29/82

SUPREME COURT OF VICTORIA

JAMES v SANDERSON

Tadgell J

23 March 1982

MOTOR TRAFFIC – DRINK/DRIVING – EXCEEDING .05 – READING 0.214%BAC – BLOOD SAMPLE TAKEN AT HOSPITAL BY LEGALLY QUALIFIED MEDICAL PRACTITIONER 2 HOURS AND 54 MINUTES AFTER THE MOTOR CAR DRIVEN BY THE DEFENDANT WAS INVOLVED IN A COLLISION WITH A LIGHT POLE – TAKING OF SAMPLE PROVED BY PRODUCTION OF 6TH SCHEDULE CERTIFICATE AND ANALYSIS BY PRODUCTION OF 8TH SCHEDULE CERTIFICATE – INFORMATION DISMISSED BY MAGISTRATE ON THE BASIS THAT HE WAS UNABLE TO DECIDE IF THE DEFENDANT WAS OVER .05% AT THE TIME OF DRIVING DUE TO THE LACK OF EXPERT EVIDENCE AS TO WHETHER THE BLOOD ALCOHOL LEVEL WAS ON THE RISE OR FALL – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Production of expert evidence was not necessary as it was open to the Court to apply the presumption of continuance "backwards in point of time", from the time when the breath analysis certificate was taken to conclude that at the time of driving of the vehicle the defendant had in his blood a percentage of alcohol greater than .05%. Advertence to s80G and to the time limit of two hours which it contains tends to create a red herring in cases to which S80G does not apply.

TADGELL J: ... The uncontradicted evidence before the Magistrate on which, as counsel for the respondent conceded, the Magistrate would have been entitled to convict included evidence of the following facts:

> (1) At 10 o'clock p.m. on Saturday, 27th September 1980 the respondent was driving a motor car when it collided with an electric light pole at Mount Waverley. The driving conditions at the time and place were unexceptional.
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> (2) The respondent was injured in the collision. He was taken to the Dandenong Hospital where a legally qualified medical practitioner took a sample of the blood at 12.45 a.m. on Sunday 28th September 1980, i.e., some two and three-quarter hours after the accident. This fact was proved by the tender and receipt in evidence of a certificate in the form of the 6th Schedule to the *Motor Car Act* 1958.
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> (3) The blood sample was later found upon due analysis to contain 0.214 of one gram of alcohol per 100 millilitres of blood (0.214%). This fact was proved by the tender and receipt in evidence of a certificate in the form of the 8th Schedule to the *Motor Car Act* 1958.
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> (4) The respondent consumed no alcohol between the time of the accident and the time the blood sample was taken.
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> (5) At the time of the accident the respondent was not undergoing dental or medical treatment and he was not taking drugs or medication.

There was evidence, then, of the respondent's blood alcohol content at 12.45 p.m. on 28 September 1980. There was no direct evidence of what his blood alcohol content had been two hours and forty-five minutes before when he was driving his motor car. Section 80G of the *Motor Car Act* did not apply because the period of two hours referred to therein had elapsed, The respondent's blood alcohol content at the time of driving was therefore left to be inferred so far as that might properly be done. In my opinion the Stipendiary Magistrate introduced an irrelevancy into the case by referring to the absence of expert evidence upon the submission to which he referred. As a matter of law it was not impossible, as the magistrate said, to decide the question on with which he was faced "because no expert evidence has been given on the blood alcohol level to say whether or not it would have been on the decrease or increase at the time of being taken..."

In *Smith v Maddison* [1967] VicRp 34; (1967) VR 307, especially at pp310-311 and in *De Kruiff v Smith* [1971] VicRp 94; (1971) VR 761, especially at pp766-767 McInerney J indicated

how it was open to a court apply the presumption of continuance "backwards in point of time" (as he put it) "from the time when the breath analysis certificate was taken to conclude that at the time of the driving of the vehicle the defendant had in his blood a percentage of alcohol greater than 0.05 per cent". The same process of reasoning is open in the case of an analysis of a sample of blood. The process of reasoning is no more than a deduction from probabilities: *Axon v Axon* [1937] HCA 80; 59 CLR 395; [1938] ALR 89 per Dixon J. It does not depend upon expert evidence unless the necessity for it is indicated by other evidence or by a consideration concerning which evidence is itself made unnecessary because judicial notice should be taken of it. That is to say, a difficulty in undertaking reasoning of a kind referred to by McInerney J should not be merely created. It should not be found to exist unless there is a factual foundation for it.

Advertence to s80G, and to the time limit of two hours which it contains, tends to create a red herring in cases to which s80G does not apply. After all, the period of two hours is only a mandatory statutory period adopted for the purposes of s80G. For myself I think that, subject to the effect that an undue lapse of time will have upon the drawing of any inference depending on the so-called presumption of continuance, in such cases a lapse of two hours will generally be of very little moment when there is an admission (or evidence allowing the proper inference to be drawn) that the subject whose blood was analysed did not ingest alcohol between the time of the alleged driving and the time of the analysis. At least that is so, in my view, where there is no evidence, as there was not here, that the blood alcohol level of the subject would tend spontaneously or for other reason to increase as the time interval between the driving and the analysis lengthened.

I am further of opinion that there was no reasonable conclusion open to the Magistrate on the evidence than that the respondent's blood alcohol content was in excess of that alleged in the information at the time of the alleged offence. I consider, therefore, that on the evidence the respondent should have been convicted of the offence with which he was charged. It should be left to the Magistrate, however, to draw the other conclusions of fact upon which the penalty would depend. Although I should myself find it difficult to understand how a court, properly applying the law to the evidence, could conclude that the respondent's blood alcohol level was less than 0.214 per cent at the relevant time, there may be arguments which were not addressed to me that would support such a conclusion. The order nisi will be made absolute. The order dismissing the information will be set aside and in lieu thereof there will be an order that the respondent be convicted. I further order that the information be remitted to the Magistrates' Court at Oakleigh to be further dealt with according to law. There will be an order that the respondent pay the applicant's costs to be taxed.
