22/94

SUPREME COURT OF VICTORIA

NUTTING v RYDER

Batt J

10-12, 17 October 1994 — (1994) 20 MVR 294

MOTOR TRAFFIC – DRINK/DRIVING – VEHICLE INVOLVED IN COLLISION – DRIVER TAKEN TO HOSPITAL – BLOOD SAMPLE TAKEN – CHARGED UNDER *ROAD SAFETY ACT* 1986, S49(1)(b) AND (g) – CHARGE UNDER S49(1)(g) DISMISSED – OTHER CHARGE FOUND PROVED – RULE OF DOUBLE JEOPARDY – WHETHER OPEN TO CONVICT ON S49(1)(b) CHARGE – PRESUMPTION OF CONTINUANCE – WHETHER PRESUMPTION EXCLUDED BY ACT – WHETHER COURT BOUND TO APPLY PRESUMPTION: *ROAD SAFETY ACT* 1986, SS48(1)(a), 49(1)(b), (g), 49(7), 50(1A), 57(2).

At 1.50 a.m. police attended the scene of a single motor car collision. N., the driver was conveyed to hospital where, at 4.15 a.m. a sample of his blood was taken which when later analysed showed a blood alcohol concentration of 0.169%. Subsequently, N. was charged with offences against s49(1)(b) and (g) of the *Road Safety Act* 1986 ('Act'). At the hearing the Magistrate dismissed the charge under s49(1)(g) on the ground that he could not be satisfied beyond reasonable doubt that the blood sample had been taken within 3 hours of the collision. In relation to the charge under s49(1)(b), N. submitted that it should be dismissed under the rule against double jeopardy. The magistrate rejected this submission, applied the presumption of continuance, found that N.'s blood alcohol concentration at the time of driving was 0.169% and convicted him. Upon appeal—

HELD: Appeal dismissed. Magistrate's orders confirmed.
1. Where the ultimate fact establishes proof of two offences of a similar character, a conviction on the first is a bar to the second.
***Falkner v Barba* [1971] VicRp 39; [1971] VR 332; (1971) 24 LGRA 270, applied.**

2. The relevant ultimate fact essential to prove guilt of an offence under s49(1)(g) was that the blood sample be taken within 3 hours after driving. But this fact was not essential to prove guilt of an offence under s49(1)(b). Accordingly, the Magistrate was correct in rejecting the double jeopardy argument and convicting N. of the charge under s49(1)(b).

3. The Act neither expressly nor impliedly excludes the common law presumption of continuance. It is open for a court to apply the presumption but it is not bound to do so. On the evidence, it was open to the Magistrate to apply the presumption and infer beyond reasonable doubt that the relevant blood alcohol concentration was 0.169%.
***Heywood v Robinson* [1975] VicRp 55; [1975] VR 562; and**
***Smith v Maddison* [1967] VicRp 34; [1967] VR 307, applied.**

BATT J: *[After setting out the facts, the grounds of appeal and relevant statutory provisions, His Honour continued]...* **[11]** The primary submission for the appellant under this question was that the conviction of the appellant on the charge under s49(1)(b), after dismissal of the charge under S49(1)(g), contravened the basic common law doctrine that a person may not be put in peril more than once of conviction of an offence of the same or a similar character. Instead, it was submitted, the charge should have been dismissed in accordance with the decisions in *Falkner v Barba* [1971] VicRp 39; [1971] VR 332; (1971) 24 LGRA 270 and *R v O'Loughlin Ex parte Ralphs* (1971) 1 SASR 219. In other words, the appellant invoked the fundamental rule of the common law against double jeopardy. *[His Honour then discussed various authorities and continued]...* **[17]** [Gillard J] at p342 of *Falkner v Barba, supra,* concluded his review of the authorities with the second principal passage relied upon by the appellant, namely:

> "From the foregoing discussion of authority there emerged, in my opinion, the general proposition that where the ultimate fact established the proof of two offences of a similar character, then it was the doctrine of the common law that the offender could not be convicted of the two offences. The conviction on the first was a bar to the second."

Falkner v Barba was itself approved, although distinguished, in *Howard v Pacholli* [1973] VicRp 83; [1973] VR 833 and *Bodna v Deller and Public Service Appeals Tribunal* [1981] VicRp

20; [1981] VR 183 at 197-8, applied in *Reardon v Baker* **[18]** [1987] VicRp 72; [1987] VR 887; (1987) 25 A Crim R 203, referred to without disapproval by the Full Court in *R v Clarkson* (1987) VR 962 at 976 and approved in *O'Loughlin*, though Jenkinson J (with whom Gallop and Wilcox JJ agreed) in *Travers v Wakeham* [1991] FCA 109; (1991) 28 FCR 425 at 435; (1991) 54 A Crim R 205; (1991) 13 MVR 257 doubted whether the proposition of Gillard J in *Falkner v Barba* at p337 was in substance the same as that of Bray CJ in *O'Loughlin*. According to either proposition, there was not, in the view of the Full Court of the Federal Court in that case, double jeopardy.

It is, in my opinion, clear that sitting at first instance in this court I should apply the proposition enunciated by Gillard J at pp337 and 342 which, in my respectful view, accords with the authorities I find it unnecessary therefore to consider whether the criticism of *O'Loughlin* by Abedee J in *State Pollution Control Commission v Tallow Products Pty Ltd* (1992) 29 NSWLR 517; 65 A Crim R 509 is sound.

The offences under paragraphs (b) and (g) of s49(1) of the Act are not the same: *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at 743; (1989) 9 MVR 1 (affirmed, without express discussion of this point, *sub nom Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257); but it may be accepted that they are similar for the purposes of the proposition stated by Gillard J.

Crucial to that proposition is the distinction between ultimate facts and evidentiary facts (compare *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464 at 532, mentioned by Jenkinson J in *Travers v Wakeham*, and *Hayes v FCT* [1956] HCA 21; (1956) 96 CLR 47 at 51; (1956) 11 ATD 68; (1956) 6 AITR 248). There were in each of the offences charged here several ultimate **[19]** facts to be proved. Driving (or being in charge, which I shall not hereafter mention) and that the conveyance was a motor vehicle, were two such ultimate facts. But, relevantly, the ultimate fact under paragraph (b) was the presence of more than the prescribed concentration of alcohol in the appellant's blood at the time of driving, whereas under paragraph (g) in my opinion it was the presence of more than the prescribed concentration of alcohol at the time of analysis (within twelve months of its taking) of a sample of the appellant's blood taken within three hours after driving. That the sample was taken within three hours after driving was essential to proof of guilt of the offence under paragraph (g). It was, or was part of, the relevant ultimate fact. But it was not essential to proof of guilt of the offence under paragraph (b), though, if established, it would, by reason of s57(2)(d) and s48(1)(a), greatly facilitate proof of the abovementioned relevant ultimate fact for that offence. But, even if it was not established, evidence of the result of the analysis of the sample could be led on that ultimate fact (cf. ss56(2), 57(2) and 57(4)). That shows, of course, the evidential, as opposed to the ultimate, nature for the purposes of the proof of the offence under paragraph (b) of the blood sample and its analysis.

In addition to the foregoing, the time as at which the presence of more than the prescribed concentration of alcohol is to be proved to establish guilt differs as between the two offences: *Meeking v Crisp*, *supra*, at 746. (I refer below to the effect of **[20]** a statement of the High Court in the judgement of Mason CJ and Toohey J on appeal upon the proposition for which I have just cited the decision of the Full Court. This case was argued on the footing, confirmed by ss48(1)(a), 57(2)(c) and 57(7A)(b)(ii), that a certificate of analysis within the above period of 12 months was evidence of the concentration present at the time of the taking of the sample, if taken within three hours after driving. In other words, the analysis and the taking of the sample were run together or telescoped. This appears to be correct, as *Meeking v Crisp*, *supra*, at 746 shows.

For the foregoing reasons I reject the submission for the appellant that the relevant ultimate fact in each charge was the same, namely, the presence of more than the prescribed concentration of alcohol in the appellant's blood and that the three hour period merely allowed the statutory presumption to prevail.

For the appellant it was also argued, as I understood it, that his plea of not guilty put satisfaction of the three hour period (which was for this argument conceded to be essential in relation to paragraph (g)), also in issue in relation to paragraph (b) (where its relevance was said to lie in the rebuttable statutory presumption created by s48(1)(a)). But, even if its relevance for paragraph (b) is confined to that, this shows, in my view, that for the purposes of paragraph (b) satisfaction of a three hour period is evidentiary only.

It seems to me that my analysis finds support in the analysis in *Travers v Wakeham* at 431 and 435, **[21]** though the facts are, I acknowledge, quite different. The other driving offence cases, *O'Loughlin*, *Wilton v Taneborne* (1908) 21 Cox CC 702; 99 LT 668, are, I consider, quite distinguishable, for in the former the breath alcohol content was the gravamen or essential ingredient of the charge of driving under the influence as it was presented, and in the latter the speed was the gravamen or essential ingredient of the dangerous driving charge as it was presented. Here, by contrast, the case on paragraph (b) as presented below was not confined to the statutory presumption.

The conclusion that I have come to would derive further support if one applied the test stated in the three early High Court cases to be applicable to the plea of *autrefois convict*, namely: "Would the evidence that was necessary to support the second charge have been sufficient to procure a legal conviction on the first?": *Ex parte Spencer*, *supra*, at 251; *Chia Gee v Martin* [1905] HCA 70; (1905) 3 CLR 649; 12 ALR 425; and *Li Wan Quai v Christie* [1906] HCA 42; (1906) 3 CLR 1125; 12 ALR 429. The answer in this case is clearly No, for evidence of the results of analysis of a blood sample taken within three hours was not necessary under paragraph (b). It appears, however, that that test is not exhaustive: *R v Cleary* at 574 and 578; *O'Loughlin* at 227, 253-254 and 258; *Maple v Kerrison* (1978) 18 SASR 513; 34 FLR 180; (1978) 19 ALR 152. Indeed, the line of cases exemplified by *Falkner v Barba* may be said to demonstrate that.

I have not so far mentioned the important fact that, although argument proceeded by reference to cases of or analogous to *autrefois convict*, the true analogue **[22]** is *autrefois acquit* because the charge under paragraph (g) was dismissed. It is recognised that dismissal or acquittal may not lead to the upholding of a plea in bar that would be upheld if there had been a conviction: *O'Loughlin* at 222 and 226. At 222, Bray CJ said:

> "I agree with Wells J that *autrefois acquit*, and its extensions bear some resemblance to estoppel and that *autrefois convict* and its extensions bear some resemblance to merger and I think this has important consequences.

If the accused is acquitted on a charge of a greater offence then, it seems to me, there is no logical reason, apart from the question of judicial discretion to prevent a possible abuse of process, why he should not be tried for a lesser offence wholly comprised within the greater offence, provided it was not possible for him to have been convicted of the lesser offence on the first trial, and provided further that he can call in aid no principle of issue estoppel. This explains cases like *R v Barron* [1914] 2 KB 570; 78 JP 311. An acquittal is only an acquittal of the whole offence and it may have been the very additional circumstance distinguishing the greater offence from the lesser which the jury was not prepared to find proved."

Conversely, I should add that the respondent before me accepted that a <u>conviction</u> on the charge under paragraph (g) would have constituted a plea in bar to the charge under paragraph (b) because the proof of the latter would have been the analysis of the sample <u>satisfying the former</u>.

Reference was made to s51 of the *Interpretation of Legislation Act* 1984, but the parties were in agreement that it was not relevant. I agree. Compare *Falkner v Barba* at 336. It has been well said that the meaning of the section is largely a matter for speculation (Pearce and Geddes, *Statutory Interpretation in Australia*, 3rd edition, paragraph 6.29). But, **[23]** insofar as the section deals with commencement of proceedings, the use of the word "all" shows that, even if an act constituted an offence under both provisions in question here, the appellant could be prosecuted under both. Otherwise, the section has been said to deal only with punishment (*DPP Reference No.1 of 1992* [1992] VicRp 71; [1992] 2 VR 405 at 413; (1992) 60 A Crim R 109 per Marks J with whom the other members of the Court agreed. Compare *Meeking v Crisp* at 742, also a decision of a Full Court). But, even if section 51 deals with convictions as well, it is inapplicable because of the dismissal of the charge under paragraph (g). I should, however, mention that at the conclusion of their judgement in *Mills v Meeking*, *supra*, Mason CJ and Toohey J stated at 226-7:

> "There is nothing express in the Act which would require that the appellant be prosecuted under par.(b) of s49(1) rather than par.(f). In accordance with s51(1) of the *Interpretation of Legislation Act*, therefore, the appellant was liable to be prosecuted under either of these provisions. In the present case there can be no basis for alleging abuse of process because a decision was made to prosecute the appellant under par.(f) of s49(1) rather than par.(b)."

Brennan J agreed with "the joint judgment of Mason CJ and Toohey J that the appeal should be dismissed." It is not clear to me whether that agreement extends to the passage I have cited. With respect, I find that passage cryptic. Both parties submitted that the sentence referring to s51(1) was *obiter*, and I am inclined to agree. In any event, it is not a reasoned exposition of the opening clause of s51(1): cf. *Coles Myer Ltd v FCT* [1993] HCA 29; (1993) 176 CLR 640 at 661; (1992-93) 112 ALR 322; (1993) 25 ATR 95; 67 ALJR 463; (1993) 93 ATC 4,214. But if I were bound to treat it as a binding decision by a majority of **[24]** justices on the application of that clause, it would only be one about the application of the clause to paragraphs (b) and (f) and in relation to paragraph (f) the terms of section 55(6) may have been decisive in the unexpressed reasoning. Finally, the word "either" (assuming it means one only of two as opposed to each or both) was sufficient for the case in hand but should not, I would think in the face of the word "all" in s51(1) be taken as meaning that a prosecution under only one paragraph could be commenced.

For the foregoing reasons, in my opinion, the magistrate was correct in rejecting the double jeopardy argument and the answers to questions (a)(i) and (ii) respectively are, Yes and No. *[His Honour dealt with the claim that the magistrate failed to exercise his discretion properly or at all and continued]* ... **[29]** I turn now to questions (b) and (c). Both questions were argued together. It is convenient to deal with those questions by reference to the four submissions made for the appellant, namely:

> (1) The presumption [of continuance] does not apply to the *Road Safety Act* 1986 because:
> (i) This new Act requires specific findings as to concentrations;
> (ii) Parliament has increased the two hour limitation that obtained under the *Motor Car Act* 1958 to three hours.
>
> (2) Alternatively, the magistrate misdirected himself:
> (i) In feeling bound to apply the presumption; and/or
> (ii) In applying it in circumstances where there was no admissible evidence on which to fix the time of the accident.
>
> (3) If the Magistrate was entitled to find as a fact that at the time of driving the blood alcohol concentration of the appellant was in excess of .05 per cent, he could not be satisfied beyond reasonable doubt as to the actual concentration for the purposes of sentencing, and reference was made to *R v Chamberlain* [1983] VicRp 110; [1983] 2 VR 511; (1982) 14 A Crim R 67 as authority for the proposition that critical sentencing facts (which clearly the concentration **[30]** would be) must be found by the sentencing judge or Magistrate beyond reasonable doubt.
>
> (4) Even if the Magistrate was entitled to find that the blood alcohol concentration of the appellant was in excess of .05 per cent at the time of driving he could not make a finding as to the concentration, in which case the appellant must be fitted within the lowest category, namely, .05 per cent to .10 per cent (or presumably for the purposes of Schedule 1, less than .07%).

As part of this fourth proposition it was submitted that I should deal with the question of sentencing, pursuant to s92(7) of the *Magistrates' Court Act* 1989 (as was done in *DPP (Vic.) v Parsons* [1993] VicRp 1; [1993] 1 VR 1; (1992) 15 MVR 474 at 478), and even exercise any discretion requiring to be exercised.

As regards the first submission, reference was made to the four cases where in respect of the corresponding, but by no means identical, provisions of the *Motor Car Act* 1958 it was held that the presumption of continuance could be applied where the facts warranted that. Those cases, decided in respect of charges under s81A(l) of the *Motor Car Act* 1958 (which corresponds substantially to s49(1) (b) of the Act), are: *Smith v Maddison* [1967] VicRp 34; [1967] VR 307; *De Kruiff v Smith* [1971] VicRp 94; [1971] VR 761; *Heywood v Robinson* [1975] VicRp 55; [1975] VR 562 and *Wright v Bastin (No.2)* [1979] VicRp 35; [1979] VR 329. [See however *R v Olejarnik* (1994) 72 A Crim R 542; (1994) 33 NSWLR 567; (1994) 19 MVR 125, CCA, published since delivery of judgement]. It was pointed out that there was no decision of this court whether the presumption is in appropriate circumstances available under the present Act. *[After discussing relevant authorities His Honour continued].* ... **[35]** Section 49(7) is important in the scheme of the Act for a number of reasons, I acknowledge. It is necessary for the purpose of sentencing for later offences. It is relevant on general discretion because the scheduled periods of disqualification are minimum periods. It is relevant also to rehabilitation and relicensing. The requirement in it, not in existence at the time of the four decisions I have mentioned, simply **[36]** means that the court must make and record a finding of the highest blood alcohol concentration of which it is satisfied beyond reasonable

doubt. This is not necessarily an affirmative finding that the blood alcohol concentration was not higher. Even though the finding in the blood alcohol concentration may be a sentencing fact, *R v Chamberlain* clearly requires it to be found beyond reasonable doubt. Therefore, I do not rely upon its being a sentencing fact to deny the contended for effect to s49(7); rather, I consider that the necessary finding for s49(7) can, in appropriate cases, be made by application of the common law presumption in the way outlined by Menhennitt J when the three hour limit in s48(1) (a) has not been satisfied. Menhennitt J took .05 per cent as what I may call the base level. The same reasoning can be applied to any other base level, e.g., .16 per cent.

I turn to the extension of that limit to three hours. The appellant pointed out that the cases so far decided were ones where the sample had been taken just outside the two hours but well within three hours and that the extension had given the prosecution an extra hour to obtain a sample and be able to rely on the statutory presumption. It was pointed out that the three hour period had great importance in the Act being mentioned in a number of sections, namely, 49(1), 53, 55 and 57. It was submitted that by increasing the period and thereby absorbing the facts in the only two cases where the presumption had been in fact applied, Parliament was making the common law presumption irrelevant.

[37] For the respondent it was said that the extension to three hours did not make the application of the common law presumption more difficult or less frequent because, so it was said, if a high blood alcohol content was found more than three hours after driving there must have been more time for the alcohol in the blood to dissipate, and therefore it was said the concentration at the time of driving was probably higher. I do not find it necessary to say, and I do not know that I am qualified to say, whether that last contention is correct. The change in the time limit, in my view, is a change in degree only, not one of principle, such as would be necessary for the exclusion of the presumption. Whether the presumption should be applied is a question of fact for the tribunal of fact, as the passages cited below from *Wigmore on Evidence*, 3rd ed., vol. 2, show. The fact that the extended time encompasses the times in question before Menhennitt J is, in my view, coincidental.

For the reasons I have given, then, I do not consider that provisions of the Act exclude or oust the application of the common law presumption of continuance where otherwise appropriate. I would add that s57(2) by its words "without affecting the admissibility of any evidence which might be given apart from the provisions of this section" is indeed apt to contemplate use of evidence of the result of analysis of a sample taken after three hours as founding the presumption. It is of course for the prosecution to establish guilt and a blood alcohol concentration beyond reasonable doubt and to exclude beyond reasonable doubt all reasonable hypotheses consistent with innocence: **[38]** see, e.g., *Martin v Osborne* [1936] HCA 23; (1936) 55 CLR 367; [1936] ALR 261 at 375 and *Shepherd v R* [1990] HCA 56; (1990) 170 CLR 573; 97 ALR 161; (1990) 65 ALJR 132; 51 A Crim R 181. There is no onus on the defendant and, if the concluding remarks of Menhennitt J in *Wright v Bastin* at 342 mean otherwise, I would respectfully disagree with them. Further, as the cases such as *De Kruiff v Smith* show, a court is not <u>bound</u> to apply the presumption, even if it is <u>open</u>.

I turn then to the second submission set out above, that the Magistrate had misdirected himself. As to the first limb of that submission, for the reasons I have given earlier, I consider on balance that he did not hold or state that he was bound to apply the presumption; rather, he treated himself as at liberty to apply it if the circumstances were appropriate and he found them to be appropriate. Had he considered himself bound to do so, he would, in my view, have erred in law. But, as I say, I do not consider that he treated himself as bound. *[His Honour then examined the evidence as to the finding in relation to the time of the accident and continued]* ... **[42]** A tribunal of fact cannot go beyond ordinary human experience in applying the presumption. If it is to go beyond that it must be assisted by expert evidence, of which there was none here. But having regard to the relatively high concentration as at 4.15 a.m. and yet taking into account the evidence of recent drinking just before departure from the restaurant, I think it was open to the Magistrate here as a matter of ordinary human experience to apply the presumption. The question is, as indicated, really one of fact and a wrong finding of fact is not an error of law: *Waterford v The Commonwealth* [1987] HCA 25; (1987) 163 CLR 54 at 77; (1987) 71 ALR 673; (1987) 61 ALJR 350; 12 ALD 741; *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 356; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.

As to the recent consumption of alcohol, reliance, was placed on certain statements in *Heywood v Robinson* at 571, but I think that, having regard to the concentration at 4.15 a.m., the evidence of recent consumption (which admittedly it is not shown the Magistrate did not accept) did not require – if that is the test for error of law – that the Magistrate decline as a reasonable magistrate to apply the presumption: **[43]** cf *Wright v Bastin* at 341 as to discounting the effect of post-accident drinking. Further, I do not think that the time of the taking of the sample is too far distant from the driving to make as a matter of law the result of analysis of the sample irrelevant and so inadmissible within the statement of Menhennitt J, in *Heywood v Robinson* at 570 in a passage to which he referred in *Wright v Bastin (No.2)*, at 340. I have not relied upon the fact that the sample of blood was taken only 15 minutes outside three hours after the accident, for, if s48(1)(a) is not satisfied, the three hour period is irrelevant.

On the whole, so far as a question of law is concerned, it seems to me that it cannot be said that the conclusion reached by the application of the presumption was a finding that no reasonable Magistrate could make within the principle discussed in *Taylor v Armour & Co. Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232.

I turn then to the third submission. The reasons which I have already given constitute a rejection of the submission. For those reasons, I consider that it was open to the Magistrate to find beyond reasonable doubt that at the time of driving the blood alcohol concentration was not less than 0.169 per cent; that is to say, that at 1.00 a.m. his blood alcohol concentration was not less than that at 4.15 a.m. This is the most difficult aspect of this case and I am not of course saying that I would have made that finding, but that is not the question before this court. Clearly, in my view, the Magistrate could have inferred beyond reasonable doubt that at 1.00 a.m. the blood alcohol **[44]** concentration exceeded .05 per cent. If, as I have held, he was entitled to apply the presumption he was also entitled as the tribunal of fact to infer beyond reasonable doubt that it was 0.169 per cent. It follows that for similar reasons I do not accept the fourth submission.

For reasons which I have given, I consider that the answers to questions (b) and (c) are respectively, Yes and No. Accordingly, I am of the view that the appeal should be dismissed, the order of the Magistrates' Court at Heidelberg confirmed, and the appellant ordered to pay the respondent's costs, but I will hear the parties as to the precise orders that should be made.
