20/77

SUPREME COURT OF VICTORIA

SACHSE v EMMS

Starke J

8 November 1976

MOTOR TRAFFIC – DRINK/DRIVING – .05 CHARGE – REBUTTAL OF PRESUMPTION OF 7TH SCHEDULE CERTIFICATE BY EXPERT EVIDENCE – MAGISTRATE ACCEPTED EVIDENCE OF DEFENDANT AS TO CONSUMPTION OF ALCOHOL – MAGISTRATE ACCEPTED EXPERT EVIDENCE CALLED ON BEHALF OF THE DEFENDANT – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F.

The applicant was intercepted apparently exceeding the speed limit, where the informant gave observatory and admission evidence that the applicant had been drinking. The applicant breathalysed at .110 per cent. In defence the applicant gave evidence of the quantity of alcohol he had consumed during the past 24 hours and the approximate times of his imbibing. A further witness named Roberts was called, who gave evidence he was an analyst and consultant chemist holding a Bachelor of Science degree. He said that over 12 years he had engaged in analysing alcohol content of blood, read literature regarding relevant tests and performed tests used on machines used by the police, and that the machines can make mistakes of varying degrees as to the accuracy of the blood alcohol content. He further said accepting the evidence of the applicant as to his drinking the reading .110 could not be correct, and considering dissipation of the alcohol, and quantity and times of drinking the alcohol, for a man of average build such as the applicant, he considered the reading should have been .044 per cent at the time the test was taken. The Magistrate said that he accepted the evidence given by the defendant as to his consumption of alcohol and also the evidence given by the expert witness, however, he found the charge proved. Upon Order Nisi to review—

HELD: Order absolute. Conviction quashed.
1. If the Magistrate accepted the defendant's evidence, the qualification of the expert witness and that witness' evidence, then it was impossible on those findings of fact for the Magistrate to come to the conclusion beyond reasonable doubt that the applicant had had more than .05 per cent at the relevant time in his bloodstream.

2. Those findings of fact inevitably led to the conclusion that if one puts aside the question of dishonesty there must have been something wrong with the operation of the machine on that night. On those findings, accepting the fact that the burden of proof was placed upon the applicant, the only inference from the findings was that the presumption in the legislation was rebutted, and in those circumstances a conviction was not warranted.

STARKE J: *[After referring to the facts and the grounds of the Order nisi, His Honour continued]* … I agree with the submission made by Mr Fricke supported as it was by authority, that the result of this legislation where the provisions of the Act have been complied with is to change the burden of proof and place it on the defendant. If no more appears on any prosecution of this nature but that a certificate showing a greater content than .05 is put in evidence and that certificate complies with the provisions of the Act and the various things required of the police in the Act are done, then a conviction would follow because the presumption has not been displaced. In other words, the defendant who has the onus of proof on him has not established that in some way the reading on the certificate is wrong. Of course, this may be done in various ways. It may be suggested that there was a deliberate falsifying of the certificate by the police officers concerned that is not suggested in this case. It may, on the other hand, be suggested, for whatever reason, that the instrument by which the applicant was tested was for one reason or another inaccurate.

In this case, if the evidence that was given was indeed given, and if the Magistrate merely said that he found the information made out and would record a conviction, I think if that was all that had happened, it would have been impossible to review the Magistrate's decision. He should, of course, give reasons but if he had not in this case, I would have inferred that he had either disbelieved the applicant on his oath or not accepted the expert as being an expert or rejected the expert's evidence, and in any of those situations he would have been justified in convicting and one would infer that if he did convict that he must have done one of those things at least. However, that is

not the situation with which I am confronted. It appears in the applicant's affidavit in paragraph 28 that after the Magistrate had said that he found a case proved, counsel for the applicant, most astutely, arose and asked the Magistrate to specify the findings of fact which he had made. The Magistrate then stated that he accepted all the defendant's evidence including evidence as to the quantity of drink at the time of consumption. The Magistrate also stated that he accepted the qualification of the expert witness and then accepted the opinion evidence offered by that witness. Within the last few days, indeed on the 3rd November, the Magistrate in question, has sworn an affidavit, and he says:

> "Insofar as is material that in answer to paragraph 27 of the affidavit in support the correct position to the best of my knowledge and belief is as follows:
> (a) I did not say that I was troubled by paragraph 3(c) of the certificate where it was stated the machine was in proper working order.
> (b) I expressed no doubt as to paragraph 3(c) of the certificate in the form of the Seventh Schedule of the *Motor Car Act* which was produced.
> (c) In fact, I accepted the reading in the certificate and the remainder of the contents after hearing evidence for the prosecution and defence."

It is to be noted that the Magistrate does not controvert the contents of paragraph 28 which I have already read. This makes it all the easier for me to accept that paragraph as correctly setting out the findings of fact of the Magistrate. If he accepted, as the affidavit says he did and as he does not deny, the defendant's evidence, and if he accepts the qualification of the expert witness and that witness' evidence, then in my judgment it is impossible on those findings of fact for him to come to the conclusion beyond reasonable doubt that the applicant had had more than .05 per cent at the relevant time in his bloodstream.

Those findings of fact inevitably lead to the conclusion that if one puts aside the question of dishonesty there must have been something wrong with the operation of the machine on that night. In my view, on those findings, accepting the fact that the burden of proof is placed upon the applicant, the only inference from the findings must be that the presumption in the legislation is rebutted, and in those circumstances a conviction was not warranted."
