19/75

SUPREME COURT OF VICTORIA

PEETERS v HELMAN

Harris J

26 June 1975

MOTOR TRAFFIC – DRINK/DRIVING – EXCEEDING .05% – READING 0.150%BAC – EVIDENCE GIVEN BY DEFENDANT THAT HE CONSUMED FOUR GLASSES OF BEER BEFORE DRIVING – NO EXPERT EVIDENCE GIVEN AS TO EFFECT UPON DEFENDANT OF THE ALCOHOL CONSUMED – THE EVIDENCE GIVEN FOR AND ON BEHALF OF THE DEFENDANT ACCEPTED BY MAGISTRATE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR – SUFFICIENCY OF EVIDENCE TO REBUT BREATHALYZER READING: *MOTOR CAR ACT* 1958, S81A.

On a charge of exceeding .05%, the prosecution gave evidence that the defendant's breath smelt of liquor, that an alcotest was positive, and that he had a breathalyser reading of .15%, producing a Schedule 7 to that effect. The defence evidence, which was accepted by the Court was that he had consumed only 4 glasses of beer and that he was not affected by liquor. The Magistrate held that he was not satisfied beyond reasonable doubt that the defendant had a reading of .15% at the time of the test. Order Nisi that this conclusion could not be reached except by expert evidence.

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination in accordance with the law with a direction that the charge be found proved.
The Magistrate was not entitled to reject the certificate of the breathalyser reading by acting upon the lay evidence as to the quantity of liquor consumed by the defendant and his behaviour, when the Magistrate had no expert evidence before him to establish that the consumption of such a quantity of liquor and the absence of an appearance of being affected by liquor at least threw doubt upon the reading of .150%.

HARRIS J: ... As a certificate is only *prima facie* evidence, it must be considered in the light of the other evidence in the case. Such evidence may be sufficient to cause a Magistrate to have a reasonable doubt about a defendant's blood alcohol level at the time of the offence alleged. But the other evidence must be such that it can properly be used for this purpose.

Why should evidence that the defendant had only consumed four glasses of beer before he had driven his car be capable of producing such a doubt, when there was no evidence before the Court to show what level of blood alcohol such an amount of liquor would produce in the defendant or that such an amount of liquor would not produce a level of .150%?

The Magistrate must have acted on the basis that he knew enough to make him doubt whether four glasses of beer, when coupled with the evidence that the defendant did not appear to be affected by liquor, would produce a reading of .15%. Hence he was not prepared to accept the *prima facie* evidence of the certificate and therefore what he did (though he did not say so expressly) was to reject the evidence provided by the certificate leaving him with no evidence of what the defendant's blood alcohol level was.

But how did the Magistrate know sufficient for that? There was no evidence about it. Perhaps what he did was to infer that as .15% was three times the permissible limit, it would require more than four glasses of beer to produce such a reading; that is to say, that he made an inference based on the relationship between the level stated in the certificate and the level which a person may have without committing an offence and upon a view that four glasses of beer was a modest amount to drink so that it would not provide sufficient alcohol to result in the blood alcohol percentage being as high as .150. Four glasses of beer may well be regarded as a modest amount to drink but is a Magistrate entitled to hold that it is a matter of common knowledge and therefore a matter which does not require proof by evidence that four glasses of beer would not produce .150%? I am unable to see that it is. One might speculate that it would be insufficient, but the estimation of the quantity of liquor required to produce any particular blood alcohol reading is

a scientific matter which has to be proved by expert evidence. One might also speculate that the Magistrate had heard a large number of informations under s81A(1) of the *Motor Car Act* 1958, and had heard a good deal of scientific evidence about what quantities of liquor will produce particular blood alcohol percentages (and under what circumstances) and that he felt able to act upon the knowledge which he had built up with that experience. There was no evidence before me that this was the case, but in any event, a Court cannot use such accumulated knowledge as a substitute for evidence (see *McArthur v McRae* [1974] VicRp 43; [1974] VR 353.

In my opinion, it is not possible to say that expert evidence is necessary in every case in which it is sought to throw a doubt on a blood alcohol reading obtained by a breathalyser test. When reviewing the decisions of Magistrates' Courts, in some cases, this Court may not feel that it can say that a Magistrates' Court was not entitled to reject the *prima facie* evidence of a Seventh Schedule Certificate even though the only evidence which told against the certificate was the size of the reading and the evidence of lay witnesses. *Saxe v Kellett* [1970] VicRp 79; [1970] VR 600 was such a case. I do not regard that case as one which binds me to hold that the Magistrate in this case was entitled to refuse to act on the certificate on the findings of fact that the defendant had only consumed four glasses of beer and did not appear to be affected by liquor.

In my opinion, the situation in this case is that the Magistrate was not entitled to reject the certificate of the breathalyser reading by acting upon the lay evidence as to the quantity of liquor consumed by the defendant and his behaviour, when the Magistrate had no expert evidence before him to establish that the consumption of such a quantity of liquor and the absence of an appearance of being affected by liquor at least threw doubt upon the reading of .150%.

A further feature of this case is the fact that the Magistrate allowed the lay evidence to tell against the evidence provided by the certificate without hearing the officer who conducted the test. The attack that was made on that officer was that he had deliberately written down an incorrect figure on the certificate. This is a very serious allegation to make against an officer of the police. What is more, there was really only a slender basis for suggesting that Sergeant Haeusler would do such a thing. This was that he was irritated by the defendant insisting on seeing his solicitor. There is no basis for suggesting that there was a conspiracy with the informant and Constable Sharp about the matter as there was no evidence that there had been any opportunity for the three to conspire together and there was no cross-examination directed to the informant or Constable Sharp about such a suggestion. The evidence, that some unknown person made a slighting remark on the police radio, even if accepted, cannot be used against Sergeant Haeusler.

Thus if one accepts the Magistrate's findings that the defendant had only consumed four glasses of beer and did not appear to be affected by liquor and if one then looks to see whether this is a case in which the Magistrate could have refused to act on the certificate without expert evidence (even though, as I have already said, I do not consider that it is) one finds that there is only one suggested explanation as to why the certificate does not state the reading given by the breathalyser. That explanation is that the officer falsified the certificate. By reason of the gravity of that matter, a court would require at least some reasonably persuasive evidence, direct or circumstantial, to raise a reasonable doubt about the accuracy of the certificate. Here the only positive matter was the one I adverted to (the alleged irritation of the officer) and there was also the negative circumstance that the officer had not been heard in the witness box (there being no reason why, the prosecution would have thought it appropriate to call him). Hence, there is, on the one hand, a conclusion drawn by the Magistrate, without evidence, on a scientific matter and, on the other hand, no fair basis for giving credence to the only, suggested explanation for the alleged falsity of the certificate. This re-enforces my conclusion that the Magistrate was not entitled to refuse to act upon the evidence provided by the certificate, there being no expert evidence upon which he could act...
