07/81

SUPREME COURT OF VICTORIA

COLLINS v SMITH

Anderson J

12 December 1980

MOTOR TRAFFIC – DRINK/DRIVING – BAC 0.169% - DRIVER INJURED IN MOTOR CAR ACCIDENT – SAMPLE OF BLOOD TAKEN BY LEGALLY QUALIFIED MEDICAL PRACTITIONER – NO EVIDENCE THAT SAMPLE TAKEN AT HOSPITAL – PRESUMPTION OF REGULARITY – CERTIFICATE INDICATED THAT DRIVER'S FIRST NAME WAS SPELT DIFFERENTLY ON CERTIFICATES – DIFFERENT NAME GIVEN TO CONSTABLE – NUMBER IN THE ADDRESSES DIFFERENT – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80DA(1).

Evidence established that the defendant had been in an accident, received some injuries and the constable who attended the scene, appears to have sent the defendant off in an ambulance, presuming that the ambulance would reach the (Country) District Hospital from whence it had come. Certificate produced showed a reading of 0.169. Certificate of legally qualified medical practitioner in the form of Schedule 6 certified that a blood sample had been taken. No express reference to the defendant's express consent. Variation of the spelling of defendant's first name: GEOFFREY cf JEFFREY. Defendant's address different: 21 Perkins Street cf 18 Perkins Street. Defendant was convicted. Upon appeal—

HELD: Appeal dismissed.
1. The magistrate was entitled to apply the presumption of regularity and to draw the conclusion that the certificate which was before it, that the doctor collected the blood, did so in the performance of the functions of a legally qualified medical practitioner, acting pursuant to Section 80DA of the *Motor Car Act* 1958.

2. The difference in the spelling of the defendant's first name and the infelicity of the address being different was not sufficient to say that the magistrate was in error in drawing the inferences which he did.

***Collins v Mithen* (1975) (unreported, Vic Sup Ct, Gowans J, 21 May 1975); and**
***Mallock v Tabak* [1977] VicRp 7; (1977) VR 78; and**
***Wright v Bastin No 2* [1979] VicRp 35; (1979) VR 329 followed.**

ANDERSON J: ... **[3]** The submission made in this case was that there was no evidence that the sample was taken at the hospital. In other words, there was no evidence before the Court that the sample was taken pursuant to 80DA(1) in circumstances where the consent of the defendant was not necessary. The matter has been argued succinctly before me by counsel but I feel that I am bound by the persuasive authority of three of my brother judges ... What is missing from this case, it is said, is that there was no evidence that the sample was taken pursuant to s80DA because there is no evidence that the sample was taken in the hospital. There is actually no evidence before the court, so it is said, that the defendant was ever at the hospital. I think it is relevant to look at what Gowans J had to say in the case concerned before him, *Collins v Mithen* (1975). ... The submission was made there that it could not be assumed that the sample of blood was taken pursuant to s80DA by reason of the fact that the words with his express consent had not been written into the form. His Honour Gowans J said this as to that argument:

> "In my view, the presumption of regularity should apply to justify the inference that the doctor who took the sample and gave that certificate was a doctor answering the description of subsection (1) of s80DA which authorised the taking of a blood sample as otherwise an unlawful assault would have been committed by the doctor on the defendant and it is to be presumed that that was not the case."

... Consequently I am of the view that the Magistrate was entitled to draw the conclusion from the certificate which was before him, that the doctor, Dr Kirkwood, who collected the blood sample at 11:05 on the evening of 17 April 1980, did so in the performance of the functions of a legally qualified medical practitioner acting pursuant to s80DA. There is certainly nothing in the evidence that was before the Magistrate to suggest that the case was other than that; ...

There is a second ground and that is ... that the defendant's name in this case was given by him to the police who visited the scene, as Geoffrey Lancelot Smith and his address was given as 21 Perkins Street, Alexandra, where the certificate is to a Jeffrey Smith of 18 Perkins Street, Alexandra. Now the name given by the defendant to the policeman, the Christian name of Geoffrey, was spelt G.E.O.F.F.R.E.Y. and the certificate given by the doctor shows the Christian name as being spelt as J.E.F.F.R.E.Y., Jeffrey Smith. The Smith at all events is the same in both cases, they are not spelt differently.

The point however that was taken was that the addresses of the two men, G.E.O.F.F.R.E.Y. being 21 Perkins Street and J.E.F.F.R.E.Y. being shown on the certificate by the doctor as 18 Perkins Street. Now I suppose a Magistrate sitting at Benalla could take judicial notice of the fact that it is a country town. ... The circumstance that Geoffrey is spelt one way to the Constable, and the doctor writes it down with another spelling is not, I think, a matter which would disentitle the Magistrate to say that the certificate in the circumstances of the case could relate to the one man, and a proper inference would be that they did so relate, and the infelicity of the address being different, 18 Perkins Street and the other one 21 Perkins Street, I do not think in the circumstances was sufficient for me to say that the Magistrate was in error in drawing the inferences which he did, namely that the certificate given by the doctor of what he did at 11:05 p.m. on the night of 17th April was in relation to the man who, on the evidence, was sufficiently identified in the circumstances of this case as being the man whom the informant, Robert John Collins, saw at the scene of the accident and on whom he later served a copy of the certificate of the doctor.

APPEARANCES: For the defendant Smith: Mr RF Redlich, counsel. Cornwall, Stodart & Co, solicitors. For the informant Collins: Mr PC Golombek, counsel. Mr D Yeaman, State Crown Solicitor.
