01/86

SUPREME COURT OF VICTORIA — FULL COURT

LAMB v MORROW

Murphy, Brooking and Nicholson JJ

13, 20 February 1986 — [1986] VicRp 61; [1986] VR 623; [1986] 3 MVR 175

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST – EVIDENCE ADDUCED TO QUESTION ACCURACY OF BREATHALYZERS GENERALLY – WHETHER SUCH EVIDENCE ADMISSIBLE – WHETHER STATUTORY PRESUMPTION OF ACCURACY OF BREATHALYZERS CREATED: *MOTOR CAR ACT* 1958, SS80F, 80G, 81A.

The effect of s80F(1) of the *Motor Car Act* 1958 is that evidence of a breathalyzer reading is admissible and is evidence of the percentage of alcohol present in the blood of the person concerned at the time of the analysis. S80F(1) does not say in general terms that breathalyzers must be taken to provide accurate readings of the percentage of blood alcohol. Accordingly, it is open to a defendant to elicit evidence that breathalyzers in general do not always show accurately the percentage of alcohol in the blood.

BROOKING J *[with whom Murphy and Nicholson JJ agreed]:* **[1]** Last March, the respondent, after pleading guilty, **[2]** was convicted in the Magistrates' Court at Broadmeadows of driving a motor car whilst the percentage of alcohol in his blood, expressed in grams per 100 millilitres of blood, was more than .05 per centum. He had been given a breathalyzer test and a copy of the resulting certificate, showing a reading of .17, was put in evidence pursuant to s80F(3) of the *Motor Car Act* 1958.

By s81A(3) the period of licence disqualification to be imposed by the Court was not less than two years if the percentage of alcohol in the blood at the time of the offence was .15 per cent or more; if it was .10 per cent or more but less than .15 per cent the period was not less than twelve months. In an attempt to persuade the Stipendiary Magistrate that, notwithstanding the breathalyzer reading, the applicable period of disqualification was not less than twelve months, the respondent, who was represented by counsel, called an expert witness. As a result of the evidence of this witness, the Stipendiary Magistrate decided that the higher of the two disqualification terms was not shown to be applicable and accordingly disqualified the respondent from obtaining a licence for a period of twelve months.

The informant obtained from a Master an order to review, returnable before the Full Court, relating to that part of the order of the Magistrates' Court which imposed the disqualification. His contention is that the Court was constrained to disqualify the respondent for not less than two years, since the only proper finding on the evidence was that at the time of the offence the percentage of alcohol in the respondent's blood was .17 per cent.

[3] The witness called by the respondent was Mr Fabb. Evidently his qualifications and experience were not given in evidence, those being well known to the prosecuting sergeant of police, who informed the Stipendiary Magistrate that he accepted that the witness qualified as an expert. The sergeant's affidavit, filed on behalf of the applicant, contains the following account of the evidence of the witness Fabb:

> "12.(a) THAT after being duly sworn, Mr Fabb gave evidence in chief the substance of which was that in his experience breathalysers have been found to have been capable of overestimating or producing an 'over read' of blood alcohol concentration of .021% and under-estimating or producing an 'under-read' of blood alcohol concentration to the extent of .05%. He also deposed that studies on the subject by McCallum and Scroggie have shown variations to the extent of .028% over and .067% under.
> (b) When I later cross-examined Mr Fabb it was explained to the Court by Mr Fabb that 'over-read' refers to the variation between blood alcohol concentrations of a pulmonary sample of blood compared to a venous sample, where the pulmonary sample reads higher.

13. THAT I then cross-examined Mr Fabb as to the meaning of 'discrepancies' and as to how that concept applied to the facts of his case.
(a) I put it to him that it has been established and most experts will concede, that the reasons **[4]** for discrepancies' is to be found in biological factors of absorption and elimination of alcohol. The reason for 'discrepancies' is not due to an inaccuracy inherent in the breathalyser instrument, but rather to bodily functions of absorption and elimination of alcohol. Mr Fabb agreed that that was usually the case.

(b) I then put it to Mr Fabb that tests have demonstrated that during the absorption phase of alcohol into the system, the pulmonary arterial blood alcohol concentration will be higher than that of the peripheral venous blood, but that during the elimination phase the reverse applies. He also agreed with that proposition and with the proposition that the blood which is sampled by the breathalyser instrument is pulmonary arterial blood as that is the blood which supplies the lungs.

(c) I then asked Mr Fabb with reference to the drinking pattern, times of driving and breath analysis in the case now before the Court whether or not the defendant would have been undergoing the elimination phase at the time of driving. Mr Fabb agreed that the defendant would have been.

(d) I then put it to Mr Fabb that in the circumstances pertaining in this case the defendant's blood alcohol concentration at the time of driving would have been higher than at the time of analysis. Mr Fabb said that it probably would have been. I then asked him whether he agreed **[5]** that at the time of the test in this particular case the breathalyser instrument would have registered a lesser reading than the blood alcohol concentration in the defendant's peripheral venous blood because of the previously mentioned biological factors of elimination. Mr Fabb said that he did agree with that proposition.

(e) Mr Fabb stated that there was in his opinion a 'slight possibility' that the breathalyser instrument could 'over-read' during the elimination phase. I asked him to explain how this possibility could arise, but he simply reiterated his opinion and gave no explanation."

[6] The remainder of the deponent's account of Fabb's evidence is contradicted by the affidavit filed on behalf of the respondent, which must, for present purposes, be taken to be correct. According to this affidavit, after the cross-examination the Stipendiary Magistrate asked the witness what the likelihood was of the breathalyzer instrument's over-reading by up to .021 per cent during the elimination phase, and asked the witness whether he would place this situation in the category of being a probability a possibility or a remote possibility. The witness answered that he regarded this situation as a slight possibility.

After hearing submissions in which certain reported and unreported decisions of Judges of this Court were referred to, the Stipendiary Magistrate, having made brief reference to the cases, said in substance that, in view of the evidence of Fabb there was a "slight" possibility that the percentage of alcohol in the respondent's blood was .021 per cent lower than the breathalyzer reading, he found the reading contained in the certificate to have been impugned and accepted that the respondent's blood alcohol level could have been lower than .15 per cent.

By s80F(1) of the *Motor Car Act* 1958, where the question of the percentage of alcohol in the blood of any person arises on the hearing of an information, for the offence with which the respondent was charged:

" ... then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the percentage of alcohol indicated to be present in the blood of that **[7]** person by a breath analysing instrument operated by a person authorized in that behalf by the Chief Commissioner of Police and the percentage of alcohol so indicated shall subject to compliance with the provisions of sub-section (2) be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument."

Sub-section (2) was complied with in the present case. There is, in addition, the presumption created by s80G. By this section:

"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."

The effect of s80G did not arise in the present case, since the Stipendiary Magistrate was concerned with the preliminary question of the accuracy of the breathalyzer reading in showing the percentage of alcohol at the time of the breath test. If the Stipendiary Magistrate was satisfied that the breathalyzer reading correctly showed the percentage of alcohol at the time of the analysis, the presumption created by s80G would then arise and there would be no proof to contradict the presumption. The contest concerned only what the percentage was at the time of the breath test.

The grounds of the order nisi need not be stated. The learned Solicitor-General submits that s80F(1) creates a statutory presumption of the accuracy of breathalyzers, and that it is not open to a defendant to adduce evidence which negates that presumption. A defendant must, it is **[8/9]** said, accept the general rule that breathalyzers accurately indicate the percentage of alcohol present in the blood and may not elicit evidence to deny the existence of the general rule. He may, however, adduce evidence suggesting that his case forms an exception to the general rule.

The short answer to this submission is that, for present purposes, all that s80F(1) says in terms is that evidence of the breathalyzer reading shall be admissible and shall be evidence of the percentage of alcohol present in the blood of the person concerned at the time of the analysis. It does not say in terms that breathalyzers must in general be taken to provide accurate readings of the percentage of blood alcohol and that the accuracy of the reading as a measure of that percentage may not be challenged by evidence which does not accept this general rule. Nor is this to be derived from the sub-section as a matter of necessary implication. All that can be said is that Parliament would presumably not have enacted s80F(1) if it had not considered that the breathalyzer was an instrument which warranted the enactment, but it is a far cry from this general observation to the assertion of a legislative presumption which may not be denied by evidence. **[10]** At different times the submission expressed in different ways the supposed presumption or general rule, and its effect in limiting the evidence that a defendant might adduce, and the argument encountered difficulties when attempts were made to ascertain on which side of the line given instances would, according to the submission, fall. The difficulty of formulating the proposition and of ascertaining its operation suggests that the proposition is unsound.

If a defendant calls evidence about how much he had drunk and expert evidence as to what percentage of alcohol would as a result have been present in his blood, should the case be characterised as one in which the evidence for the defence is inadmissible because it does not accept the supposed statutory presumption? The evidence can do no more than induce the Magistrate not to accept the particular breathalyzer reading as accurately stating the blood alcohol percentage: it does not enable any inference to be drawn as to whether the inaccuracy resulted from some defect that might be described as peculiar to the particular breathalyzer used or from some more general cause. The submission apparently is that evidence is inadmissible if it expressly or by necessary implication negates the general rule that breathalyzers accurately indicate the percentage of blood alcohol and that, since in the case just put some "casual" defect might be responsible for the error, the evidence is admissible.

But is not the distinction between "casual" and "inherent" defects a false one? Every time a defendant elicits evidence of any kind which tends to cast doubt on the **[11]** accuracy of the breathalyzer reading relied on in his case he is, if one is to speak in terms of a general rule, saying that the rule is not to be applied in his case. Does it make any difference if the defendant's attack is based on evidence that numerous tests have shown discrepancies between breathalyzer readings and blood sample test results, the witness not offering any scientific explanation of the discrepancies, as in *Francis v Stevens* [1983] VicRp 21; [1983] 1 VR 260; or evidence attributing the discrepancies to the differing alcohol concentrations in pulmonary and venous blood, as in the present case; or evidence about the calibration of all breathalyzers, as in *Reeves v McWilliams* (unreported, Tadgell J, 25th September 1985); or evidence that the particular breathalyzer used was faulty; or evidence of how much the defendant had drunk and what reading that should have produced, as in *Sachse v Emms* (unreported, Starke J, 8th November 1976), and *Fitzgerald v Browning* (unreported, Murphy J, 29th November 1985)? In all cases the defendant is not only trying to take his case outside the "general rule" but doing so by proving facts which necessarily in some sense undermine the "general rule". If the breathalyzer was wrong in this case, may it not have been wrong in other cases?

The Solicitor-General's submission rests on a supposed distinction, never made explicit,

between inherent defects or shortcomings and casual defects or accidents, or something of that kind. To suggest that breathalyzers give unreliable readings because they measure only the alcohol level in the arterial pulmonary blood, **[12]** or because (the calibration wrongly assuming that each person partitions alcohol into his breath at the same rate as every other person) they do not accurately measure even the blood alcohol level in the pulmonary blood, is, so the Solicitor-General contends, impermissibly to challenge the statutory presumption that breathalyzers accurately measure the alcohol in the blood.

To suggest that the particular instrument malfunctioned on the occasion of the particular test is not, he says, to challenge that presumption. But is this distinction valid? Either machines of the kind in question will always accurately show the percentage of alcohol in the blood or they will not. What is in a sense the result of casual defect or accident is also a defect to which the machine is liable by reason of its nature, even though the occurrence of the "accident" may be highly unlikely.

[13] Whatever example of accidental malfunction or the like may be put forward, one can always say of it, assuming it to be accepted as a possible cause of error in the case in hand, "This is something that can go wrong with a breathalyzer". And so the distinction between inherent and casual defects is seen to be a false one for present purposes. Section 80F(1) makes the reading evidence of the percentage of alcohol present and any evidence tending to show that the reading did not accurately state that percentage undermines the supposed general rule that breathalyzers accurately show the percentage of blood alcohol. It is for this reason that the argument for the applicant encountered difficulties when faced with examples which seemed not to fall within either of the two categories of inherent shortcoming and accidental defect.

To avoid any possibility of subsequent misunderstanding, I make it clear that when I say that every time a defendant elicits evidence which tends to show that his blood alcohol percentage was not as shown by the machine he is challenging or undermining the general rule, I am concerned only with the validity for present purposes of the supposed distinction between inherent and casual defects. I do not intend to countenance the suggestion, rejected in *McArthur v McRae* [1974] VicRp 43; [1974] VR 353, that evidence given in one case may be used for the purposes of another.

The authorities support the view that it is open to a defendant, under the present legislation, or legislation similar in the material respects, to elicit evidence that breathalyzers in general do not always show accurately the percentage of alcohol in the blood. I refer to **[14]** *McArthur v McRae* [1974] VicRp 43; [1974] VR 353 at pp357-8; *Francis v Stevens* [1983] VicRp 21; [1983] 1 VR 280; *Reeves v McWilliams*, unreported, Tadgell J, 25th September 1985; *Knights v Cook* [1972] Tas SR 34; *Fenn v Wilson* (1974) 5 ACTR 27. The decision of the Full Court of Queensland in *Bartlett v Harrison* [1975] Qd R 325, which accepts for another purpose the distinction between inherent and other defects of breathalyzers, gives no support to the applicant's argument in the present case.

It may be that the unreported decision of O'Bryan J in *Hearn v Poot*, given on 29th March 1984, proceeds on the basis that it is not open to a defendant to elicit evidence to the effect that breathalyzers in general, as opposed to the particular instrument used, do not always show accurately the percentage of alcohol in the blood at the time of the analysis. If this was His Honour's view, and I am by no means clear it was, then I would respectfully disagree.

For the reasons given, I am of opinion that the evidence of Mr Fabb was admissible, in that it was relevant as bearing on the question whether the breathalyzer reading relied on by the informant accurately stated the percentage of alcohol present in the respondent's blood at the time of the analysis.

There is much to be said for the robust view that the evidence of Mr Fabb that there was a slight possibility of the breathalyzer's giving a reading up to .021 too high during the elimination phase was not evidence on which the Stipendiary Magistrate could act, having regard to the **[15]** evidence of the witness as a whole, including his failure to give the explanation sought in cross-examination as to how this possibility could arise. But the Solicitor-General declined to argue this question, although it was covered by the grounds of the order nisi, and since the only point

taken in argument fails the order nisi must be discharged.

In a number of other jurisdictions legislation exists which, in one way or another, seeks to give conclusive effect to the results of blood or breathalyzer tests. In the United Kingdom, s1(1) of the *Road Safety Act* 1967 makes it an offence to drive after consuming alcohol in such a quantity that the proportion of it in the blood, as ascertained from a laboratory test, exceeds the prescribed limit at the time the driver provides the specimen, and so the sole test is an objective one depending on a scientifically ascertained measurement (*R v Jackson* [1970] 1 QB 647 at 658), the object of the provision being to avoid, so far as possible, medical and scientific evidence and to make the result of the laboratory test conclusive evidence (*R v Durrant* (1969) 3 All ER 1357 at pp1358-9; [1970] 1 WLR 29 at p32).

In the Australian Capital Territory a person who has provided a sample of his breath for analysis is guilty of an offence if the resulting reading is or exceeds .08. This provision, described as "absolute" in *Gosden v Billerwell* [1980] FCA 84; (1980) 31 ALR 103 at p105; (1980) 47 FLR 357; 2 A Crim R 1, was yet held not to require a conviction in *Perkins v Pohla-Murray* (1983) 51 ACTR 3; (1983) 74 FLR 365; (1983) 1 MVR 165.

The Parliament of South Australia has legislated to prevent the accuracy of a breathalyzer reading from being **[16]** called in question: see *Richardson v Fingleton* (1980) 24 SASR 511, where the effect of the provision is considered.

[17] In Queensland the breathalyzer reading has been made conclusive evidence of the concentration of alcohol present unless the defendant proves that the breathalyzer was defective or not properly operated; the qualification has been held not to extend to inherent defects (*Bartlett v Harrison* [1975] Qd R 325). The provisions in force in Western Australia, considered in *Todd v Payne* [1975] WAR 45 and *Clarke v Smoothy* [1984] WAR 3, may also be noted. Whether Victoria should follow the lead of these other jurisdictions is a matter for Parliament.

MURPHY J: I agree that the order nisi should be discharged.

NICHOLSON J: I agree also.

MURPHY J: The order of the court is that the order nisi shall be discharged.

Solicitor for the applicant: RJ Lambert, Crown Solicitor.
Solicitor for the respondent: Tony French.
