6/78

SUPREME COURT OF VICTORIA

MYERS v HALL

Harris J

14 December 1977

MOTOR TRAFFIC – DRINK/DRIVING – ADMISSIBILITY OF SCHEDULE 6 CERTIFICATE OF COLLECTION OF BLOOD SAMPLE WHEN NON-ATTENDANCE OF WITNESS AFTER NOTICE GIVEN – APPLICATION FOR ADJOURNMENT BECAUSE DOCTOR UNABLE TO ATTEND COURT – DOCTOR OVERSEAS FOR TWO YEARS – APPLICATION REFUSED – CERTIFICATE OF DOCTOR ADMITTED INTO EVIDENCE AND MATTER FOUND PROVED – DISCRETION OF MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT*, S80D.

On an information for exceeding .050, the defendant gave notice requiring the doctor who collected the blood sample to attend. The doctor was, however, overseas for 2 years. An application for an adjournment for that period was refused. The prosecution proved that a copy of the schedule 6 was served on the defendant – but the defence objected to its admissibility on the grounds of unfairness as the defendant would be denied the right to cross-examine the witness. There was some evidence that the doctor concerned had indicated that not enough blood had been taken, although there was further evidence that the sample had in fact been divided into 3 parts etc.

On review it was argued that the Court had a discretion as to whether the certificate should be admitted, and the Court should have exercised that discretion to reject it as the witness could not be cross-examined. The magistrate received the certificate in evidence and acted upon it. Upon appeal—

HELD: Appeal dismissed.

1. Sub-s(7) of the *Motor Car Act* 1958 creates a form of procedure by which the defendant can compel the person giving a certificate under s80D to attend at the court for the purposes of cross-examination. It does not state that where such a notice has been given and the person giving the certificate does not attend, the certificate shall not be tendered in evidence or shall not be evidence of the matters stated in it. With that sub-section is to be contrasted the very different wording which is found in s80F(3).

2. It follows from the language used by the legislature in sub-s(7) that, in a case where the requisite notice has been given and the person giving the certificate does not attend for cross-examination, the Magistrates' Court, or other court, has a discretion as to how that situation should be dealt with. But what is very striking is that there is nothing in sub-s(7) which says that where that procedure has been carried out, the certificate shall not be tendered in evidence nor does it say that the certificate shall not be *prima facie* proof of the facts and matters therein contained. It leaves the mandatory requirements of sub-s(3) unqualified.

3. What was directly raised by this order nisi was the point whether or not the Magistrate should have received the certificate in evidence. The Magistrate did not have any discretion about receiving the certificate in evidence and that was sufficient to dispose of the ground of the order nisi.

HARRIS J: *[After referring to the provisions of s80D of the* Motor Car Act *1958, His Honour continued]* … Having now referred to all the relevant sub-sections of s80D it can be seen that what the section sets out to do is to provide for ways in which the matters relevant to the various offences referred to in sub-s(1) may be proved. It adopts the technique of making certain matters *prima facie* evidence or *prima facie* proof of the particular facts or matters adverted to in the various sub-sections.

So far as concerns proof that the sample of blood had been collected and that the regulations relating to the collection of such a sample have been complied with and that the sample was placed in two containers labelled in a particular way, the section provides that those matters may be proved by a certificate which complies with the requirements of sub-s3. Where the certificate does comply with those requirements then the Act states in mandatory terms that the certificate shall be admitted in evidence as *prima facie* proof of the facts and matters therein contained. Standing on its own, that section makes it mandatory for the court to receive the certificate in evidence and to accept it as *prima facie* proof of the facts and matters contained in it.

Sub-s(5) is an express limitation upon the circumstances under which a certificate to the effect of Schedule 6 shall be admitted in evidence. It expressly provides that no such certificate shall be tendered in evidence without the consent of the accused unless a copy has been served as required by sub-s(5). That debars the prosecution from putting the certificate in evidence to prove the matters of which it is *prima facie* proof unless it is proved that the copy has been served as the sub-section requires.

Sub-s(7) adopts a different technique. Sub-s(3) adopts the technique as to the way in which certain matters may be proved. Sub-s(5) adopts the technique of preventing proof in that way in the circumstances described in sub-s(5). What sub-s(7) does is to create a form of procedure by which the defendant can compel the person giving a certificate under s80D to attend at the court for the purposes of cross-examination. It does not state that where such a notice has been given and the person giving the certificate does not attend, the certificate shall not be tendered in evidence or shall not be evidence of the matters stated in it. With that sub-section is to be contrasted the very different wording which is found in s80F(3).

In my opinion, it does follow from the language used by the legislature in sub-s(7) that, in a case where the requisite notice has been given and the person giving the certificate does not attend for cross-examination, the Magistrates' Court, or other court, has a discretion as to how that situation should be dealt with. But what is very striking is that there is nothing in sub-s(7) which says that where that procedure has been carried out, the certificate shall not be tendered in evidence nor does it say that the certificate shall not be *prima facie* proof of the facts and matters therein contained. It leaves the mandatory requirements of sub-s(3) unqualified.

In my opinion, it follows from the language used in the section that, where the procedure adopted by sub-s(7) has been observed and the person giving the certificate does not attend, nevertheless the certificate is to be admitted in evidence as *prima facie* proof of the facts and matters therein contained. The Magistrate or other judicial officer may, where the person who has given the certificate does not attend, consider that the proceedings should be adjourned to enable the person to attend or that some other steps should be taken, but he is not, as I read the words of the section, given any discretion to refuse to allow the certificate to be tendered. It is true that there is a principle of criminal law that a judge has a discretion to exclude admissible evidence after an evaluation of its probative value against its prejudicial effect to the accused, but it was not suggested that the situation in the present case is analogous to the situation where the prosecution tenders evidence which is of slight probative value but of substantial prejudicial effect.

In the case of this order nisi, the first limb of it is, in my opinion, correctly expressed. It is expressed in language which shows that it is conceded that the Magistrate did have a discretion about the matter. However, insofar as that first limb is expressed in language which says that the Magistrate had a discretion as to whether or not he would admit in evidence a certificate in the form of Schedule 6 to the said Act tendered by the informant, it is, in my opinion, expressed upon an incorrect assumption.

I am satisfied the Magistrate did not have any discretion as to whether or not he would admit in evidence the certificate. What he had was a discretion as to whether or not he would take some step, such as an adjournment of the proceedings, in view of the non-attendance of the person giving the certificate.

He had in fact dealt with that sort of matter at the outset of the hearing when the prosecution had made an application for an adjournment so as to enable the prosecution to produce the doctor for cross-examination. He refused to do that and the refusal to grant the adjournment is not the subject of this order nisi.

It would seem to me that there is a question which does arise under sub-s(7) where the person certifying does not appear, as to what course the Magistrate should then adopt. It may well be that the way in which the Magistrate should deal with the situation raises some questions of principle. Those matters are not, however, before the court on this order nisi and it would be entirely undesirable for me to express any observations about a matter which is not directly raised by the order nisi.

What is directly raised by this order nisi is the point whether or not the Magistrate should have received the certificate in evidence. The view that I have taken is that the Magistrate did not have any discretion about receiving the certificate in evidence and that is sufficient to dispose of the ground of the order nisi.

It is perhaps somewhat unfortunate that both the Magistrate and counsel seem to have misconceived the situation as it arose on the day when the case was heard. It would seem to me that the course that the defendant's counsel ought to have pursued was an application of some sort to deal with the situation which arose because of the non-attendance of the doctor other than the course of seeking to have the certificate excluded from evidence. However, he did not adopt that course and the certificate was received by the Magistrate and the Magistrate acted upon it, In my opinion the Magistrate was entitled to this. Indeed, in my opinion, he was bound by the Act to receive the certificate as *prima facie* proof of what was in it. The result was that the Magistrate had evidence before him upon which he was entitled to conclude that the informant, who is the respondent here, had proved all the necessary elements of the case which was laid against the defendant, who is the applicant before me.
