80F, 80G.

P. was intercepted driving his motor car. After undergoing a preliminary breath test – which proved positive – P's breath was analysed showing a reading of .095%. At the hearing, the Schedule 7 certificate was tendered in evidence. P. gave evidence about his consumption of alcohol, and a consulting analytical chemist was called who said that, based on previous tests he had conducted, P. could have had a blood/alcohol content between .04% and .095%, and that the breathalyser machine may overestimate the blood/alcohol content up to .028%. The Magistrate dismissed the information, having been satisfied that the presumption in s80G of the *Motor Car Act* 1958 had been rebutted. On order nisi to review—

HELD: Order absolute.
(1) The effect of the presumption created by s80G of the *Motor Car Act* 1958, is that the defendant bears the onus of proving that at the time of driving, the percentage of alcohol in his blood was:
(a) either some other precise percentage; or
(b) a percentage lower than is significant for any relevant purpose.
***Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225, applied.**

(2) As the defendant's evidence did not show what was the precise percentage of blood/alcohol at the time of driving, nor that it was a percentage lower than .05% from that recorded by the breathalyser, then it did not rebut the presumption created by s80G of the Act.

(3) As the evidence of the consulting chemist was not sufficiently connected with the defendant, it is doubtful whether the chemist's evidence was admissible.
***Larchin v Traynor* (MC 28/1980), followed.**

(4) In order to prove an error of .028% in the breathalyser used by the operator in this instance, the consulting chemist would have had to test the instrument personally and determine, as a fact, that an error of over-estimation existed in the instrument used.
***Francis v Stevens* [1983] VicRp 21; [1983] 1 VR 260, not followed, in relation to the admissibility of evidence concerning breathalyser error.**

O'BRYAN J: [1] Order nisi to review the decision of the Magistrates' Court at Lilydale on the 21 December 1982. The respondent, who did not appear to uphold the decision in the Court below, was charged on information, on the 23 August 1982, at Chirnside Park he did drive a motor car whilst the percentage of alcohol in his blood, expressed in grams per hundred millilitres of blood, was more than .05 per centum, contrary to s81A of the *Motor Car Act* 1958. The respondent was intercepted at about 7.15 pm. whilst driving a motor vehicle along Maroondah Highway. He underwent a preliminary breath test and, when the result was positive, was conveyed to Ringwood Police Station, where a breath test was carried out on a breathalyser machine by an authorised operator. The test was carried out at 7.50 pm. The operator **[2]** produced a Schedule 7 certificate and gave a copy of the certificate to the respondent. It shows that an analysis of the breath of the respondent, recorded on a breath analysing instrument, indicated the quantity of alcohol per hundred millilitres of blood, expressed as a percentage, is 0.095 per centum.

In the lower Court these facts were proved and the Schedule 7 certificate was tendered and received in evidence. I might add that, when asked for an explanation, the respondent said, "I didn't think it would be that high. I only had two stubbies". When the respondent gave evidence at the hearing, he admitted that he had consumed two stubbies of beer after work between 6.30

pm. and 7.00 pm. A consulting chemist, named Roberts, was called for the respondent. Amongst other matters, he said this, that, in his opinion, based on previous tests he had conducted, "a person who had consumed only two stubbies of beer some 15 minutes before interception could be expected to register a reading of between 0.04 per cent and 0.05 per cent and, as a person's blood level is rising steeply at this time, a reading of 0.095 per cent at the time of the test could conceivably have been obtained".

This opinion was favourable to the informant's case. He was asked if the breathalyser could over-estimate a person's blood alcohol level by 0.028 per cent. Roberts said it could and explained that two stubbies could give a reading of 0.06 per cent at the time of test and with the over-estimation of the breathalyser of 0.028 per cent, you could achieve **[3]** a reading of 0.088 per cent, which is within the limits of 0.095 per cent. Roberts was also asked his opinion about the accuracy of the preliminary breath test. He said, "Where alcohol had been consumed within 15 minutes of the preliminary test, it is conceivable that the person furnishing the sample could still have alcohol in his mouth or throat, which would give an elevated reading".

This evidence at best for the respondent might persuade the Court that a true reading in the case of the respondent was 0.067 per cent, in which case the respondent would still be guilty of the offence charged. The learned Magistrate dismissed the information and expressed his reasons as follows: "that he must take into account evidence of the breath analysis test, the evidence of Mr Roberts that, at 7.15 pm., it could be generally assumed that the defendant's reading would be between 0.04 and 0.05 per cent, the inconsistency between the amount of alcohol consumed and the result of the breath tests and also the amount of alcohol consumed". He also said that, after consideration of all of these matters, he had reached the conclusion that the evidentiary burden placed on the defendant of rebutting the presumption in s80G on the balance of probabilities had been satisfied. He referred to the case of *Francis v Stevens*, a decision of **[4]** Crockett J, on the 17 February 1982 [1983] VicRp 21; [1983] 1 VR 260, in support of his acceptance of the evidence of the over-estimation of a person's blood alcohol level. He then dismissed the information in respect of s81A of the *Motor Car Act* 1958.

The grounds of the order nisi are:

(1) On the evidence and on the proper construction of s80F and s80G of the *Motor Car Act* 1958 the learned Magistrate ought

(a) to have held that there was evidence before him which was capable of establishing and which did establish beyond reasonable doubt all the elements of the charge against the defendant;

(b) to have convicted the defendant.

(2) The learned Magistrate was wrong in law

(a) in holding that there was evidence before him which was capable of destroying the *prima facie* effect given to the Schedule 7 certificate by s80F(3) of the *Motor Car Act* 1958;

(b) in holding that there was evidence before him capable of rebutting the presumption created by s80G of the *Motor Car Act* 1958;

(c) in inferring from the evidence of Mr Roberts that, at 7.15 pm., on the 23rd day of April 1982, it could be generally assumed that the defendant's reading on the breath analysis test would be between 0.04 per cent and 0.05 per cent;

[5] (d) in holding that the evidentiary burden placed on the defendant of rebutting the presumption in s80G on the balance of probabilities had been satisfied;

(e) in holding that, at the time of driving, the percentage of alcohol in the defendant's blood, expressed in grams per hundred millilitres of blood, was not more than .05 per centum.

The grounds raise the following questions:

(1) Was the evidence called for the defence capable of displacing the *prima facie* evidentiary effect of a Schedule 7 certificate under s80F(3) of the Act?

(2) Was the evidence called for the defence capable of rebutting the presumption created by s80G of the Act, after a blood alcohol reading of 0.095 per cent is obtained by a breathalyser test within two hours of the cessation of driving?

Section 80F(3) provides that "a certificate in or to the effect of Schedule 7, signed by the operator and delivered to the person whose breath has been analysed shall be *prima facie* evidence in any proceedings referred to in sub-section (1) of the facts and matters stated therein, unless the person gives notice that he requires the person making the certificate to attend".

Section 80G provides:

"For the purposes of this Division, if it is established at any time within two hours after an alleged offence, a certain percentage of alcohol was present in the blood of the person charged **[6]** with the offence, it shall be presumed until the contrary is proved that not less than that percentage of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed".

It is implicit in the decision of the learned Magistrate that he accepted the respondent's evidence as to the quantity of alcohol the respondent consumed. I shall proceed first to consider the submissions made by Mr Nash of Counsel for the applicant, based upon s80G of the Act. Mr Nash contends that, on the facts before the Court, a presumption was established that at about 7.15 pm., when the respondent was driving a motor vehicle on Maroondah Highway, his blood alcohol level was 0.095 per cent because that level had been recorded by a breath analysing instrument at 7.50 pm., a few minutes after the cessation of driving.

What effect do the words in the section, "until the contrary is proved" have? Menhennitt J, in *Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225, had to determine that very question. He said,

"The conclusion I have reached, having considered the matter, is that, once the necessary elements of the section are established, namely, proof of the percentage of alcohol present in the blood of a person within two hours after the alleged offence, there is then a presumption that that was the percentage of alcohol present in the person's blood at the time at which the offence is alleged to have been committed until the contrary, in the sense of proof of a lesser percentage, is given and by 'lesser', it appears to me that, on its true construction, the contrary means proof, either that the blood alcohol content at the time of the driving was a specific figure, different **[7]** from that at the time within two hours later, or at the very least that it was lower than is significant for any relevant purpose.

In other words, in my view, once that 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".

The question that arises here is whether the respondent, either by his own evidence or by the evidence of Roberts, discharged the onus. Clearly, the respondent's evidence did not do so because it was not directed to proving that a lesser percentage of alcohol was present in his blood at the relevant time. The evidence of Roberts, (if it was admissible, as to which I would raise a serious doubt in the light of the unreported decision of Fullagar J in *Larchin v Traynor*, 24 March 1980) which was accepted by the Court, was capable of proving the following:

(1) that a person, who consumes two stubbies shortly before he is breath-tested, might show alcohol in the blood varying between a low of .04 per cent and a high of .095 per cent:

(2) that a breathalyser machine may produce an over-estimate of alcohol in the blood up to 0.028 per cent.

Mr Roberts was unable to say, and did not in fact say to the Court, that at the time of the driving the percentage of alcohol present in the respondent's blood was a different percentage, being either some other **[8]** precise percentage or a percentage lower than .05 per cent from the percentage recorded by the breathalyser. His evidence, therefore, fell short of discharging the onus created by s80G. The evidence at most might be said to have reduced the reading by .028 per cent but I do not believe it went that far. In order to prove an error of .028 per cent in the breathalyser

used by the operator, in this instance, Roberts would have had to test the instrument personally and determine, as a fact, that an error of over-estimation existed in the instrument used. In my opinion, the evidence called on behalf of the respondent did not rebut the presumption created by s80G of the Act.

Therefore, Ground 1 of the order nisi is made out. Accordingly, I find it unnecessary to consider the effect of s80F(3). The learned Magistrate ought to have convicted the respondent on the evidence before him, as all the essential elements of the offence charged were proved. The matter will be returned to the Court for the imposition of an appropriate penalty. The order nisi will be made absolute, with costs of the informant to be referred to the Taxing Master, to be taxed and when taxed such costs are to he paid by the respondent.

APPEARANCES: Mr Nash for informant/applicant. Mr JG Coleman for defendant/respondent.
