75/82

SUPREME COURT OF VICTORIA

PATTEN v VAN DER HAAR

Lush J

19 October 1982

MOTOR TRAFFIC – DRINK/DRIVING – READING .135% BAC – EVIDENCE GIVEN BY DEFENDANT AS TO CONSUMPTION OF ALCOHOL PRIOR TO INTERCEPTION – EVIDENCE CORROBORATED BY OTHER WITNESSES – EXPERT WITNESS CALLED – OPINION GIVEN BY EXPERT THAT DEFENDANT'S BAC AT THE TIME OF DRIVING WOULD HAVE BEEN .014% OR THEREABOUTS – FINDING BY MAGISTRATE THAT UNLIKELY WITNESSES WOULD KNOW AMOUNT OF ALCOHOL CONSUMED BY DEFENDANT – FURTHER FINDING THAT DIFFERENCE TOO GREAT BETWEEN READING AND THAT GIVEN BY EXPERT WITNESS – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F(3).

Defendant was tested on a breathalyser and the reading was .135%. Evidence of drinks consumed was given. An expert witness was called who said the reading should have been .014%, The Magistrate said it was unlikely that the defendant and his witnesses would know the exact amount the defendant had drunk and stated that he did not believe the defendant had discharged the onus on him. Upon appeal—

HELD: Order nisi absolute. Matter remitted to the Magistrates' Court to be reheard.
1. In relation to the issues of credibility and the weight to be given to particular aspects of the evidence, the assessment of the truth and weight of the evidence was entirely a matter for the magistrate. Accordingly, it is impossible to say that the magistrate should have accepted the defence evidence.

2. In relation to the words used by the magistrate namely, that the defendant was under an obligation of proof to displace the *prima facie* evidence, such words indicated a wrong approach to the ultimate onus of proof.

LUSH J: This is the return of an order nisi to review a conviction under the *Motor Car Act* 1958 s81A recorded in the Magistrates' Court at Moonee Ponds on 12 September 1981. I do not propose to read in full the grounds on which the order nisi was obtained, but there were five of them. Four of them related to the question whether the conviction was against the evidence and whether the Stipendiary Magistrate gave adequate weight to various parts of the evidence, and whether the evidence was such as to compel me to say that it should have raised a doubt in the Stipendiary Magistrate's mind. The fifth ground was that the magistrate had failed to exercise his discretion properly because he rejected the evidence without giving reasons for rejecting it.

At the beginning of the hearing, Mr O'Brien, who appeared for the applicant, asked me to give him leave to amend under *Magistrates' Courts Act* 1971, s91, by adding two further grounds, which would in the Order be grounds 6 and 7, in these terms:

> "6. That the Stipendiary Magistrate erred in law in holding that the defendant bore an onus of proof.
>
> 7. That the Stipendiary Magistrate erred in law in holding that the defendant failed to discharge any onus of proof which rested upon him."

The second of these is to be classed with the four of the original grounds of which I have already spoken.

The evidence in the case was this: The informant gave evidence that at about 1.15 a.m. on 24th May 1981 he stopped a car driven by the defendant, that he smelt liquor on his breath, administered a preliminary breath test and subsequently took the defendant to be submitted to a breathalyzer test. The result of that test was a reading of .135 per cent, a reading of course which established the offence. The informant gave evidence that the defendant shortly after he was intercepted gave a detailed account of the drinks which he had consumed during the day: detailed

both in its description of quantities and its description of the times at which drink was taken. The same account of his drinking was repeated in detail by the defendant himself in giving evidence and was corroborated by the defendant's father and a friend, the defendant's father having been with the defendant for part of the evening and the friend for the whole of the evening.

An expert witness was called for the defence. His evidence took the fairly well known form of describing that he had submitted the defendant to a repetition in quantities and times of the drink consumption which the defendant said he had had on the evening of the offence, and testing his blood percentage at the end of the period of consumption of drinks and again at later times said to correspond to the times of interception and the times of testing by the police. His relevant result from this was a percentage of .01, and he offered the opinion that given the stated consumption of alcohol the defendant's blood reading at the time of interception would have stood at .014 or thereabouts.

The Crown filed an affidavit in reply in which paragraph 7 is of importance. That paragraph roads:

> "The reasons the Magistrate gave are as follows. He stated that it was unlikely that the Defendant and his witnesses would know the exact amount the defendant had drunk. He further stated that he could not understand how Mr Young" (the expert witness) "had obtained a reading of 0.01 per cent when the Police breath analysis operator had obtained a reading of 0.135 per cent, the difference was too great. He stated that he did not believe the Defendant had discharged the onus on him."

So far as the order nisi raises credibility issues or issues concerning the weight given to particular aspects of the evidence, in my opinion it must fail. The assessment of the truth and weight of evidence is entirely a matter for the magistrate. Both for reasons of law and fact it is therefore quite impossible for me to say that the Stipendiary Magistrate should have accepted the defence evidence, or even that it should have raised a doubt in his mind. Those comments are sufficient to dispose of the original grounds in the order nisi. The answering affidavit, however, gives rise to problems whether the Stipendiary Magistrate applied the correct onus of proof, and to deal with this point the ground added as ground 6 by way of amendment is appropriate. There are two relevant evidentiary provisions in the group of sections out of which this information arose. The first is in s80F(3).

Section 80F(1) makes provision for the giving of evidence of breath tests to prove blood alcohol percentage, and sub-s(2) provides that after a test has been given by use of a breathalyzing instrument the operator must sign and deliver to the person tested a certificate of the result, Sub-Section (3) then provides that a copy of that certificate, if it complies with certain conditions, shall be *prima facie* evidence in any proceedings, including s81A proceedings, of the facts and matters 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. Section 80G in these terms:

> "For the purposes of this division if it is 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 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 will be seen that that section includes the words "until the contrary is proved", words of different significance from the provision in s80F that a document is to be *prima facie* evidence. Section 80G is in fact irrelevant in this case. It is concerned only to establish that, in effect, the blood alcohol percentage at the time of the offence was the same as at the time of the test, provided the test was carried out within two hours. However, the presence of s80G in this division of the Act raises a possibility that in using the words he did the Stipendiary Magistrate might have had it in mind when he was deciding the case.

The meaning of the expression "*prima facie* evidence" in s80F(iii) has been expounded in very many cases. In *Ewen v McMullen* [1965] VicRp 48; (1965) VR 367, Dean J was concerned with a provision that stated that certain facts were to be *prima facie* evidence of the sale of liquor. His Honour at p368 referred to a judgment of Hood J in 1917, in which he said that Hood J. had:

> "explicitly stated the principle which applies to such cases. The section does not have the effect of throwing the burden of proof on the defendant. It is still for the informant to satisfy the court on the whole of the evidence, including that called for the defendant. Hood J said, 'If the *prima facie* evidence is shaken by evidence to a contrary effect, then the magistrate must be satisfied that there was a sale'. But where, as here, the evidence for the defence is not accepted, there is nothing to shake the *prima facie* case, and the magistrate is entitled, though not bound, to convict."

Very much the same observation was recently made by Crockett J in *Francis v Stevens* [1983] VicRp 21; [1983] 1 VR 260. His Honour said that the *prima facie* effect given to the Schedule form, "does no more than cast an evidentiary burden on the defendant without affecting the ultimate legal burden on the prosecution". It will be noted that Dean J described the situation by using the words that the "magistrate is entitled, though not bound, to convict".

The matter is given its most precise statement in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at p658; [1955] ALR 671. In a joint judgment the five Judges then constituting the High Court, in dealing with the expressions "*prima facie* case" and "case to answer", said

> "It is not really correct to say that the 'raising of a *prima facie* case' throws upon the defendant 'the onus of making an answer'.

It is worth referring also to an unusual case – *Scales v Charleston* [1929] VicLawRp 35; [1929] VLR 184; 35 ALR 167 in which the situation was that there was *prima facie* evidence of an offence and the defendant's evidence had been disbelieved. The defendant was convicted, and a case stated for the Supreme Court. The case did not include a finding that the offence had been committed. The conviction was quashed.

It will be seen that there is a slight difference between *May v O'Sullivan's* statement and the two Victorian statements to which I have referred. The expression 'shaking the *prima facie* case' must refer to the giving of some evidence, and Crockett J also was referring to the giving of some evidence. Both of those observations, if I may say so with the greatest of respect, describe what would inevitably be the usual course of events, that is, if the *prima facie* evidence is led and either it is not countered at all by the defence, or, if it is countered by evidence for the defence which is not accepted, then ordinarily conviction will follow.

May v O'Sullivan states in more precise terms the proposition contemplated by Dean J (in the last line of the passage which I have quoted from him) that the court will not be bound to convict in such a case and, indeed, is strictly not bound, though, as I have said, the result will almost always be a foregone conclusion. But strictly the court must ask itself, even if no evidence or no acceptable evidence, is given by the defence, whether it is satisfied beyond reasonable doubt.

The question in this case, accordingly, is whether the Stipendiary Magistrate was, in his references to onus merely saying that the *prima facie* case was unshaken and implying that he was satisfied of guilt beyond reasonable doubt; or, whether he was saying that he considered whether under s80F, or the irrelevant s80G or for some other reason, that the defendant was under an obligation of proof to displace the *prima facie* evidence.

It is unsatisfactory in the extreme to have to decide this question on the limited information before me. The only relevant words are the magistrate's sentence that he did not believe that the defendant had discharged the onus on him. The word "unlikely" at the beginning of the statement of the magistrate's reasons, which I read, was said to support the applicant's case upon a submission that it implied that the learned magistrate had not directed his attention to whether the defendant's evidence was capable of raising a doubt.

I am not prepared to say that there is nothing in this argument, but if it stood alone I certainly would not act on it. I consider that it would serve no useful purpose to refer the matter to the Stipendiary Magistrate to ask him either what his state of mind was or what the words he used were. Since twelve months and a little more have passed since the date of his hearing of the charge it is not to be supposed that he could recapture either his state of mind or his words.

Because of the form of these proceedings I think that this case must be decided by taking the words "do not believe the defendant had discharged the onus on him" as indicative of the

Stipendiary Magistrate's approach. The words to me indicate a wrong approach to the ultimate onus of proof and, as this is a matter of fundamental importance, particularly in cases of this kind, where it would not be difficult for the regular hearing of them to become not much more than a routine, that the ultimate onus should always be kept in mind. For these reasons, I think that the order should be made absolute.

The orders accordingly will be that leave is given to the applicant to amend the grounds of the order nisi by adding ground 6.

"That the Stipendiary Magistrate erred in law in holding that the defendant bore an onus of proof."

The other amendment will be refused. The order nisi will be made absolute. The case will be remitted to the Magistrates' Court to be reheard, to be dealt with so far as may be relevant upon the rehearing in accordance with the reasons for judgment now given.
