14/77

SUPREME COURT OF VICTORIA

CAUGHEY v McCLAER

O'Bryan J

9 March 1977

MOTOR TRAFFIC – DRINK/DRIVING – REBUTTAL OF SCHEDULE 7 OF CONSUMPTION OF LIQUOR BETWEEN DRIVING AND TEST – DEFENDANT SAID THAT HE CONSUMED ALCOHOL AFTER DRIVING BUT BEFORE BREATH TEST – WHETHER DEFENDANT DISCHARGED THE ONUS OF PROOF – JUDICIAL NOTICE OF EFFECT OF LATER CONSUMPTION OF ALCOHOL – NO EXPERT EVIDENCE CALLED BY DEFENDANT – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A(1).

Defendant was charged with exceeding .05% – the Schedule 7 Certificate indicated a reading of .120%. Defendant called evidence that after driving he consumed 7oz of spirits before the test. No expert evidence was called by the defendant. The Magistrate held that he was entitled to take judicial notice of the effect such consumption could have on a blood alcohol level and dismissed the charge. Upon Order Nisi to review—

HELD: Order absolute. Magistrate's order set aside and remitted for imposition of penalty.
1. The real question in the present case was whether the defendant discharged the onus of proof.

2. If a person is able to establish the amount of alcohol he consumed after the driving and before the test it should not be difficult for him to obtain expert evidence from a doctor or some other expert as to the effect that amount of alcohol would, at the relevant time, have on that particular person and, in that way he would be able to show whether or not the percentage of alcohol present in his blood was or was not below permissible limits.

3. The critical matter from the defendant's point of view in this case was that, to rebut the statutory presumption, he needed to call some expert evidence. The expert evidence did not necessarily have to establish a particular percentage of alcohol in the blood at the relevant time, but it had to satisfy the court the percentage level was lower than was significant for any relevant purpose. This, the defendant failed altogether to do. The evidence called for the defendant left the Magistrate in a situation where he accepted that a quantity of alcohol, albeit a considerable quantity, had been consumed between the time of the cessation of driving and the time of the test, and the percentage of alcohol present in the blood of the defendant had been raised above what it was at the time of the driving, but it did no more than that.

4. To succeed on the Order to review the defendant had to persuade the Court that the Magistrate could take judicial notice of the effect a given amount of alcohol has upon the blood alcohol level of an individual. Unaided by authority, the Magistrate could not do so. The matter fell to be determined according to common law principles.

O'BRYAN J: ... "Mr Rowlands and Mr Dyett both agreed that to rebut the presumption the defendant carried an onus of proof on the balance of probabilities that by reason of alcohol he had consumed after he ceased driving and before the breath test the percentage of alcohol shown to have been present by the breath test was less than .05 per cent which is the maximum allowed under s81A(1), or less than .10 per cent. In the latter event the penalty provisions of the Act, applicable to the defendant, would not be as severe.

The real question, therefore, is whether the defendant did discharge the onus of proof. Mr Dyett relied primarily upon the reported judgment of Menhennitt J in *Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225 a case in which a defendant was convicted by a Magistrate for an offence against s81A(1) of the *Motor Car Act* 1958 The defendant satisfied the Magistrate that between the time he stopped driving and the time he undertook a breath test, he consumed a small can of beer. He argued unsuccessfully before the Magistrate that the presumption contained in s80G was rebutted and there was not sufficient evidence that at the time of the driving the percentage of alcohol in his blood was more than .05 per cent.

The defendant was unsuccessful in the review proceedings before Menhennitt J. Mr Dyett argued that certain passages in the judgment of His Honour show clearly that the defendant in the present case did not call sufficient evidence to discharge the onus of proof upon him and the Magistrate was not entitled to find, as he did, that he did not know what the defendant's reading was at the time of driving. Mr Dyett submitted that in the absence of sufficient evidence from the defendant proving on the balance of probabilities his blood alcohol level at the time it was taken was less than .05 per cent, or less than .10 per cent, the Magistrate had to presume it was .120 per cent when the offence was alleged to have been committed.

Menhennitt J said (as p227) that the Magistrate may have concluded 'that the consumption of one small can of beer approximately a quarter of an hour before the test was taken raised the percentage of alcohol present in the blood of the defendant above what it was at the time of the driving. In my view, it is a matter of which a court could take judicial notice, etc.'

However, at p229, two passages appear in His Honour's judgment which, in my opinion, tell heavily against Mr Rowland's argument in this case that the defendant did rebut the statutory presumption. They were relied upon by Mr Dyett. His Honour said:—

> 'The conclusion I have reached, having considered the matter, is that once the necessary elements of the section are established, namely, proof of the percentage of alcohol present in the blood of a person within two hours after the alleged offence, there is then a presumption that that was the percentage of alcohol present in the person's blood at the time at which the offence is alleged to have been committed until the contrary, in the sense of proof of a lesser percentage, is given, and by "lesser" it appears to me that on its true construction "the contrary" means proof either that the blood alcohol content at the time of the driving was a specific figure different from that at the time within two hours later or at the very least that it was lower than is significant for any relevant purpose.
> In other words, in my view, once that is proved that within two hours of driving the percentage of alcohol present in the blood of a person was a certain figure, the onus is then thrown on that person to prove that at the time of the driving the percentage of alcohol present in his blood was a different percentage, being either some other precise percentage or, at the very least, a percentage lower than is significant for any relevant purpose. In specific terms this appears to me to mean that if, in a particular case, it is established that within two hours after driving the percentage of alcohol present in the blood of a person was in excess of .05 per cent, the onus is then thrown on to that person to establish that at the time of the driving the percentage of alcohol in his blood was not more than .05 per cent.'

His Honour said further, on the same page:

> 'It appears to me that the section would be deprived of much of the obvious purpose behind it if such were the case.'

I have considered whether the construction I have adopted places upon the defendants an undue burden as a factor which might point against the construction to be put on the section. However, it appears to me that if a person is able to establish the amount of alcohol he consumed after the driving and before the test it should not be difficult for him to obtain expert evidence from a doctor or some other expert as to the effect that amount of alcohol would, at the relevant time, have on that particular person and, in that way he would, I think, be able to show whether or not the percentage of alcohol present in his blood was or was not below permissible limits.

The fact that in s81A different percentages are significant for different purposes in my view reinforces the conclusion I have reached. There may well be a case in which it could be shown that after a period of driving, and before a period of testing, a person had consumed some alcohol. It might then be possible to prove that the effect of that consumption of alcohol was to bring the percentage of alcohol in the blood below one of the percentages which would attract higher penalties. It seems to me that it would be surprising if not only that result followed, but if the result also followed that the whole of the evidence ceased to have any presumptive value at all.

This is a clear statement of the evidentiary obligation imposed upon a person placed in the situation of the defendant in this case wishing to rebut the statutory presumption. The critical matter from the defendant's point of view in this case was that, to rebut the statutory presumption, he needed to call some expert evidence. The expert evidence did not necessarily have to establish a particular percentage of alcohol in the blood at the relevant time, but it had to satisfy the court the percentage level was 'lower than, is significant for any relevant purpose'. (p229). This, the

defendant failed altogether to do. The evidence called for the defendant left the Magistrate in a situation where he accepted that a quantity of alcohol, albeit a considerable quantity, had been consumed between the time of the cessation of driving and the time of the test, and the percentage of alcohol present in the blood of the defendant had been raised above what it was at the time of the driving, but it did no more than that.

Perhaps I should observe that had the informant produced expert evidence the defendant by cross-examination may have established the facts necessary to rebut the statutory presumption. In this case the informant was not required to call any expert evidence as he relied on the Schedule 7 Certificate.

To succeed on this order to review, Mr Rowlands conceded the defendant had to persuade me the Magistrate could take judicial notice of the effect a given amount of alcohol has upon the blood alcohol level of an individual. In my opinion, unaided by authority, I believe he could not do so. The matter fell to be determined according to common law principles. (See Herring CJ in *Porter v Kolodzeij* [1962] VicRp 11; [1962] VR 75, particularly at p77).

I was referred to several unreported judgments in this court where some of the questions under consideration before me now were decided in favour of the arguments relied upon by Mr Dyett. I believe it is unnecessary to refer to all of those decisions.

In *Peeters v Holman* (judgment delivered 26th June 1975) Harris J at p7 said this:

> '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 per cent? 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'.

That decision is very much in point and is against the argument put by Mr Rowlands that a Magistrate would take judicial notice of the effect a given amount of alcohol has upon the blood alcohol level of an individual. Mr Rowlands sought to rely upon a unreported judgment of Pape J in *Adair v Durbridge* (delivered on 19th July 1974). That case, when examined, was clearly distinguishable from the facts in the present case, and the case I have previously referred to.

In *Adair's case*, the informant failed to prove the breath test was reliable in the reading and the statutory presumption arising under s80G was not raised against the defendant. In the present case no challenge was made to the breath test result and the presumption did arise under s80G.

In the circumstances, I consider the Magistrate erred in this case and, upon the whole of the evidence, the defendant should have been convicted of a breach of s81A(1) of the *Motor Car Act.* The informant has made out ground one of the grounds granted to him in this order to review. The proper course for me to adopt is to order that the order nisi be made absolute with costs. The order of the court below will be set aside and the information will be remitted to the Magistrates' Court at Hamilton to convict the defendant and impose such penalty as in the circumstances should be thought proper.

The defendant was legally represented in the court below and fully presented his defence to the Magistrate. He chose deliberately not to call expert evidence and, in my opinion, the matter cannot now be re-opened".
