15/77

SUPREME COURT OF VICTORIA

RUST v FLEMING

Murray J

18 February 1977

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL OF BREATH TEST – EVIDENCE THAT DEFENDANT'S MOTOR CAR SLOWLY DRIFTED IN ONE LANE – ADMISSION BY DEFENDANT THAT HE HAD HAD A FEW DRINKS BEFORE DRIVING – SUFFICIENCY OF EVIDENCE AS TO INFORMANT HAVING REASONABLE GROUNDS TO BELIEVE ABILITY TO DRIVE IMPAIRED – FINDING BY MAGISTRATE THAT CHARGE PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80E.

Evidence was that the police informant took up position behind a vehicle that was drifting in one lane. No evidence was given as to driver's demeanour on interception as to unsteadiness, slurred speech etc and as to belief under s80E of the *Motor Car Act* 1958. The driver/defendant admitted he had been to a party and had some drink. He refused a breath test; he did not give evidence. It was argued that this evidence was insufficient to prove either directly or by inference that the informant had the necessary belief prerequisite to requiring a breath test. The charge was found proved. Upon Order Nisi to review—

HELD: Order absolute. Conviction quashed.
1. In order to convict the applicant the Magistrate had to be satisfied beyond reasonable doubt that the respondent found the applicant driving a motor car and had reasonable grounds, based on his personal observations, for believing that the applicant had consumed intoxicating liquor and that his ability to drive a motor car may have been impaired thereby.

2. The two pieces of evidence given to prove beyond reasonable doubt that the police officers had reasonable grounds for believing that the applicant's ability to drive may have been impaired by the consumption of alcohol were not sufficient.

3. While the social policy behind the provisions of s80E is of the greatest importance to the community, the consequences of a conviction under the section are very serious and it is important that defects of proof must not be glossed over in order to implement the policy.
***Reddy v Ross* [1973] VicRp 46; (1973) VR 462 at p469, applied.**

4. In the present case the police may well have intercepted the applicant too soon and asked too few questions. It also appears that there may have been cogent evidence in the police brief which they overlooked at the hearing. The applicant may therefore count himself lucky. But for the reasons given the conviction was unsafe and one which ought not to be allowed to stand.

MURRAY J: "... In order to convict the applicant the Magistrate had to be satisfied beyond reasonable doubt that the respondent found the applicant driving a motor car and had reasonable grounds, based on his personal observations, for believing that the applicant had consumed intoxicating liquor and that his ability to drive a motor car may have been impaired thereby. Neither the respondent nor Sergeant Hawker gave any evidence of actually entertaining such a belief, but the existence of such a belief may be proved by inference. Furthermore, it may well be that as s80E(1)(a) is now framed all that need be shown is reasonable grounds for such a belief and not the actual existence of such a belief.

The evidence to constitute reasonable grounds amounted to evidence that the applicant's car slowly drifted in one lane and this conduct was observed over a distance of 100 yards – probably a matter of about 8 to 10 seconds. Such evidence is certainly consistent with things other than an intake of alcohol; tiredness, inattention, lighting a cigarette, adjusting the radio, are examples. The second piece of evidence comes from the applicant's admission that he had had a few drinks after work and then went to a party. There was no evidence as to how many drinks he had either after work or at the party, or as to when he last had a drink. The evidence can only amount to an admission that after finishing work – which may have been at 4 or 5 pm – the applicant had consumed some drink, which I would be prepared to assume in this context meant drink of an

alcoholic nature. There was no other evidence of conduct of the applicant which suggested he was affected by alcohol.

In my opinion, those two pieces of evidence are not sufficient to prove beyond reasonable doubt that either Sergeant Hawken or the respondent had reasonable grounds for believing that the applicant's ability to drive may have been impaired by the consumption of alcohol. The Magistrate made some point in his reasons of two other matters.

First, that no evidence was called by the applicant. But the use to which it is legitimate to use this fact is limited: see *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 and the discussion of the matter of McInerney J in *Australian Safeway Stores Pty Ltd v Gorman* [1973] VicRp 55; [1973] VR 570 at p580 *et seq*; (1972) 28 LGRA 303. Indeed, on the question of whether the respondent had reasonable grounds for believing, it is not easy to see what useful evidence the applicant could have given, except perhaps to deny that his car slowly drifted in the one lane over a distance of 100 yards.

The Magistrate also made some point of the fact that the defendant refused to undergo a preliminary breath test. But for the request for him to undergo such a test to constitute a refusal an offence it must be proved that before making the request the police had reasonable grounds for believing that his ability to drive may have been affected by alcohol and therefore it follows that his refusal can have no bearing on the question of what grounds police had before making the request. As was pointed out to me by counsel, there is no way of telling how much importance the Magistrate attached to these last two matters and what part they played in his reaching the decision to convict.

While the social policy behind the provisions of s80E is of the greatest importance to the community, the consequences of a conviction under the section are very serious and it is important that defects of proof must not be glossed over in order to implement the policy: see *Reddy v Ross* [1973] VicRp 46; (1973) VR 462 at p469. In the present case the police may well have intercepted the applicant too soon and asked too few questions. It also appears that there may have been cogent evidence in the police brief which they overlooked at the hearing. The applicant may therefore count himself lucky. But for the reasons I have given I regard the conviction as unsafe and one which ought not to be allowed to stand."
